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CALIFORNIA'S ANTI-SLAPP LEGISLATION: A SUMMARY OF AND COMMENTARY ON ITS OPERATION AND SCOPE

*Kathryn W. Tate**

In 1992 the California legislature enacted section 425.16 of California's Code of Civil Procedure[1] in order "to encourage continued participation in matters of public significance" and to prevent the chilling of such participation "through abuse of the judicial process."[2] When a lawsuit is brought for the purpose of chilling such participation, that lawsuit has been dubbed a SLAPP (Strategic Lawsuit Against Public Participation).[3] Section 425.16 permits a special motion to strike in any SLAPP suit[4] and freezes discovery.[5] The statute is thus designed to prevent SLAPPs by ending them early and without great cost to the SLAPP target. Another aspect of the provision's deterrence is the entitlement of the prevailing movant to attorney's fees and costs.[6]

In 1993, the California legislature amended the statute to require, in part, that the Judicial Council report back "on the frequency

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1. CAL. CIV. PROC. CODE § 425.16 (West Supp. 2000).

2. *Id.* § 425.16(a). The statute became effective January 1, 1993. *See* CAL. CIV. PROC. CODE § 425.16 Historical and Statutory Notes.

3. Professor George W. Pring first coined this term. *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989).

4. *See* CAL. CIV. PROC. CODE § 425.16(a). Specifically, section 425.16(a) permits the special motion to strike in any lawsuit "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Id.*

5. *See id.* § 425.16(g).

6. *See id.* § 425.16(c).

and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section."[7] The publication of both this report[8] and the first California Supreme Court decision interpreting section 425.16, which was decided in 1999,[9] prompted this Article, the purpose of which is to examine the provision after seven years of judicial rulings.

Part I of the Article will provide general background on SLAPP suits and the need for anti-SLAPP legislation. Part II will detail the legislative history of California's anti-SLAPP provision. Part III will review the judicial interpretations of section 425.16, beginning with an overview of how the statute operates and then highlighting the issue that was resolved by the 1999 California Supreme Court decision. This section will also review the reaction of the federal courts to section 425.16. Part IV will summarize the Judicial Council report, including certain recommendations for amendments to the statute. Finally, Part V will highlight any remaining issues in the operation and scope of section 425.16. Appendices to the Article will also provide the complete text of the statute, a summary of circumstances where motions have been granted and denied, and a fuller discussion of the Judicial Council's and the author's comments on the recommended amendments to the statute.

I. BACKGROUND

In addition to the meaning behind the acronym SLAPP, "Strategic Lawsuit Against Public Participation,"[10] these suits have been described as actions without substantial merit brought against individuals or groups with the intention of "silencing [the] opponents, or at least . . . diverting their resources."[11] The lawsuits have the effect of

7. CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 1994) (ordering the report by January 1, 1998).

8. *See generally* JUDICIAL COUNCIL OF CALIFORNIA, LEGISLATIVE REPORT: SPECIAL MOTIONS TO STRIKE STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION ("SLAPP SUITS") (1999) [hereinafter JUDICIAL COUNCIL SLAPP REPORT].

9. *See* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999).

10. *See* Pring, *supra* note 3, at 3.

11. John C. Barker, *Common-Law and Statutory Solutions to the Problem*

interfering with the defendants' past or future exercise of constitutionally protected rights.[12] More than one author has also provided a more specific definition of a SLAPP suit. The seminal article on SLAPP suits by George W. Pring identifies a SLAPP suit as: "1. a civil complaint or counterclaim (for monetary damages, and/or injunction), 2. filed against non-governmental individuals, and/or groups, 3. because of their communications to a government body, official, or the electorate, 4. on an issue of some public interest or concern."[13] The amount of petitioning activity sufficient to satisfy part 3 of the definition can be and has been limited elsewhere to include only one or a combination of administrative, judicial, or legislative communications.[14] Another way to determine if a lawsuit is a SLAPP suit is to apply a two-part test suggested by another author: "[A] SLAPP suit (1) is based on the exercise of certain First Amendment petitioning rights, where such exercise is invited by statute or a tradition of petitioning on the issues, and (2) is unlikely to succeed on the merits."[15]

