ORIGINAL

Case No. S143087
1st. Civ. No. A110069

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
JAN 16 2007
Frederick K. Ohlrich Clerk
Deputy

CLUB MEMBERS FOR AN HONEST ELECTION, ~~an unincorporated association~~
Plaintiff and Respondent

vs.

SIERRA CLUB
~~A CALIFORNIA NON-PROFIT PUBLIC BENEFIT CORPORATION~~; ET AL.
Defendants and ~~Petitioners~~ Appellants.

Appeal from an Order of the San Francisco County Superior Court
Honorable James L. Warren, Judge
Case No. 04-429277

RESPONDENT'S ANSWER BRIEF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent Club Members for an Honest Election ("CMHE"), an unincorporated association, respectfully submit this Brief in Answer to the Opening Brief of Petitioner Sierra Club.

I.
ISSUES PRESENTED FOR REVIEW

A. Issues Presented by Club Members for an Honest Election.

1. Was CMHE entitled to the protections of California Code of Civil Procedure section 425.17(b)[1] as to its third cause of action alleging breach of fiduciary duty, when the action was otherwise found by the Court of Appeal to be within the aegis of 425.17(b)?

2. Should a determination made for purposes of application of 425.16(b)(3) that a plaintiff is likely to prevail on a cause of action be made independent of whether that plaintiff actually prevails?

3. Does the explicit exemption for "actions" under 425.17(b) preclude a court from striking individual causes of action within?

B. Additional Issues Presented by Sierra Club.

4. Was Sierra Club entitled to the protections of 425.16 against the entirety of the Second Amended Complaint filed in this matter?

5. Were certain publications circulated by Sierra Club protected as "political works" under 425.17(d)(2)?

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[1] All further references are to the California Code of Civil Procedure unless otherwise noted.

II.
INTRODUCTION

This appeal concerns the interpretation of Code of Civil Procedure 425.16, the "anti-SLAPP statute," and Code of Civil Procedure 425.17, the "anti-SLAPP amendment," arising in the context of a challenge to the procedures implemented for the 2004 election for Board of Directors of the Sierra Club.

The Gordian and ironic history of the anti-SLAPP statute - created to protect the rights of the politically vocal against the depredations of those who would silence them, transformed into a tool of the politically powerful against those who would protest them - needs little recounting.[2] Such was the state of affairs when the legislature acted in 2003 to curb the abuse of the anti-SLAPP statute by restricting its use against lawsuits brought on behalf of the general public or classes thereof.

This case presents the sort of abuse of the anti-SLAPP statute which the Legislature moved to curb in 2003 – the invocation of the special motion to strike by a large and well-funded corporate defendant under the rubric of "free speech" against a small group of citizens holding a limited stake and challenging the fairness of the corporate election.

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[2] *See generally* Arkin, *Bringing California's Anti-SLAPP Statute Full Circle to Commercial Speech and Back Again* (2003) 31 W.St.U.L.Rev. 1; Baker, *Chapter 338: Another New Law, Another SLAPP in the Face of California Business* (2004) 35 McGeorge L. Rev. 409.

III.
PROCEDURAL HISTORY

The Board of Directors of Sierra Club, a corporation with a membership of three quarters of a million persons and a budget of 95 million dollars, grew concerned in 2003 that their vision of the organization's mission was at increasing variance with that of certain elements of the rank-and-file membership. Clerk's Transcript 296, 303-313 (hereinafter "CT"). In an admitted effort to deny these members an increased voice on the Board of Directors, the Board authorized and condoned certain actions, including the distribution of campaign resources and the promotion of several "shill" candidates whose purpose in running was to disadvantage those candidates whose views differed from those of the Board.

A flurry of legal action followed as more exhaustively detailed in the record below; this appeal concerns itself with the filing of a Second Amended Complaint (the "Complaint") by CMHE, a collection of Sierra Club members who perceived their views to have been threatened by the Board's actions. This Complaint was filed on September 2, 2004, and alleged four causes of action – a violation of Corporations Code section 5617, a cause for declaratory relief, a breach of fiduciary duty on the part of certain members of the Board, and an unfair business practice.

