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IN THE SUPREME COURT OF CALIFORNIA

CLUB MEMBERS FOR AN HONEST ELECTION, an unincorporated association,

Plaintiff/~~Respondent~~ and Appellants,

vs.

SIERRA CLUB, a California Non-Profit Public Benefit Corporation, et al.,

Defendants/~~Petitioners~~ and Appellants.

Supreme Court Case No. S143087

After A Decision By The Court Of Appeal

First Appellate District, Division One

ANSWER TO PETITION FOR REVIEW

Jeff Hoffman

Attorney for Club Members for an Honest Election

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3. Does the exemption for "actions" in Code of Civil Procedure section 425.17(b) include the entire action, or may a court separate causes of action that do not qualify for section 425.17(b)'s protections?

INTRODUCTION

The petition for review by the defendants in this appeal of a largely unsuccessful anti-SLAPP motion challenges a judgment affirming that denial pursuant to Code of Civil Procedure section 425.17(b).[1]

Club Members for an Honest Election ("CMHE"), a group of Sierra Club members, sued Sierra Club over allegedly illegal election procedures during its 2004 board of directors election. Sierra Club had published and distributed to its voting members two writings that allegedly advocated voting for certain candidates and advocated voting against others, without providing the same resources or opportunities to all candidates. (CT 715-739.)

In response to CMHE's second amended complaint, Sierra Club filed its second anti-SLAPP motion (section 425.16). The Court of Appeal found that three of the four causes of action in the second amended complaint, upon which the action at issue here was based, were not subject to an anti-SLAPP motion, because they were exempt under section 425.17(b). (*Club Members for an Honest Election v. Sierra Club* (2006) 137 Cal.App.4th 1166 ("*Club Members*").)

The petition for review contends that review is necessary because CMHE and Roy van de Hoek, a secondary plaintiff and member of CMHE, stood to gain incidentally had Plaintiffs prevailed.

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[1] All code sections refer to the Code of Civil Procedure unless otherwise noted.

The petition is meritless for two reasons: First, it neither asserts an important question of law nor presents a necessity to secure uniformity of decision. The issues presented for review by Sierra Club are fact-specific and unworthy of this Court's attention, because Sierra Club is merely attempting to apply the existing legal standard to this case. Second, the petition asserts an issue that was waived by failing to raise it in the Superior Court.

If this Court were to grant Sierra Club's petition for review, it should consider three additional issues that were decided incorrectly.

First, the Court of Appeal, without citing any authority, held that a cause of action for breach of fiduciary duty against directors of a corporation was not brought in the public interest, even where the actions of those directors were directly connected to what the Court deemed to be a public interest lawsuit. (*Club Members, supra,* 137 Cal.App.4th at p. 1182.) This is illogical, as it was the directors who voted for the actions of Sierra Club that resulted in the public interest lawsuit, and judicial challenges to votes by directors that are the root causes of public interest lawsuits are certainly also in the public interest.

Second, section 425.17(b) does not provide for separating and striking individual causes of action where a case was brought in the public interest or on behalf of the general public. Instead, by its plain language, that subsection refers to the entire lawsuit. Where an action is brought in the public interest or on behalf of the general public, the entire lawsuit is exempt from an anti-SLAPP statute. The Court of Appeal thus erred in removing

CMHE's third cause of action from the anti-SLAPP amendment's protection.

Finally, the Court of Appeal ruled that the granting of summary judgment in favor of Sierra Club by the Superior Court "conclusively establishes that plaintiffs had no probability of success" for the purposes of section 425.16(b)(3). (*Club Members, supra,* 137 Cal.App4th at p. 1183.) This is clear error, because a plaintiff need only present a prima facie case in order to show a probability of success for the purposes of defeating an anti-SLAPP motion pursuant to that subsection. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 906; see *Navellier v. Sletten* (2002), 29 Cal.4th 82, 88, 89.) The standard set forth in *Kashian* is a much lower standard than that which must be met in order to prevail at summary judgment, and the Court of Appeal should have analyzed whether CMHE presented a prima facie case, independent of the fact that summary judgment was granted in favor of Sierra Club.