Both the Pring definition and the two-part test suggest that plaintiffs bring SLAPP suits in response to an individual's or group's exercise of the right to speak out on a public issue. Thus, SLAPP suits can follow such simple communications as writing a letter to a newspaper, testifying at a public hearing, lobbying a government official, or circulating a petition.[16] The injury wrought by the SLAPP suit lies primarily in its being brought at all. The motive of SLAPP filers—or "SLAPPers"—is not to win, but rather to chill the defendants' activities of speech or protest and to discourage others from

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of SLAPPs, 26 LOY. L.A. L. REV. 395, 396 (1993).

12. *See* Scott E. Mollen, *SLAPP Suits – Award of Attorney's Fees and Expenses Under 22 NYCRR Part 130-1 for Frivolous Conduct, Based on Prosecution of Colorable Claim for Improper Purpose, Not Unconstitutional*, N.Y. L.J., June 3, 1992, at 4.

13. Pring, *supra* note 3, at 4.

14. *See* Thomas A. Waldman, Comment, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 1045 (1992) (citing Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361, 1369 (Colo. 1984)).

15. *Id.* at 1044.

16. *See* Dora A. Corby, *Clearing Up Civil Procedure Section 425.16—Delivering the Final Knockout Punch to SLAPP Suits*, 29 MCGEORGE L. REV. 459, 459 (1998).

similar activities.[17] The enormous damage amounts claimed by SLAPPers can intimidate an unsophisticated defendant,[18] as can the specter of staggering defense costs, even though SLAPPers lose eighty to ninety percent of the suits that actually go to trial.[19]

SLAPP suits "masquerade as ordinary lawsuits" and thus are not easy to recognize, even by the courts.[20] They can be brought as a counterclaim or cross-claim in a given action,[21] as a separate action following the dismissal of another party's original suit,[22] or as an initial action against a party who has acted in opposition to the suing party's interests by means other than litigation.[23] The most frequent

17. *See* Barker, *supra* note 11, at 403.

18. *See id.* (noting that the average damage amount sought in SLAPP suits is $9.1 million).

19. *See id.* at 406.

20. Pring, *supra* note 3, at 8-9.

21. *See, e.g.*, Wilcox v. Superior Court, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994). *Wilcox* arose from another lawsuit in which certain court reporters sued an association of court reporters (California Reporting Alliance (CRA)) alleging that CRA's exclusive contracts were a tortious interference with business relationships. *See id.* at 814, 33 Cal. Rptr. 2d at 448. Wilcox was not a party to the lawsuit, but she contributed money to support the litigation and drafted a memorandum to other court reporters seeking litigation funds and characterizing the lawsuit as accusing CRA of "extortion and racketeering." *Id.* at 814, 33 Cal. Rptr. 2d at 448-49. CRA then filed a cross-complaint for defamation against Wilcox in the original suit. *See id.* at 814, 33 Cal. Rptr. 2d at 449.

22. *See, e.g.*, Sierra Club v. Superior Court, 168 Cal. App. 3d 1138, 214 Cal. Rptr. 740 (Ct. App. 1985). In *Sierra Club*, the Sierra Club was able to delay a developer's construction by securing a remand to the California Coastal Commission after successfully arguing that an incorrect administrative standard had been used in approving the developer's permit. *See id.* at 1140, 214 Cal. Rptr. at 741. However, on remand, the Commission again voted in favor of the developer, using the appropriate standard. *See id.* at 1143, 214 Cal. Rptr. at 743. Thereafter, the developer sued the Sierra Club for malicious prosecution based on the action that resulted in the remand. *See id.* at 1144, 214 Cal. Rptr. at 744.