Sierra Club responded with a motion to strike pursuant to 425.16; both sides filed motions for summary judgment. The trial court, in separate orders issued on February 23, 2005, granted the motion to strike as to the third cause of action for breach of fiduciary duty and struck a single paragraph of the first cause of action. The court otherwise denied the motion to strike. The court went on to

deny CMHE's motion for summary judgment and to grant summary judgment to Sierra Club.

CMHE appealed the partial granting of the motion to strike; Sierra Club cross-appealed the entirety of the judge's order.

The Court of Appeal considered the matter and issued an opinion on March 24, 2006 affirming the decision of the trial court.

IV.
THE PROTECTIONS OF 425.17 SWEEP MORE BROADLY THAN THOSE CASES BROUGHT "SOLELY IN THE PUBLIC INTEREST"

Considerable legal efforts have attended Petitioner's argument that the protections of 425.17 apply only to those cases brought "solely in the public interest" given that, as must be conceded here, there has been *some* personal gain sought by Plaintiff.

Reliance on this phrase is misplaced, however, and requires reading out the next portion of the statute. The protections of the anti-SLAPP amendment apply to those cases brought "solely in the public interest **or** on behalf of the general public," 425.17(b) (emphasis added).

In *Gene Gentis, et al. v. Safeguard Business Systems Inc.* (1998) 60 Cal.App.4th 1294, the court in interpreting a statute noted that when using the word "or" within the statute, the Legislature intends to broaden the scope of the statute. *Id.* at 1300; *see also, Cel-Tec Communications Inc. et al. v. Los Angeles Cellular Telephone Company* (1999) 20 Cal.4th 163, 180.

Two types of lawsuits are protected from the special motion to strike by 425.17: those that are brought solely in the public interest

and those that are brought on behalf of the general public. Petitioner's focus on the "solely" portion of the statement is unjustifiably narrow.

V.
THIS ACTION, WRIT LARGE, IS A PUBLIC INTEREST LAWSUIT BROUGHT ON BEHALF OF THE GENERAL PUBLIC

In reading out the second portion of 425.17(b), Petitioner urges a false dichotomy, namely, that a lawsuit cannot simultaneously confer **any** benefit to a plaintiff without losing its character as a public interest lawsuit. This view is in error.

As previously discussed, 425.17(b) contemplates extending its protections both to a plaintiff who brings an action "solely" in the public interest wherein she does not seek any benefit personal to her, **and** to a plaintiff who brings a lawsuit on behalf of the general public. The more specific dictates are found in the three-prong test which follows:

1. The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member...
2. The action enforces an important right affecting the public interest and would confer a significant benefit, whether pecuniary or non-pecuniary, on the general public or a large class of persons.
3. Private enforcement is necessary and places a disproportionate financial burden on the

> plaintiff in relation to the plaintiff's stake in the matter.
>
> 425.17 (b)(1)-(3).

Considering the lawsuit writ large, the action fits within the conditions contemplated by 425.17(b).

a. CMHE Seeks no Relief Greater than that to be Conferred Upon the General Public or a Class of which CMHE is a Member.

425.17 (b)(1) contemplates some benefit to the plaintiff, but limits the benefit to relief no greater than or different from that which the general public or the class of which plaintiff is a member will receive. Such is the case here.

In the instant case, to the extent that CMHE seeks enforcement through the courts to compel Sierra Club to provide legal and reasonable election procedures, the same public interest to be vindicated and the same legal relief to be had will be conferred upon future candidates (in the class of the plaintiff) in future elections, on boards of directors everywhere in California, whether public and private corporations, non-profit or otherwise. Therefore, even if CMHE is the sole immediate beneficiary, plaintiff's benefit is not "greater than or different from the relief sought for the general public or a class of which the plaintiff is a member." 425.17(b)(1).

It may be fairly argued that in a representative democracy, the gravamen of every action which challenges the fairness of elections is brought "on behalf of the general public."[3]

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[3] Although the challenge to an election for the board of a private organization, as here, arguably does not accrue as broadly to the interests of the general public, the benefits accrue in the same fashion

b. This Action Enforces an Important Right Affecting the Public Interest and would Confer a Significant Benefit on a Large Class of Persons.

The next prong of 425.17(b) ensures that, whatever the interest of the plaintiff, the general public or a large class of persons will benefit from the outcome of the lawsuit. As such, the statute provides that the type of benefit must be "an important right affecting the public interest" and that the benefit must be "significant." 425.17(b)(2).

