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No. S143087

SUPREME COURT
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Frederick K. Ohlrich Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CLUB MEMBERS FOR AN HONEST ELECTION,

Plaintiffs, and Appellants and Respondents,

v.

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

Defendants, and Appellants.

1st Civ. No. A110069

San Francisco County
(Case No. 04-429277)

Appeal From an Order of the San Francisco County Superior Court
Honorable James L. Warren, Judge

REPLY IN SUPPORT OF SIERRA CLUB'S PETITION FOR REVIEW

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Sierra Club, Nick Aumen, Jan O'Connell, David Karpf, Sanjay Ranchod, Lisa Renstrom and Greg Casisi (collectively, "Sierra Club"), petitioners, appellants and cross-respondents in this action, pursuant to California Rule of Court 28(e)(5), urge this Court to decline to review the "additional issues" offered by Club Members for an Honest Election ("CMHE" or "Plaintiffs"), appellants and cross-respondents. The "additional issues" represent either arguments that CMHE lost or reflect its misinterpretation of the recently enacted "public interest" exemption to California's anti-SLAPP statute found in Code of Civil Procedure Section 425.17(b).

CMHE offers no analysis of why review of any of these additional issues is "necessary to secure uniformity of decision or to settle an important question of law." Cal. Rule of Court 28(b)(1). In sharp contrast to the Petition filed by Sierra Club, which explains how the Court of Appeal's decision raises "important questions of first impression concerning application of the 'public interest' exemption" (Letter from California Attorney General Bill Lockyer to Chief Justice Ronald George (May 8, 2006) at 1), there is no reason for this Court to review the additional questions posed by CMHE.

Sierra Club submits this Reply to explain why this Court should not be distracted by the tangential issues raised by CMHE. Although some of these issues

will implicitly be addressed if this Court grants Sierra Club's Petition for Review, they emphasize the necessity of granting Sierra Club's Petition because they highlight the inconsistencies and problems created by the Court of Appeal's published decision, and the unworkable "gravamen" test adopted by the Court.

II. REVIEW OF THE BREACH OF FIDUCIARY DUTY CLAIM IS NOT REQUIRED BECAUSE THE COURT OF APPEAL CORRECTLY DETERMINED THAT PLAINTIFFS' ACTION SOUGHT PERSONAL RELIEF.

CMHE urges this Court to review the Court of Appeal's dismissal of its breach of fiduciary cause of action on the grounds that it "was in the public interest to prosecute those directors, who, by their votes" authorized certain election materials to be distributed to Sierra Club voters in the Club's 2004 election. (CMHE's Answer to Petition for Review ("Answer") at 16-17.) CMHE offers no explanation of how this issue is worthy of this Court's review. It is not. Both the trial court and the Court of Appeal properly recognized that the conduct of these individuals was protected by the First Amendment and the anti-SLAPP statute. (Court of Appeal Opinion ("Op.") at 18-19.) Although Sierra Club believes that the Court of Appeal should have dismissed Plaintiffs' entire action when it correctly determined that it included relief that was personal to them, the Court certainly did not err when it dismissed the breach of fiduciary duty claim. Nor does the dismissal of this particular claim present any issue of statewide importance.

Plaintiffs' breach of fiduciary duty claim targeted two volunteer Sierra Club directors – based on their constitutionally protected voting activities. (Clerk's Transcript ("CT") at 734, 739.) Yet, of course, Directors Aumen and O'Connell were not the only individuals who voted to approve measures designed to inform the Club's membership about issues presented in the Club's 2004 election. The Club's election-related measures were approved by a majority of the Club's volunteer directors yet no other individual directors were sued. Only Aumen and O'Connell, who were both candidates in the Club's 2004 election, were singled out for their protected voting activity. For this engaging in this First Amendment protected activity (Op. at 18-19), Plaintiffs sought to remove these two directors from office and permanently bar them from office or even running for office. (CT at 739.) The highly personal nature of the relief sought by Plaintiffs against these volunteer directors could not have been more obvious and unprotected by Section 425.17(b). For these reasons, there is no reason for this Court to review this issue.