23. *See, e.g.*, Evans v. Unkow, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (Ct. App. 1995). Evans was a former member of the board of directors for a sanitary district in East Palo Alto who lost a recall election. *See id.* at 1493-94, 45 Cal. Rptr. 2d at 626. A recall election petition circulated by the defendants stated that Evans had, inter alia, spent more of the district's money on official parties, travel, and finery than on needed repairs to sewers; had hired friends as consultants; refused to test industrial sewage for arsenic; failed to make various repairs to the system, which endangered the health of mostly low-income people; and attempted to hire his personal attorney to represent the district. *See id.* at 1494, 45

type of SLAPP suit is for defamation, but the causes of action are myriad. They include business torts (such as interference with contractual rights or with prospective economic advantage), antitrust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial process abuse, and malicious prosecution.[24]

Because of the motives behind the SLAPP action, the usual judicial safeguards were seen as inadequate because they focused on preventing a meritless claim from prevailing.[25] A SLAPP plaintiff, however, expects to lose and is willing to write off litigation expenses (and even the defendant's attorney's fees where necessary) as the cost of doing business. Thus, the existing safeguards did not serve as a deterrent, given that the SLAPP plaintiff's real motivation was delay and diversion to enable the project at issue to be approved, or even completed, before the course of litigation was concluded.[26]

Early judicial review of SLAPP litigation came to be the most important deterrent of SLAPP actions. Quick resolution of the matter would greatly diminish a SLAPP's intimidation effect because a dismissal could be granted before the defendant would be forced either to pay substantial attorney fees for discovery and other defense costs, or to bear the stress of the specter of a large judgment for an extended period of time.[27] One solution taken by some states has been to adopt a statutory scheme that addresses the need for expediting judicial review, as well as monetary recovery, for the party who has been SLAPPed.[28] California is one of a growing number of

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Cal. Rptr. 2d at 626. After his recall, Evans sued the defendants for defamation and libel. *See id.*

24. *See* Barker, *supra* note 11, at 402-03 & n.34.

25. *See id.* at 407-48 (discussing comprehensively the weaknesses of the procedural and substantive protections existing before anti-SLAPP legislation, such as summary judgment and a SLAPP-back suit, or a claim by the SLAPP target, or "SLAPPee").

26. *See id.* at 406-07.

27. *See id.* at 408-09.

28. *See, e.g.*, N.Y. C.P.L.R. §§ 3211(g), 3212(h) (McKinney 1999); N.Y. CIV. RIGHTS LAW §§ 70-a, 76 (McKinney 1999); R.I. GEN. LAWS §§ 9-33-1 to 9-33-4 (1997); WASH. REV. CODE §§ 4.24.500, 4.24.510, 4.24.520 (1999).

states that have enacted such legislation.[29] The next Section describes California's anti-SLAPP statute.

II. CALIFORNIA'S ANTI-SLAPP PROVISION

A. Section 425.16's Legislative History

It took the California legislature three tries before it finally passed SB 1264,[30] the Lockyer Bill (now California Code of Civil Procedure section 425.16), which became effective January 1, 1993.[31] The legislature included in the statute specific findings concerning the need for this legislation:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.[32]

The report of the Assembly's Judicial Subcommittee also described the purpose of the bill:

> *Existing law* does not specifically address the growing, and frequently, [sic] criticized phenomena of SLAPP suits.

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29. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 189 (1996) (noting that eight other states have such legislation: Delaware, Massachusetts, Minnesota, Nebraska, Nevada, New York, Rhode Island, and Washington); Gail Diane Cox, *Pushing the SLAPP Envelope*, NAT'L L.J., Apr. 19, 1999, at A1 (reporting that 11 other states have an anti-SLAPP law: Delaware, Georgia, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New York, Oklahoma, Rhode Island, and Tennessee, and that Colorado has a state supreme court ruling allowing a SLAPPee to win a summary judgment if the suit arises from the exercise of the right to petition).

30. *See* Barker, *supra* note 11, at 448-49.