California courts have consistently held that the right of organization members to fair and reasonable election procedures is an important right affecting the public. *Ferry v. San Diego Museum of Art* (1986) 180 Cal.App.3d 35, 45; *Braude v. Automobile Club of Southern California* (1986) 178 Cal.App.3d 994, 1012.

In the instant case, the essence of CMHE's claim is a challenge to the fairness and reasonableness of the 2004 election to the Sierra Club Board of Directors. The complaint charges that a majority faction of Sierra Club's Board of Directors approved and employed unfair and unreasonable methods to influence the 2004 Board elections (CT 715-739). In so doing, the Board adversely affected the interest of the Sierra Club membership in having an election where information on all lawful candidates is equally available to all enfranchised members. The three quarters of a million persons comprising the Sierra Club membership stand to benefit from an adjudication of the issues raised by CMHE.

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to the class of which plaintiff is a member – here, the conceded 750,000 individuals who, like plaintiffs, are members of the Sierra Club.

CMHE's lawsuit, if successful, would enforce an important right affecting the public interest and thus confer a significant benefit both to the general public and to that class of individuals – members of Sierra Club – to which plaintiff belongs.

c. Private Enforcement of the Interests Raised in this Action is Necessary and Places a Disproportionate Financial Burden on CMHE in Relation to its Stake in this Matter.

Subsection (b)(3) concerns the necessity of private enforcement when the plaintiff's stake in the outcome of the case is disproportionate to the financial burden placed upon her. The plain language is controlling.

The language of this subsection anticipates plaintiff's "stake in the matter;" that plaintiff enjoys some direct benefit is not dispositive here. The issue addressed by subsection (b)(3) is the relationship between the interest to be enforced, and the burden placed on Plaintiff in so enforcing. "It has been said about this element that 'the less direct or concrete a personal interest someone has, the more likely he or she will satisfy the element...'" *Blanchard v. DirecTV Inc.*, (2004) 123 Cal.App.4th 903, 915, citing *Hammond v. Agran* (2002) 99 Cal.App.4th 115, 122. The *Blanchard* court queried, again citing *Hammond*, "What the plaintiff hoped to gain financially from the litigation in comparison to what it cost," *Id.* at 125, and "whether the cost of the [plaintiff's] legal victory transcends [their] personal interest." *Ibid*, brackets original. In the instant case, plaintiff stands to gain no pecuniary reward; at most, plaintiff gains a level playing field on which to conduct an electoral campaign for an unpaid position on the Board of a non-profit corporation. The legal relief prayed for is not pecuniary in nature. The evanescent benefit to

plaintiffs is transcended by the much more significant benefit to the public in general and the membership of Sierra Club in particular.

CMHE has pursued this case at great legal peril as they face attorney fee motions from powerful and well-funded corporate defendants. Their greatest stake is their knowledge that future Club election procedures will be fair and reasonable. Therefore, it is necessary for this Court to privately enforce what plaintiff is without the wherewithal to do: compel Sierra Club to provide fair and reasonable elections procedures.

VI.
THE COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S STRIKING OF AN INDIVIDUAL COUNT; THE PROTECTIONS OF 425.17(b) RUN TO THE ENTIRE ACTION

When different terms are used in the same statute they are presumed to have different meanings. "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 meanings is used instead, the construction employing that different meaning is to be favored." *Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21.

One paragraph of 425.17 refers to the general application of the statute, under certain circumstances extending its protections to "any action." 425.17(b).

One paragraph of 425.17 refers to a more specific application of that statute in the commercial context, where under certain circumstances its protections are extended to "any cause of action." 425.17(c).

The terms "action" and "cause of action" have long been understood to have different meanings in common usage under the law, *see, e.g., Frost v. Witter* (1901) 132 Cal. 421, 426; a "cause of action" is a group of facts giving rise to a legal basis for suit, *Black's Law Dict.* (abridged 7th ed. 2000) 174, col.2, while an "action" is the lawsuit itself, a "civil or criminal proceeding." *Id.* at 24, col. 1.