LEGAL DISCUSSION OPPOSING REVIEW

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW.

Review should be denied for the simple reason that this case presents neither an important question of law nor a necessity to secure uniformity of decision, because there is no case law to the contrary and because the Court of Appeal merely applied well-settled law to the facts of this case. (See California Rules of Court, rule 29(a)(1).)

It is well-settled that a judicial challenge to an election for the board of directors of a non-profit corporation, which was the gravamen of this case, is a public interest case for the purpose of awarding attorneys' fees under the private attorney general statute (Code Civ. Proc., § 1021.5).[2] (*Ferry v. San Diego Museum of Art* (1986) 180 Cal.App.3d 35, 45, quoting *Braude v. Automobile Club of Southern California* (1986) 178 Cal.App.3d 994, 1012; *Club Members, supra,* 137 Cal.App.4th at p. 1175.)

It is also clear, both from the legislative history of section 425.17 ("anti-SLAPP amendment") and from subsequent court decisions confirming that history, that requirements for qualifying for the protections of the anti-SLAPP amendment for a public interest case are the same as the requirements for qualifying for fees under the private attorney general statute. (Assem. Com. on Judiciary, Rep. on Senate Bill No. 515 (2003-2005 Reg. Sess.) as amended June 27, 2003, pp. 11-12; *Blanchard v. DirecTV, Inc.* (2004) 123 Cal.App.4th 903, 914; *Club Members, supra,* 137 Cal.App.4th at p. 1174.

Finally, the Court of Appeal merely followed legal precedent in ruling that it is the gravamen of a cause of action that determines whether a case was brought in the public interest so that the anti-SLAPP amendment applies. (*Club Members, supra,* 137 Cal.App.4th at p. 1181, quoting *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) As there are no cases holding to the contrary, and as there is no logical reason to give the term "public

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[2] The private attorney general statute refers to section 1021.5 and those terms are used interchangeably.

interest," as used in section 425.17(b), a different meaning from that in section 425.16, this ruling was wholly unremarkable. (See Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515, (2003-2004 Reg. Sess.), as amended June 27, 2003, pp. 11-12.)

In contrast to Sierra Club's assertion (Petition for Review, p. 32), the Court of Appeal's decision will not create any uncertainty or confusion, because it merely follows existing precedent: it is the gravamen of a cause of action that determines whether sections 425.16 or 425.17 are applicable, not incidental relief prayed for or the intentions of the parties. (*Martinez v. Metabolife Internat., Inc., supra,* 113 Cal.App.4th at p. 188.)

It must also be noted that Sierra Club's Petition for Review presents issues for review in a manner contrary to law. "The body of the petition must begin with a concise, *nonargumentative* statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail." (California Rules of Court, rule 28.1(b)(1), emphasis added.)

Sierra Club uses language that is misleading, because it is biased and argumentative, claiming that CMHE's complaint sought to "punish" Sierra Club and that the remedies sought were "intended to further the candidacy and personal views of Plaintiffs." (Petition for Review, p. 1, ¶ 1.) This statement also contains unnecessary details about facts specific to this case. (*Ibid.*) Even had the Court of Appeal erred, which it clearly did not, that error would have been specific to the facts of this case and thus does not warrant Supreme Court review.

As discussed directly below, the first, second, and fourth causes of action of CMHE's second amended complaint were, as a matter of law, brought in the public interest and were thus clearly exempted by section 425.17(b) from being subject to an anti-SLAPP motion.

II. SIERRA CLUB'S PETITION FOR REVIEW IS UNSUPPORTED BY THE LAW AS APPLIED TO THE FACTS OF THIS CASE.

An action brought in the public interest is generally exempt from the anti-SLAPP statute. (Code Civ. Proc., § 425.17(b).) As the Court of Appeal found, the first, second, and fourth causes of action were brought in order to require fair election procedures. (*Club Members, supra,* 137 Cal.App.4th at pp. 1180, 1181.) As Sierra Club is a non-profit corporation (CT 839, Bylaw 2.1), ensuring fair election procedures for Sierra Club is in the public interest. (*Ferry v. San Diego Museum of Art, supra,* 180 Cal.App.3d at p. 45, quoting *Braude v. Automobile Club of Southern California, supra,* 178 Cal.App.3d at p. 1012; *Club Members, supra,* 137 Cal.App.4th at p. 1175.)