31. Although wide majorities in both legislative houses passed the earlier versions of the Lockyer Bill, two governors, Deukmejian and Wilson, vetoed those earlier bills. Finally, in 1992, after the legislature reworked the bill to meet Governor Wilson's objections, it was signed into law. *See id.*; Corby, *supra* note 16, at 460-61.

32. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1994).

> *This bill* states that a cause of action against a person arising out of the person's exercise of his or her constitutional rights of petition and free speech "in connection with a public issue shall be subject to a special motion to strike," unless the court determines that the plaintiff has established that there is a "probability" that the plaintiff will prevail on the claim.
>
> Defendants who prevail on the motion to strike are entitled to attorney fees and costs. This provision does not apply to "enforcement actions" brought by public prosecutors. Plaintiffs may be awarded attorney fees if the court determines that the special motion to strike was "frivolous" or "solely intended to cause unnecessary delay."
>
> Upon the filing of a special motion to strike, discovery shall be stayed, unless authorized by the court.[33]

The legislature made minor amendments to the provision in 1993, including the directive that the Judicial Council provide the legislature with a report on the usage of the provision, as well as "any other [pertinent] matters" concerning the statute's purpose.[34] By 1996, after several years of judicial interpretation of section 425.16, conflicting opinions developed in the courts of appeal as to the scope of the section.[35] Therefore, in 1997, Senator Lockyer

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33. ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, CALIFORNIA ASSEMBLY, STATUTORY SUMMARY AND INTERPRETATION OF SB 1264, at 2-3 (June 29, 1992).

34. CAL. CIV. PROC. CODE § 425.16(i); *see supra* note 7 and accompanying text. In addition, the language of section 425.16(c) concerning the court's awarding of costs and attorney's fees to a plaintiff was changed from "may award" to "shall award" where a motion to strike was found to be frivolous or solely for delaying purposes. *See* CAL. CIV. PROC. CODE § 425.16(c).

35. *Compare, e.g.*, Zhao v. Wong, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996) (holding statute only applies to limited activities, such as those involving the right of petition and free speech), *disapproved by* Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999), *with, e.g.*, Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996) (holding statute applies to any exercise of the right to seek redress of grievances from the government, including the filing of a private lawsuit). *See also infra* notes 100-21 and accompanying text.

shepherded SB 1296,[36] an amendment to section 425.16, through unanimous approval by both legislative houses and by the governor. The amendment's purpose in large part was to make explicit in the section's declaration of legislative purpose that the section was to be construed broadly.[37] Another key amendment was the addition of a fourth category of explicitly protected rights of petition and free speech.[38] This addition was intended to clarify that the statute's protections applied to both statements and conduct.[39]

Most recently, in the fall of 1999, the legislature enacted two new provisions to the statute which were to take effect immediately.[40] First, they added a section making an appeal possible from any order granting or denying a special motion to strike in order "to further the purpose of the anti-SLAPP statute."[41] The legislature believed that "[w]ithout this ability [to immediately appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated."[42] Second, the amendments require a

36. *See* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296 (May 13, 1997).

37. *See* CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1997) (last sentence added: "To this end, this section shall be construed broadly.").

38. *See id.* § 425.16(e)(4) (adding the category "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest").

39. Before the 1997 amendments, the enumerated categories in section 425.16(e) described only conduct that involved written or oral communications. *Compare* CAL. CIV. PROC. CODE § 425.16(e) as enacted in 1993, *with id.* as amended in 1997. This amendment was intended to ensure that the section was interpreted in conformity with *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 18-20, 43 Cal. Rptr. 2d 350, 357-59 (Ct. App. 1995), which found that the scope of section 425.16 included both communicative and non-communicative conduct. *See* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296, at 3-4.

40. *See* CAL. CIV. PROC. CODE § 425.16(j)-(k) (West Supp. 2000).

41. *Id.* § 425.16(j). A concomitant amendment was made to the California Code of Civil Procedure specifying that an appeal may be had from an order denying or granting a special motion to strike. *See id.* § 904.1(a)(13).

42. ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF AB 1675, at 2 (Apr. 20, 1999); *accord* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF AB 1675, at 4 (June 29, 1999). In its consideration of the amendment on granting immediate appeal, the legislature also noted:

party filing a section 425.16 special motion to strike and any opponent of that motion to submit certain documents to the Judicial Council.[43] The amendments further require the Judicial Council to maintain these materials as a public record for at least three years.[44] This mandated filing of information with the Judicial Council pertaining to all special motions to strike should allow better tracking of the use and effectiveness of the anti-SLAPP statute, something that was not possible until now.[45]

> When a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the Anti-SLAPP Law is useless and has failed to protect the defendant's constitutional rights. Since the right of petition and free speech expressly granted by the U.S. Constitution are at issue when these motions are filed, the defendant should have the same right to appeal as plaintiffs already have under current law and have the matter reviewed by a higher court.

ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF AB 1675, at 2-3 (Apr. 20, 1999); *accord* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF AB 1675, at 4 (June 29, 1999).

43. *See* CAL. CIV. PROC. CODE § 425.16(k)(1). The specific documents required to be filed are copies of the endorsed-filed caption page of the motion or opposition and any related notice of appeal or petition for a writ, and a confirmed copy of any order issued under section 425.16, including orders granting or denying a special motion to strike, discovery and attorney's fees. *See id.*

44. *See id.* § 425.16(k)(2). At the time the 1999 amendments were first proposed by the Assembly Judiciary Committee, the Judicial Council had not submitted to the legislature the report that section 425.16(i) required. *See* ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF AB 1675, at 2, item (9) (Apr. 20, 1999) (noting that no report had been submitted). However, by the time the Assembly had approved the bill and passed it to the Senate, the Judicial Council report was available to the legislators. *See* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF AB 1675, at 4-5 (June 29, 1999) (discussing the Judicial Council report). *See generally* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8. In its analysis of the bill, the Senate Judiciary Committee noted that while the Judicial Council had concluded in its report that no further data collection was needed, the consultants hired by the Council had recommended that, if the legislature wanted reliable data about the operation of the anti-SLAPP statute, it should "[a]t a minimum . . . require the filing of a simple form whenever the [special] motion is entered." SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF AB 1675, at 5 (June 29, 1999) (quoting JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 4).

45. As will be more fully discussed in Appendix 3, the Judicial Council's

However, this mandate does not require the Judicial Council to do anything more than maintain the records for the set period of time; there is no requirement of a report to the legislature similar to the 1993 amendment.[46] It is therefore unclear what use will be made of the information. Moreover, the information-gathering itself may not be fully effective unless the Judicial Council publicizes this requirement to the courts and sets up procedures to ensure that attorneys for both filers and defenders of special motions to strike are aware of the document submission requirement.[47]

B. The Current Statute

Section 425.16 provides specific protections to SLAPP targets—or SLAPPees—because of the special burdens they face. Through

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data collection efforts for its 1999 report were ineffective and provided incomplete information about the operation of the anti-SLAPP statute. *See infra* notes 339-49, 356-59 and accompanying text.

46. *Compare* CAL. CIV. PROC. CODE § 425.16(k)(2) (West Supp. 2000), *with* CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 1994). Since the 1999 amendment, the Judicial Council has been maintaining a log of the section 425.16 special motion filings, which can be accessed on the California courts' Web site. As of this Article's publication date, 74 filings had been made. *See SLAPP Special Motion Log, available at California Courts: Reference: Courts—How to Use* (last modified May 10, 2000) <http://www.courtinfo.ca.gov/reference/4_courtshowto.htm#SLAPPs>.