This proposed construction – where entire actions are exempted under the public interest criteria of 425.17, but individual causes of *commercial* actions are exempted on a case-by-case basis – accords with the prevailing Constitutional view that commercial speech, while protected, enjoys less protection than does non-commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, (1980) 447 U.S. 557, 562-63.

Given the foregoing, the Court of Appeal erred in affirming the trial court's striking of Count Three of the Second Amended Complaint. Whether the breach of fiduciary duty claim, standing alone, would survive the rigors of 425.16 was not a question before either the Trial or Appellate Courts; the question was whether the action itself qualified for the protections of 425.17(b). As the Court of Appeal answered that question in the affirmative, it should have reversed the disharmonizing finding of the trial court that an "action" explicitly qualifying for the protection of 425.17(b) nonetheless is subject to 425.16 attack as to individual "causes of action" contained therein.

We might speculate broadly as to what the legislature "intended," if such is ever the appropriate verb to describe the actions of as broadly-motivated a body as a state legislature. Indeed, this body is invited to do so in both the briefs and the requests for judicial

notice filed by Defendant in this matter. Such questions of intent, however, are misplaced inquiry when, as here, the language is express. "We do not inquire what the legislature meant; was ask only what the statute means." Holmes, *The Theory of Legal Interpretation*, 12 Harvard Law Review (1898) 417, 419.

VII.
EACH OF THE CAUSES OF ACTION ARE IMMUNE FROM THE SPECIAL MOTION TO STRIKE

a. Each Cause of Action is Subject to the Protections of 425.17 as Being in the Public Interest.

Arguendo that the protections of 425.17 are severable, or that each cause of action must be analyzed separately, we are guided by the analysis of the Court of Appeal.

This lawsuit was brought in the public interest. CMHE has the statutory authority to seek relief under Corporation Code Section 5617.[4] Under *Ferry v. San Diego Museum of Art*, *supra*, 180 Cal.App.3d at 45, the Court held that the right to fair and reasonable election procedures are important rights affecting the public interest. *Ibid.*, citing *Braude v. Automobile Club of Southern California, supra,* 178 Cal.App.3d at 1012. Therefore, to the extent that each of CMHE's causes of action satisfies the three-prong test under 425.17 (b)(1) through (3), CMHE's lawsuit is exempted from the anti-SLAPP statute.

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[4] California Corporations Code §5617 in subdivision (a) states that "upon the filing of an action therefore by any director or member, or by any person who had the right to vote in the election at issue, the superior court of the proper county shall determine the validity of any election or appointment of any director of any corporation."

b. The Court of Appeal on the Basis of the "Principal Thrust or Gravamen" Test Correctly Determined that the First, Second, and Fourth Causes of Action were not Subject to a Motion to Strike.

The first cause of action alleged that the defendants violated provisions of the Corporations Code and Sierra Club's own bylaws and standing rules in conducting the 2004 Board of Directors elections. The second cause of action sought declaratory relief based on the allegations in the first cause of action. The fourth cause of action alleged the defendants engaged in unfair business practices also based on the allegations in the first cause of action.

With respect to 425.17(b)(2), the requirement that an action enforce an important right affecting the public interest and confer a significant benefit on a large class of persons, the Court of Appeal correctly found that CMHE's suit qualifies as an action brought in the public interest; analogous language in 1021.5[5] and 425.16 has been consistently so interpreted. As previously stated, three quarters of a million persons comprising the Sierra Club membership stand to benefit from an adjudication of the issues raised by CMHE. The Court of Appeal correctly found that this action by CMHE satisfies subdivision (b)(2).

With respect to 425.17(b)(3), the necessity of private enforcement is present. The Court of Appeal found *Hammond v. Agran* (2002) 99 Cal.App.4th 115 persuasive in construing subdivision (b)(3), considering the formulation of "whether the cost of the [plaintiff's] legal victory transcends [their] personal interest."

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[5] Code of Civil Procedure section 1021.5 provides a three-prong test for determining the eligibility for a fee award under the private attorneys general doctrine; the Court of Appeal found that this test mirrored 425.17(b)(1)-(3).