The underlying issue here was whether Sierra Club provided the legally required fair election procedures for its 2004 board of directors election. The Court of Appeal correctly ruled that claims brought pursuant to this issue are in the public interest and thus exempt from anti-SLAPP motions. This was a simple application of well established law to the specific facts of this case, which is not worthy of Supreme Court review.

A. There Are No Conflicting Opinions From Other Courts Of Appeal, Because Plaintiffs In Other Cases Sought Mainly Monetary Or Other Personal Damages.

Sierra Club cites numerous cases for the proposition that the Court of Appeal's decision is "directly contrary to [inter alia] previous appellate decisions." (Petition for Review, p. 22, last paragraph and fn. 4.) In stark contrast to Sierra Club's claim, none of the cited cases contradicts the Appellate Court's decision here. (*Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1067 [the first cause of action was for monetary damages and Plaintiff admitted to the Court that the second "was seeking damages personal to himself"]; *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 358, fn. 9 [the Court merely cited instances where mandamus petitions might be subject to anti-SLAPP motions despite section 425.17(b), because they "do not seek relief on behalf of the public or of a class"]; *Blanchard v. DirecTv, Inc.* (2004) 123 Cal.App.4th 903, 916 [there would have been no public benefit had Plaintiffs prevailed, because the claim was "entirely personal to them"]; *Northern California Carpenters Regional Council v. Warmington Hercules Associates* (2004) 124 Cal.App.4th 296, 920, 921 [section 425.17(b) applies even though "Plaintiffs brought the action "on behalf of *themselves*, on behalf of the general public and on behalf of all others similarly situated," though Plaintiffs did not seek personal any relief (emphasis added)].)

In this case, CMHE sought relief that would benefit the general public, though incidental relief would have been gained by

plaintiff van de Hoek or CMHE had the Court ruled in favor of the Plaintiffs *and* had it granted two of many alternative types of relief sought. (CT 735-738.) None of the cases cited by Sierra Club held that where a plaintiff seeks relief that is in the public interest, incidental personal relief sought bars the application of section 425.17(b).

B. It Is Well Established That This Type Of Case Is A Public Interest Case.

1. For The Purpose Of Determining Attorney's Fees, A Challenge To A Board Of Directors Election For A Nonprofit Corporation Has Been Deemed To Be A Public Interest Case.

The right to fair and reasonable election procedures for the Board of a California nonprofit corporation are "'important rights affecting the public interest.'" (*Ferry v. San Diego Museum of Art, supra,* 180 Cal.App.3d at p. 45, quoting *Braude v. Automobile Club of Southern California, supra,* 178 Cal.App.3d at p. 1012; *Club Members, supra,* 137 Cal.App.4th at p. 1175.)

Not only have three appellate courts unequivocally held that this type of case is in the public interest, that holding is so well established that a well regarded and popular California attorney practice guide lists this type of case as an example of one in which the prevailing party may collect attorneys' fees from the opposing party based on the private attorney general doctrine. (Wegner, Fairbank, and Epstein, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2004) ¶ 17:150.19 (citing *Braude v.*

Automobile Club of Southern California, supra, 178 Cal.App.3d at p. 1013).)

The Court of Appeal here merely followed uncontested precedent by holding that a judicial challenge to a board of directors election for a non-profit corporation is a matter of public interest. (*Club Members, supra,* 137 Cal.App.4th at p. 1175.) There being no authority to the contrary, it is thus unanimous that these types of cases are brought in the public interest. Sierra Club does not contest this issue, nor could it credibly do so.

2. It is Clear That The Standard For Determining Whether A Case Has Been Brought In The Public Interest Is The Same For Section 425.17(b) As It Is For Section 1021.5.

In order to qualify to receive attorneys' fees from the opposing party pursuant to the private attorney general statute, a prevailing party that has not sought any monetary recovery must meet three requirements: "(1) plaintiffs' action 'has resulted in the enforcement of an important right affecting the public interest,' (2) 'a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons' and (3) 'the necessity and financial burden of private enforcement are such as to make the award appropriate.'" (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 934, quoting Code Civ. Proc., § 1021.5.)