47. Instructions for transmitting the required documents to the Judicial Council by fax or as e-mail attachments can be found on the California courts' Web site. *See How to Transmit and Access Documents Related to Special Motions to Strike Strategic Lawsuits Against Public Participation (SLAPPs)* (last modified Jan. 6, 2000) <http://www.courtinfo.ca.gov/reference/documents/transmit.pdf>. When the instructions were first posted, in November 1999, the information was featured on the courts' home page for the first month. *See* E-mail from Jacquelyn Harbert, Judicial Council, Administrative Office of the Courts, Research and Planning Unit to author (Jan. 4, 2000) (on file with the *Loyola of Los Angeles Law Review*). Currently, once one gets to the home page, one must figure out to click on the "Reference" icon; from the reference page, one must enter the table of contents at the "Courts: How to Use" section, which contains a heading titled "Special Motions to Strike Strategic Lawsuits Against Public Participation (SLAPPs)." The complete Web address to get to where one can click on the filing instructions is <http://www.courtinfo.ca.gov/reference/4_courtshowto.htm#SLAPPs> (visited Apr. 27, 2000). Telephone assistance for document transmission is available at 415-865-7454; the fax number is 415-865-4332.

the special motion to strike procedure, [48] the statute shifts the moment for judicial intervention back from the summary judgment stage to the motion to dismiss stage,[49] thus reducing the overall time involvement. The statute also suspends discovery upon filing of the special motion to strike in order to forestall excessive discovery costs and the intimidating effect of ponderous pretrial discovery requests, although limited discovery may be permitted if the plaintiff makes a noticed motion and shows good cause.[50] The statute permits successful SLAPPees to recover litigation costs and attorney's fees upon dismissal, yet it also provides for attorney's fees and costs for the plaintiff if the motion to strike is found to be frivolous or solely

48. Governor Wilson vetoed an earlier version of this anti-SLAPP legislation, SB 2313, which structured the protections differently by proposing a special "pleading hurdle" for potential plaintiffs. *See* Barker, *supra* note 11, at 448. It specified that *prior* to pleading a SLAPP suit, a plaintiff would have to demonstrate to the court the "substantial probability" of plaintiff's success on the merits. The Lockyer bill changed the burden and the procedure. Plaintiffs may now file a SLAPP suit without special permission from the court. *See* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2000). The SLAPP defendant then has 60 days to file the special motion to strike. *See id.* § 425.16(f). The plaintiff's only burden in response to such a motion is to demonstrate the "probability" of success on the merits. *See id.* § 425.16(b)(1). The change from a "pleading hurdle" to a mandatory special motion to strike was made pursuant to the request of the State Bar's Committee on the Administration of Justice. Their concern was the potential for violation of the plaintiff's constitutional right to a jury trial. *See* ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, CALIFORNIA ASSEMBLY, STATUTORY SUMMARY AND INTERPRETATION OF SB 1264, at 2-3 (June 30, 1992).

49. Section 425.16(f) provides:

> The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

CAL. CIV. PROC. CODE § 425.16(f). One attorney for a SLAPPee has suggested that the motion filing deadline of 60 days after the filing of a complaint is too restrictive, especially if a defendant turns over the lawsuit to the defendant's insurance carrier. In such cases, the deadline may pass before the carrier can act, and rights may be lost if a late motion request is not granted. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Everett L. Skillman to James Brighton and Gregory Loarie, Judicial Council of California (Jan. 23, 1998)).

50. *See* CAL. CIV. PROC. CODE § 425.16(g); *infra* notes 211-19 and accompanying text.

intended for delay.[51] Lastly, the 1999 amendment to the statute allows for immediate appeal by whichever party loses the motion to strike.[52] For the SLAPP defendant, this is crucial in order to avoid having to incur the cost of the full lawsuit before the constitutional rights issue is fully adjudicated. The current statute is quoted in full in Appendix 1.

It is of note that section 425.16 provides protection beyond the traditional scope of anti-SLAPP legislation, which is focused on protecting the right to petition. Under the more traditional scope of such legislation, the right to free speech is protected only in the context of the right to petition.[53] The California legislature, however, has made clear that, in addition to protection of the right to petition, protection of free speech regarding a public issue divorced from petitioning is also within the scope of section 425.16.[54] While many of

51. *See* CAL. CIV. PROC. CODE § 425.16(c); *infra* notes 221-39 and accompanying text.