Blanchard v. DirecTV Inc., supra, 123 Cal.App.4th at 915, quoting *Hammond v. Agran* (2002) 99 Cal.App.4th 115, 122 (brackets in original). The Court of Appeal's holding in this respect is correct; as discussed, members of the CMHE faction gain no pecuniary reward in prevailing in this case. The transient benefit to the plaintiffs is far eclipsed by the benefit to the Club in that future election procedures will be fair and reasonable, something that CMHE is without power to provide and something that this Court has the authority to compel.

The more difficult issue of construction is that of 425.17(b)(1), whether the plaintiff "does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member." The essence of the finding of the Court of Appeal is that the measure by which we would test the application of the anti-SLAPP statute – whether the "principal thrust or gravamen" of the cause of action is such as to bring it within the ambit of the statute – is also the appropriate measure by which we test the application of 425.17(b)(1). Respondent agrees.

This Court in determining the proper test must find its way between competing interests; as articulated in the context of the application of the statute itself, "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one cause of action." *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308. At the same time, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some reference to speech or petitioning activity by the defendant." *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188. The

balancing of these two concerns is at the heart of the Court's consideration.

As further discussed under section 'c' below, one may reach a dispositive conclusion on this particular set of facts without engaging the question of the proper interpretation of 425.17; put simply, we need never reach 425.17 because the actions complained of are ineligible for the protections of 425.16. As discussed below, the questioned actions do not *arise from* protected activity, notwithstanding that they may have been *preceded by* protected activity.

Arguendo that Plaintiffs need to seek shelter under 425.17, the Court of Appeal correctly decided that the "principal thrust or gravamen" test, *Martinez, supra,* 133 Cal.App.4th at 188, was the appropriate test so as to balance the above concerns. The Court recognized that prayers for relief are frequently pled in the alternative; here, the objectionable prayer was but one of four alternate forms of injunctive relief sought. Had Plaintiff sought "such other and further relief as the court deems proper," the effect would have been very much the same; one wonders if that boilerplate phrase is sufficient, in Petitioner's calculus, to bring the action outside the ambit of 425.17.

Respondent disagrees with the parade of horribles suggested by Petitioner, that the principal thrust or gravamen test will lead to subjectivity, abuse, and confusion, Petitioner's Brief at 49; the focus upon "relief" urged by Petitioner is no less subject to abuse, given the ambiguity of the statute itself.

The statute allows that the Plaintiff may seek relief greater than that of the general public, so long as that relief is consistent with the relief sought by a "class of which the plaintiff is a member." It is not

clear what is meant by the term "class" in this context; all individuals comprising the Plaintiff in this case are Sierra Club members who desire certain election procedures and outcomes, and seek relief consistent with that class of persons.

The statute further allows that a "claim for attorney's fees, costs, **or penalties** does not constitute greater or different relief for purposes of this subdivision." 425.17(b)(1) (emphasis added). To the degree that Plaintiffs sought certain specific relief as against particular Board Members, it can colorably be argued that this relief falls within the "penalties" exemption of 425.17(b)(1).

All of which is to say that a test which looks narrowly to the relief pled is no less subjective nor more given to abuse or confusion than any other. The Court of Appeal applied a common-sense approach to the interpretation of 425.17 which harmonized it with 425.16 and struck the proper balance between the competing interests outlined above.

c. The Court of Appeal Erred in Affirming the Trial Court as to Count Three; the Fact that the Breach of Fiduciary Duty was Alleged to have Occurred Through Voting is not Dispositive of the Relevant Question.

In order to gain the protections of 425.16, the movant must show as a threshold matter that the challenged cause of action arises from constitutionally "protected activity," *Equilon Enterprises v. Consumer Cause Inc.*(2002) 29 Cal.4th 53, 67. The Court of Appeal in this matter upheld the trial court's affirmative finding as to this question, on the sole basis that the activity complained of was accomplished through voting: "We have no difficulty concluding that

the third cause of action arises out of statutorily protected activity because it is predicated on the voting of [the defendants]..." Op. at 18. Affirming on this basis was error.

The *conduct* complained of was an alleged breach of lawful duty and of specific rules and statutes on the part of two individuals who caused certain actions and occurrences which constituted the breach. The *means* complained of were votes. It is the actionable *conduct* which the lawsuit sought to reach, not the fact of the *votes* themselves.

The statement "voting qualifies for protection under the First Amendment" is an oversimplification; a more accurate rendering of the law as presented might be "the First Amendment protects the expressive qualities of voting."