The Legislature used the three requirements of the private attorney general statute in defining section 425.17(b), so that the

latter "'parallels the existing exception for actions by the attorney general and public prosecutors.'" (*Blanchard v. DirecTV, Inc., supra,* 123 Cal.App.4th at p. 914 (quoting Assem. Com. on Judiciary, Rep. on Senate Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, pp. 11-12).) The three requirements for invoking section 425.17(b)'s protection thus "mirror the three elements for determining the eligibility for a fee award under the private attorney general doctrine as codified in section 1021.5." (*Blanchard* at p. 914, citing *Woodland Hills Residents Assn., Inc. v. City Council, supra* at pp. 934, 935).)

Because it is well established that cases such as this one are public interest cases for the purpose of awarding attorneys' fees pursuant to the private attorney general statute, and because the requirements for invoking the protection of section 425.17(b) are the same as those for attaining attorneys' fees pursuant to that doctrine, it seems beyond contention that the first, second, and fourth causes of action in CMHE's second amended complaint are entitled to the protection of the anti-SLAPP amendment.

Sierra Club claims that the legislative history of section 425.17 shows that subsection (b) was meant to be narrowly construed so that only cases brought by plaintiffs without *any* personal interest qualify for its protection. (Petition for Review, pp. 23-25.) However, as discussed directly above and as an unbiased reading of the legislative history shows, section 425.17(b) was meant to provide the same requirements as section 1021.5. (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 515, (2003-2004 Reg. Sess.), as amended June 27, 2003, pp. 11-12; Sen. Com. on Judiciary, Rep. on

Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, pp. 13-14) *Blanchard v. DIRECTV, Inc., supra,* 123 Cal.App.4th at p. 914.) Furthermore, there is no authority supporting the narrow construction of subsection (b) that Sierra Club urges.

Sierra Club's claim – that the legislative history shows that in order to qualify for the protection of section 425.17(b), a plaintiff must not be injured or seek any personal relief for herself (Petition for Review, p. 24, top paragraph) – is highly misleading. The phrases "without an injured plaintiff" and "not seeking any special relief for themselves" were used by an advocacy group to describe certain suits brought by private attorneys general, and were taken out of context by Sierra Club. (Sen. Com. on Judiciary, Rep. on Sen. Bill No. 515, (2003-2004 Reg. Sess.), as amended May 1, 2003, p. 13.) Furthermore, the legislative history explicitly states that the reason for restricting the protection of section 425.17(b) was specifically to prevent abuse of California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.). (*Ibid.*) The restrictions were clearly not intended to prevent plaintiffs who stood to gain incidental relief from qualifying for the protection of the anti-SLAPP amendment.

III. SIERRA CLUB WAIVED ITS CLAIM REGARDING SECTION 425.17(d)(2) BY FAILING TO RAISE THAT ISSUE IN SUPERIOR COURT.

"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried. Stated otherwise, a litigant may not change his or her position on appeal and assert a new theory. To permit this change in strategy would be

unfair to the trial court and the opposing litigant." (*Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.) Yet Sierra Club attempted to raise the issue of whether section 425.17(d)(2) applies to this case in the Court of Appeal, even though it failed to raise that issue in Superior Court, and it now attempts to raise that issue here.

In Superior Court, Sierra Club did not raise the issue of whether subsection (d)(2) exempts the causes of action at issue here from the protections of section 425.17(b). In fact, it did not even mention that subsection in arguing that section 425.17(b) did not apply to this case. (See CT 690-701, esp. 695-697 and CT 1319-1329, esp. 1329.) While an "appellate court has the discretion to consider a new issue on appeal where it involves a pure question of the application of law to undisputed facts" (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 599, fn. 6), the Court of Appeal remained silent on this issue, clearly choosing not to consider it. This was not error, because the Court of Appeal was well within its authority to deem this issue waived. Sierra Club's claim regarding this issue has thus been waived by its failure to raise the issue in Superior Court.