III. REVIEW OF THE LEGAL SHOWING REQUIRED UNDER SECTION 425.16(b)(3) IS NOT REQUIRED BECAUSE THE COURT OF APPEAL CORRECTLY DETERMINED THAT PLAINTIFFS' ACTION COULD NOT SURVIVE AS A MATTER OF LAW.

CMHE also urges this Court to address the standard of review required under Section 425.16(b)(3), when a special motion to strike is reviewed concurrent with the granting of a motion for summary judgment. (Answer at 17-18.) This issue arose because Plaintiffs objected to a continuance that would have allowed

the trial court time to address Sierra Club's pending special motion to strike.[1] CMHE now insists that the Court of Appeal committed "clear error" when it held that the trial court's concurrent granting of Sierra Club's motion for summary judgment "conclusively establishes that plaintiffs had no probability of success." (Answer at 18.)

Again, CMHE makes no attempt to explain how the trial and Court of Appeal's resolution of this procedural issue was in any way inconsistent with existing precedent or presents an issue of statewide importance. Its argument also makes no sense.

Here, the trial court granted Sierra Club's motion for summary judgment and dismissed Plaintiffs' motion for summary judgment. (CT at 1650-1669.) CMHE didn't appeal this order. CMHE only appealed the trial court's order partially granting Sierra Club's second special motion to strike, triggering a mandatory award of attorneys' fees and costs to Sierra Club. (Op. at 5-6.) The trial court's order partially granting Sierra Club's special motion to strike expressly incorporated by reference, the court's concurrent ruling on the parties' summary judgment motions. (CT at 1667.) Moreover, both Sierra Club's motion for

[1] Sierra Club sought *ex parte*, to avoid the unnecessary expense of the parties' filing cross-motions for summary judgment by continuing the deadline for the parties to file their respective motions, pending the trial court's ruling on Sierra Club's second special motion to strike. (CT 1511-14.) However, Plaintiffs CMHE and Robert "Roy" van de Hoek opposed this request, and it was denied by the trial court. (CT 1515-19.)

summary judgment and its special motion to strike were decided on pure issues of law using the identical factual record, in which there were no material disputes of fact. (CT 1525-1649.) Under these circumstances, when the Court of Appeal affirmed the trial court's partial grant of Sierra Club's special motion to strike, it necessarily determined that portions of Plaintiffs' Complaint could not survive as a matter of law. Whether the "probability of prevailing on the claim" standard provided by the Section 425.16(b)(3) or the summary judgment standard was used, on this record, having failed to appeal the trial court's decision, it was entirely proper for the Court of Appeal to affirm the trial court's ruling as a matter of law.

CMHE's concern that the Court of Appeal's decision "places upon plaintiffs a burden for defeating an anti-SLAPP motion that the Legislature did not intend" is misguided. (Answer at 18.) The Court of Appeal's straightforward decision is merely the product of a trial court's ruling on a summary judgment motion that coincided with its ruling on a special motion to strike. The procedural oddities of this case are made obvious by the Court's detailed recitation of its quirky procedural history. (Op. at 1-6.) Under these circumstances, there was no legal error and certainly no compelling reason for this Court to grant review of this issue.

IV. REVIEW OF HOW SECTION 425.17(b) APPLIES TO INDIVIDUAL CAUSES OF ACTION IS NOT REQUIRED BECAUSE THE INTERPRETATION URGED BY CMHE IS CONTRARY TO THE LANGUAGE OF SECTION 425.17(b).

Finally, CMHE invites this Court to review how Section 425.17(b) applies to individual causes of action. (Answer at 19-20.) Because the Court of Appeal mistakenly focused on the "gist or gravamen" of each cause of action rather than determining whether there was any personal relief sought by Plaintiffs anywhere in their "action," Sierra Club concedes that it is likely that this Court will implicitly address this issue if it grants review of Sierra Club's Petition. Nevertheless, it is neither necessary nor appropriate for this Court to adopt CMHE's flawed interpretation of Section 425.17(b).