The Court of Appeal in this case relies primarily upon *Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174 in support of its proposition that voting is protected under the First Amendment. In *Schroeder*, the issue of First Amendment protection for the voting process was conceded below subject to the facts of that case, and was not analyzed as a general matter by the Court of Appeal. *Id.* at 183.

The other cases cited by the Court of Appeal concern situations in which the voting *itself* was the complained of activity and are thus readily distinguishable. *See Stella v. Kelley* (1st. Cir. 1995) 63 F.3d 71, 75; *Brewer v. D.C. Financial Responsibility and Manag.* (D.D.C. 1997) 953 F.Supp. 406, 408.

Here, the vote itself is not the complained of behavior; rather, the vote was simply the mechanism by which the complained of behavior occurred. The Complaint alleged a pattern of collusive self-

interest on the part of Defendants and other named individuals, which ripened into a series of actions taken near to the time of the 2004 election in violation both of relevant sections of the Corporations Code and of the Bylaws and Standing Rules of the organization itself.

That the complained of collusion took place through a series of votes is not remarkable; indeed, how else would collusive and interest-conflicted actions on the part of Board members find expression but through voting? For a deliberative body of this sort, voting is precisely the means of action on all accounts, and if all actions were to be protected on the basis of their being accomplished through votes, then much corporate malfeasance would be beyond the reach of the law – Corporations Code section 5617 would never be implicated.

This case has an analogue in *City of San Diego v. Dunkl* (2001) 86 Cal.App.4th 384. In *Dunkl*, plaintiffs sued the removal of their proposed ballot initiative from the ballot. The proposed initiative was found facially invalid; plaintiffs sued on free expression grounds. The Court found for the striking of the initiative. "There is no constitutional right to place an invalid initiative on the ballot." *Id.* at 389.

Like *Dunkl*, this case involves actions taken in an ordinarily protected context – here, the voting of Directors of a public benefit corporation. Like *Dunkl*, the actions were nonetheless impermissible, because the "protected" activity was merely the *means* by which the impermissible would otherwise be accomplished.

This case likewise finds analogue in *Foundation for Taxpayer and Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1375. There, plaintiffs suing to prevent the Insurance Commissioner from

implementing an amendment to the Insurance Code, duly voted on and passed by the Legislature. Plaintiffs withstood intervenor's Motion to Strike; the Court of Appeal affirmed, recognizing that not every lawsuit challenging a legislative act "arises from" protected activity. "That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from that activity." *Id.* at 1384, quoting *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.

Foundation for Taxpayer and Consumer Rights recognizes that a lawsuit may be based upon actions which implicate the First Amendment without the action arising from the First Amendment. Such is the case here.

The actions complained of should not be insulated from review simply because the alleged malfeasance was accomplished in a boardroom. Neither the Legislature of this State nor the founders of this nation intended that all "expression" be thusly protected; to conclude otherwise is to condone a confederacy of crooks.

VIII.
THE COURT OF APPEAL ERRED IN FAILING TO MAKE A *DE NOVO* ASSESSMENT UNDER 425.16(b)(3) OF THE PROBABILITY OF SUCCESS OF COUNT THREE AT THE TIME OF THE TRIAL COURT'S RULING

Defendant Sierra Club moved to strike all four counts of the complaint pursuant to 425.16; the trial court granted the motion as to count three only (CT 1663-1669). This ruling , as conceded by both parties, gave rise to a substantial attorney fee award in favor of Sierra Club.

The trial court subsequently granted Sierra Club's motion for summary judgment, a motion which was not appealed by CMHE. Based on this set of facts, the Court of Appeal determined that the granting of the summary judgment "conclusively establishes that plaintiffs had no probability of success in pursuing the claim," (Op. at 19) and thus that there was no need for further review to determine whether the trial court erred in not granting CMHE the shelter of 425.16(b)(1). The Court of Appeal's determination was in error.

A ruling on a motion to strike under 425.16 is reviewed *de novo*. *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 645.

The Court of Appeal committed what might be called temporal error - in reviewing this matter they considered the facts as they existed at the time of review, rather than the facts as they existed at the time of the trial judge's ruling.