IV. SECTION 425.17(d)(2) DOES NOT APPLY TO THIS CASE, BECAUSE SIERRA CLUB'S SPEECH WAS "IDEOLOGICAL," NOT "POLITICAL."

The protections of the anti-SLAPP amendment do not apply where the action arose from, inter alia, the defendant's "political" work. (Code Civ. Proc., § 425.17(d)(2).) Even had Sierra Club not waived its right to argue that the second amended complaint did not qualify for the protection of the anti-SLAPP amendment, its claim

that the speech from which the complaint arose was "political" (Petition for Review, pp. 35-37) is meritless. The speech involved here was ideological, not political, as defined by this Court and by the anti-SLAPP statute itself.

"'[P]olitical speech' is speech that deals with 'governmental affairs' [citation], and 'ideological speech' [citation] is speech that apparently concerns itself with 'philosophical,' 'social,' 'artistic,' 'economic,' 'literary,' 'ethical,' and similar matters [citation]...." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 486.) *Gerawan* was decided in 2000, three years before section 425.17 was enacted (*Goldstein v. Ralphs Grocery Co.* (2004) 122 Cal.App.4th 229, 232), and the Legislature could certainly have added ideological speech to the exception created by subsection (d)(2) had it wished to do so.

The anti-SLAPP statute defines governmental affairs as "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., §§ 425.16(e)(1), (2).)

In support of the proposition that the speech involved here was "political," Sierra Club cites *Major v. Silna* (2005) 134 Cal.App.4th 1485. However, as even Sierra Club notes, that case involved an election to *public* office. (Petition for Review p. 36, ¶ 2.) There was no public office being contested here, nor does the

speech at issue here concern any "governmental affairs." Instead, the speech here concerned the affairs of a *private* corporation, which are certainly not "governmental" affairs.

It is well established that exceptions to a statute, such as subsection (d)(2), are to be *narrowly* construed to cover only situations that are "within the words and reason of the exception," as even the case cited by Sierra Club notes. (*Major v. Silna, supra,* 134 Cal.App.4th at p. 1494, quoting *Hayter Trucking, Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 20; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 400 [same]; *Gonzalez v. Toews* (2003) 111 Cal.App.4th 977,983 [same].) Section 425.17(d)(2) only excepts political speech, and Sierra Club's attempt to attain a broad construction of the term "political" is unfounded and should be summarily rejected.

Because subsection (d)(2) is an exception to the general provisions of section 425.17 and because exceptions must be construed narrowly, by this Court's own definition and by that of the anti-SLAPP statute the speech at issue here was ideological, not political, as it involved the affairs of a private corporation, not the government. Subsection (d)(2) thus does not apply to this case.

DISCUSSION OF ADDITIONAL ISSUES

V. A BREACH OF FIDUCIARY DUTY CLAIM IS SUBJECT TO THE PROTECTION OF SECTION 425.17(b), BECAUSE THE ACTIONS OF DIRECTORS OF MAJOR NON-PROFIT CORPORATIONS THAT ARE DIRECTLY CONNECTED TO BOARD OF DIRECTORS ELECTIONS ARE ISSUES OF PUBLIC INTEREST.

The third cause of action of the second amended complaint, reasoning as follows, claimed that two Sierra Club directors running for reelection breached their fiduciary duty to Sierra Club: the incumbent directors voted to publish and distribute writings to Sierra Club voters without providing the same resources or opportunities to all candidates, and those writings were allegedly beneficial to themselves while being detrimental to Sierra Club by violating the California Corporations Code. (CT 715-739, esp. 739.)

While recognizing that "the alleged breach of fiduciary duty relates to election measures," the Court of Appeal held that this cause of action "does not directly present the issue of fair election procedures but rather forms the basis for disqualifying and punishing the offending directors" and that this type of relief was personal. (*Club Members, supra,* 137 Cal.App.4th at p. 1182.) This ruling is not supported by law and is illogical.