CMHE is absolutely correct when it argues that the "public interest" exemption found in Section 425.17(b) applies to a plaintiff's entire lawsuit, and not particular causes of action:

> Because subsection 425.17(b) provides for exempting an 'action' from anti-SLAPP motions and section 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.

(Answer at 20.)

However, at the same time that CMHE urges this Court to apply the "usual and ordinary meaning" of the word "action" (Answer at 19), it conveniently overlooks the plain meaning of other key words used in Section 425.17(b). CMHE urges an interpretation of Section 425.17(b) that is inconsistent with limiting the exemption only to an "*action* brought *solely* in the public interest" and in which the plaintiff "does not seek *any* relief greater or different from the relief sought for the general public or a class of which the plaintiff is a member." Cal. Code of Civ. Proc. § 425.17(b) & (1) (Emphasis added.) In essence, CMHE now argues that because the Court of Appeal determined that Section 425.17(b) exempted Plaintiffs' first, second and fourth causes of action from having to satisfy the rigors of the anti-SLAPP statute, it was error for the Court not to have exempted the entirety of Plaintiffs' Complaint. No authority supports CMHE's position. CMHE's argument merely restates its first "additional" issue for review, and is equally flawed.

Sierra Club outlined more fully in its own Petition at 20-25, the Court of Appeal fundamentally erred by focusing on whether the "principal thrust or gravamen" of the plaintiff's action is brought in the public interest" rather than the relief sought in the complaint. (Op. at 16-17.) As a principal drafter of Section 425.17(b) recently explained to this Court, when this amendment was being considered "it became apparent that the claim, cause of action or nature of the overall lawsuit could not serve to separate the true private attorney general action

from the SLAPP plaintiff seeking personal recompenses, redress or revenge." (Letter from James Wheaton to Chief Justice Ronald George (May 16, 2006) at 4.) This "realization was key to carefully crafting an exception that would avoid being as expansive as the anti-SLAPP statute itself." (Id.)

Rather than focus on the particular cause of action pled, the express language of Section 425.17(b) and its legislative history confirm that a court should determine whether "[t]he complaint's prayer exposes [a] cause of action as motivated by personal gain." Blanchard v. DIRECTV, Inc., 123 Cal. App. 4th 903, 917 (2004). Having determined that Plaintiffs "no doubt" sought some "personal advantage" by their Complaint (Op. at 15), by CMHE's own logic and its argument quoted herein, the entirety of Plaintiffs' action should have been subject to the anti-SLAPP statute and dismissed.[2]

[2] In its Answer, CMHE again concedes, as it must, that Plaintiffs' Complaint sought "personal relief" for CMHE and failed petition candidate and plaintiff Roy van de Hoek. Id. at 9.

V. CONCLUSION

CMHE's request that this Court accept review of its "additional issues" should be denied. The review sought by CMHE is not necessary to secure uniformity of decision or to settle an important question of law. For all of the above-stated reasons, CMHE's requested review should be denied.

Respectfully submitted,

Dated: June 1, 2006

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CERTIFICATE OF WORD COUNT

Pursuant to **CRC 28.1(d)(1),** the text of this brief consists of 1,832, as counted by the Microsoft Word 2003 word-processing program used to generate the brief, including footnotes, but excluding the caption, the table of authorities, the table of contents, this certificate, and the signature blocks.

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I, Natasha Majorko, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is One Embarcadero Center, Suite 600 San Francisco, California 94111. I caused to be served the following document:

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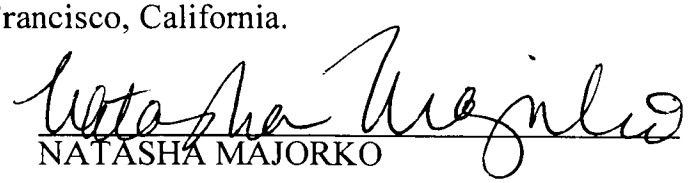

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