The question before the trial court – and hence the question on *de novo* review – is whether, *on February 23, 2005,* Plaintiff CMHE had demonstrated a sufficient probability of prevailing so as to fall outside the ambit of the special motion to strike. That the Plaintiff did not, in fact, prevail is irrelevant to this determination, as the Court of Appeal sits in Appellate rather than Original jurisdiction; *de novo* review in this context contemplates that the Court of Appeal will take a "fresh look" at the facts as they were before the trial court, not that they will consider the same question as the facts have ripened subsequent to the trial court's action.

Appellate counsel directed the attention of the Court of Appeal to a plethora of facts before the trial court in support of the Court's *de novo* review of this question, none of which was considered by the Court of Appeal; the Court based its opinion solely on the fact that,

subsequent to the trial judge's action, the matter was "conclusively establishe[d]" (Op. at 18) to lack a probability of success.

Such an approach effectively insulates the rulings of the trial court from review unless Plaintiff's choose to appeal other, extrinsic orders such that they are "kept alive" until the Court of Appeal has time to act; this approach favors neither thoughtful appellate practice nor judicial economy.

Because the substance of the review of the Court of Appeal was based on facts unknown to the trial court, their decision was in error and should be reversed.

IX.
THE "POLITICAL WORKS" ARGUMENT ADVANCED BY SIERRA CLUB IS WAIVED FOR NOT HAVING BEEN RAISED IN THE TRIAL COURT

Petitioner argues that the actions complained of by CMHE fall within the rubric of 425.17(d)(2), which places "political works," as defined by that section, within the protections of 425.16.

The record does not reflect this issue arising prior to Petitioner's briefing to the Court of Appeal.

"It is a firmly entrenched principle of appellate practice that litigants must adhere to the theory on which a case was tried... a litigant may not change his or her position on appeal and assert a new theory." *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.

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* (1998) 60 Cal.App.4th 591, 599, fn.6), they are under no obligation to do so. The Court of Appeal

did not, as asserted by Petitioner, "fail" to address this issue, Petitioner's Opening Brief at 55; rather, the Court of Appeal declined to engage an issue not raised in the trial court.

Because the issue was not raised at the trial court, it should not be considered here.

X.
CONCLUSION

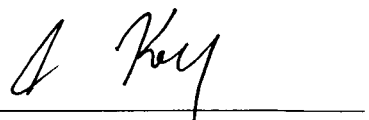
Petitioner seeks to avoid an examination of alleged corporate malfeasance in the context of a contested election under the banner of the First Amendment. The flag is never flown so high as by those seeking cover behind it.

Respondent, at personal risk far disproportionate to their stake in the matter, sought an adjudication of the fairness of an election. The essential gravamen of their lawsuit accrued to the interest of the Sierra Club and of the public in general.

The Court of Appeal correctly decided that the first, second, and fourth causes of action were immune from the special motion to strike, and this decision should be affirmed. The Court of Appeal committed temporal error in finding the third cause of action subject to the motion to strike, and this decision should be reversed.

Dated: January 13, 2007

Respectfully Submitted,



IAN KELLEY
Attorney for Respondents
CLUB MEMBERS FOR AN
HONEST ELECTION

CERTIFICATION OF WORD COUNT

The text of this brief, including footnotes, consists of 6,412 words as counted by Microsoft Word, the word processing program used to generate this brief.

Dated: January 13, 2007

Ian Kelley
Attorney for
CLUB MEMBERS FOR
AN HONEST ELECTION

PROOF OF SERVICE

I, Conrad Wu, declare that

I am an individual over the age of 18 years and not a party to the within-entitled action. My business address is 885 Bryant St., San Francisco, CA. On January 16, 2007, I caused to be delivered **RESPONDENT'S ANSWER BRIEF** to the following:

Thomas R. Burke
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, 8th Floor
San Francisco, CA 94111
Attorney for Petitioner

Clerk of the Court of Appeal
First Appellate District, Division 1
350 McAllister Street
San Francisco, CA 94102

Hon. James L. Warren
Judge of the San Francisco Superior Court
Civil Division – Dept. 301
400 McAllister Street
San Francisco, CA 94102

By personal service.

I declare the above to be true under penalty of perjury under the laws of the State of California. Executed on January 16, 2007.

Conrad Wu