It is the natural persons running Sierra Club who, by their votes on the board of directors, caused the corporation to allegedly violate the law. (See CT 1282, ¶ 19.) There can be no logical reason why, on one hand, a cause of action claiming that a corporation allegedly failed to provide legally required election

procedures is deemed to be in the public interest and thus exempt from an anti-SLAPP motion but, on the other hand, a cause of action regarding directors who caused the alleged failure by allegedly breaching their fiduciary duty, was not. Furthermore, there is no legal authority supporting this view. If it is in the public interest to prosecute a corporation for allegedly failing to provide legally required election procedures, it is certainly also in the public interest to prosecute those directors who, by their votes, caused the alleged failure.

VI. A JUDGMENT ON THE MERITS DOES NOT PRECLUDE A PLAINTIFF FROM MEETING ITS BURDEN OF SHOWING THAT IT WAS LIKELY TO PREVAIL UNDER SUBSECTION 425.16(b)(3), BECAUSE THE LATTER BURDEN ONLY REQUIRES A PRIMA FACIE SHOWING.

In order to meet their burden and defeat an anti-SLAPP motion under subsection 425.16(b)(3), plaintiffs need only "establish a 'probability' of prevailing on the claim by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor." (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 906; see *Navellier v. Sletten, supra*, 29 Cal.4th at p. 88.)

Yet, in analyzing whether CMHE met its burden under subsection 425.16(b)(3), the Court of Appeal held that the trial court's granting of summary judgment in favor of Sierra Club "conclusively establishes that plaintiffs had no probability of success." (*Club Members, supra,* 137 Cal.App.4th at p. 1183.) Because the standard of making a prima facie showing is much

lower than that for prevailing at summary judgment, this was clear error.

In determining whether a plaintiff has met her burden under subsection 425.16(b)(3), "[t]he court also considers the defendant's opposing evidence, but only to determine if it defeats the plaintiff's showing as a matter of law. [Citation.] That is, the court does not weigh the evidence or make credibility determinations. [Citation.]" (*Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 906.) In contrast, in order to grant a motion for summary judgment, a court must weigh the opposing party's evidence against the moving party's and determine that there is no triable issue of material fact. (Code Civ. Proc., § 437c(c).) In other words, an opposing party's admissible evidence regarding a material fact that contradicts the moving party's evidence is enough to defeat a summary judgment motion, but a party defending against an anti-SLAPP motion need only provide admissible evidence for all elements of the claim in order to defeat that motion.

The Court of Appeal's ruling thus places upon plaintiffs a burden for defeating an anti-SLAPP motion that the Legislature did not intend, and that other courts have not recognized. (Code Civ. Proc., § 425.16(b)(3); *Kashian v. Harriman*, *supra*, 98 Cal.App.4th at p. 906.) Not only does this purported standard for defeating an anti-SLAPP motion not find any authority in the statute or in case law, if the standards for meeting the plaintiff's burden under subsection 425.16(b)(3) were the same as those for meeting the burden of proof for summary judgment, a court might as well try the case during the

anti-SLAPP motion, because a further hearing on a motion for summary judgment would be redundant.

VII. A COURT MAY NOT STRIKE INDIVIDUAL CAUSES OF ACTION WHERE IT HAS FOUND THAT A COMPLAINT IS ENTITLED TO THE PROTECTION OF SECTION 425.17(b), BECAUSE THE WORD "ACTION" AS USED IN THAT SUBSECTION APPLIES TO THE ENTIRE COMPLAINT.

"'[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent.' [Citation.] To discover that intent [courts] first look to the words of the statute, giving them their usual and ordinary meaning." (*Trope v. Katz* (1995) 11 Cal.4th 274, 280.)

It is well settled that where different terms are used in the same statute, it is presumed that those terms have different meanings. (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171 ["'Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored,'" quoting *Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21]; *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1137, 1138 [courts "generally do not construe *different* terms within a statute to embody the same meaning," emphasis in original]; *People v. Campbell* (1930) 110 Cal.App.Supp. 783, 786 ["Where different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect"].)

An "action" is, inter alia, a "civil or criminal judicial proceeding." (Black's Law Dict. (abridged 7th ed. 2000) p. 24, col. 1.) A "cause of action" is "[a] group of operative facts giving rise to one or more bases for suing" or "[a] legal theory of a lawsuit." (*Id.* at p. 174, col. 2.) For decades in this state, the terms "action" and "suit" have been considered nearly synonymous. (*Palmer v. Agee* (1978) 87 Cal.App.3d 377, 387.) It has been settled by this Court for more than a century that the terms "action" and "cause of action" have different meanings. (*Frost v. Witter* (1901) 132 Cal. 421, 426.)

It is beyond contention that the ordinary meaning of "action" in a civil case is the entire lawsuit, not merely separate causes of action within that suit. Because subsection 425.17(b) provides for exempting an "action" from anti-SLAPP motions and subsection 425.17(c) provides for exempting a "cause of action" therefrom, the Legislature clearly distinguished between an "action" and a "cause of action." By merely using the same words that it used in subsection (c), the Legislature could certainly have said that it wished to exempt individual causes of action under subsection (b) if it so chose. Instead, it chose to exempt entire actions, not merely individual causes of action within those actions. The intent of the Legislature would thus be subverted were courts to pick and choose which causes of action qualify for the protection of section 425.17(b) and which do not.

CONCLUSION

The purpose of the anti-SLAPP statute is to prohibit corporations with deep pockets from preventing people from exercising their First Amendment right to speech. The purpose of the anti-SLAPP amendment is to prevent those same corporations from abusing the anti-SLAPP statute by thrusting significant legal expenses upon those who can ill afford them when the latter exercise their right to petition the courts. Sierra Club is a corporation with deep pockets that has attempted to prevent CMHE from exercising its right to petition the courts by abusing the anti-SLAPP statute. The Legislature was uncontrovertibly well within its authority in amending the anti-SLAPP statute that it created, regardless of whether that amendment weakens that statute. For the foregoing reasons, this Court should deny Sierra Club's Petition for Review.

If this Court were to decide to grant review, the Court of Appeal's ruling affirming the Superior Court's order granting the anti-SLAPP motion in part should be reversed. Even if the anti-SLAPP amendment did not apply to this case, CMHE presented a prima facie case that two directors breached their fiduciary duty to Sierra Club, causing Sierra Club to fail to meet the second prong of the anti-SLAPP statute. CMHE had no burden to prevail at summary judgment in order to meet its burden to defeat the anti-SLAPP motion pursuant to section 425.16(b)(3).

Dated this 22nd day of May, 2006

Respectfully submitted,

JEFF HOFFMAN
Attorney for
Plaintiff/Appellant
CLUB MEMBERS FOR
AN HONEST ELECTION

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 28.1(d)(1))

The text of this brief, including footnotes, consists of 5,096 words as counted by the Microsoft Word processing program used to generate this brief.

DATED: May 22, 2006

JEFF HOFFMAN
Attorney for
Plaintiff/Appellant
CLUB MEMBERS FOR
AN HONEST ELECTION

PROOF OF SERVICE

I, the undersigned, am a solo practitioner doing business as the Law Office of Jeff D. Hoffman. I am the attorney of record for Club Members for an Honest Election in this case.

I caused to be served the following document:

ANSWER TO PETITION FOR REVIEW

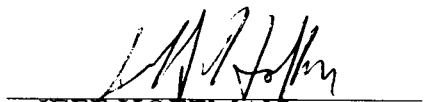
on:

1. Thomas R. Burke of Davis Wright Tremaine, One Embarcadero Center, Suite 600, San Francisco, CA 94111, attorney for Sierra Club, Nick Aumen, Jan O'connell, David Karpf, Sanjay Ranchod, Lisa Renstrom, and Greg Casini in this case;
2. The clerk of the San Francisco Superior Court, 400 McAllister Street, San Francisco, CA 94102-3680; and
3. The clerk of the Court of Appeal, First District, Division One, 350 McAllister Street, San Francisco, CA 94102-3680

BY FIRST CLASS MAIL by depositing a sealed envelope in the United States Postal Service in the ordinary course of business on the same day it is collected in San Francisco, California, postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 22, 2006 in San Francisco, California.

DATED: May 22, 2006



JEFF HOFFMAN
Attorney for
Plaintiff/Appellant
CLUB MEMBERS FOR
AN HONEST ELECTION