52. *See* CAL. CIV. PROC. CODE § 425.16(j); *infra* notes 240-42 and accompanying text.

53. Examples of states with more typical anti-SLAPP statutes include: Delaware, DEL. CODE ANN. tit. 10, §§ 8136-8137 (West Supp. 1990) (directing the granting of a motion to dismiss where movant demonstrates that the "[a]ction, claim, cross-claim, or counterclaim subject to the motion is an action involving public petition and participation," unless the motion's opponent demonstrates that "[t]he cause of action has a substantial basis in law" or that existing law should be modified); Minnesota, MINN. STAT. ANN. § 554.03 (West Supp. 2000) (providing immunity for "[l]awful conduct or speech that is genuinely aimed in whole or in part at procuring favorable government action. . . . unless the conduct or speech constitutes a tort or a violation of a person's constitutional rights"); and Washington, WASH. REV. CODE ANN. § 4.24.510 (West Supp. 2000) (offering protection only to "[a] person who in good faith communicates a complaint or information to any agency of federal, state, or local government, . . . regarding any matter reasonably of concern to that agency" for "[c]laims based upon the communication to the agency"). *See also* PRING & CANAN, *supra* note 29, at 203 (providing in their model anti-SLAPP bill that protection be afforded for "[a]cts in furtherance of the constitutional right to petition, including seeking relief, influencing action, informing, communicating, and otherwise participating in the processes of government . . . except where not aimed at procuring any governmental or electoral action, result, or outcome").

54. In its statement of findings concerning the need for section 425.16, the legislature noted its concern over increased lawsuits "brought primarily to chill the valid exercise of the constitutional *rights* of freedom of speech *and* petition

the reported California SLAPP cases involve a right to petition scenario,[55] there have been less typical SLAPP case situations,[56] and the

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for the redress of grievances." CAL. CIV. PROC. CODE § 425.16(a) (emphasis added). The legislature was also careful to specify that the acts protected by the statute included speech and conduct, acts that are broader than speech or conduct done as part of petitioning activity. *See id.* § 425.16(e)(3)-(4) (defining the acts as inclusive of "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest" and "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest"); *see also* Cox, *supra* note 29, at A11 (quoting George W. Pring as saying, "What Californians decided to do, bless their hearts, was to cover not only the right to petition but all free speech").

55. In describing the typical SLAPP scenario, the court in *Wilcox v. Superior Court* stated:

> The paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans. SLAPPs, however, are by no means limited to environmental issues, nor are the defendants necessarily local organizations with limited resources.

27 Cal. App. 4th 809, 815, 33 Cal. Rptr. 2d 446, 449 (Ct. App. 1994) (citations omitted).

56. *See, e.g.*, DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 564, 566, 92 Cal. Rptr. 2d 755, 757, 758 (Ct. App. 2000) (involving a corporate defendant who moved to strike plaintiff's class action that alleged, *inter alia*, the dissemination of false and misleading information about a pharmaceutical product in "advertising, marketing, and public relations activities directed at the medical profession and the general public"); Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973 (C.D. Cal. 1999) (involving media defendant who moved to strike plaintiff's libel complaint for false statements in an article); Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406 (Ct. App. 1999) (involving media defendants who moved to strike parents' claims arising out of a television show featuring ride-along coverage of the discovery of their son's body and telephonic notification to the parents of the son's death); Averill v. Superior Court, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996) (involving homeowner who moved to strike charitable organization's slander action based on her statements to her employer requesting that the employer discontinue support of charity).

In *Marich*, the court acknowledged that the case was not the type of SLAPP suit described in *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994). *See* discussion *supra* note 55. The court noted that the plaintiffs "[had] challenged the application of section 425.16 in the trial court" but had not pursued the issue on appeal. *Marich*, 73 Cal. App. 4th at 307 n.3, 86 Cal. Rptr. 2d at 412 n.3.

judicial interpretations have made clear that speech apart from petitioning activity is protected by the statute.[57]

III. REVIEW OF JUDICIAL INTERPRETATIONS OF SECTION 425.16[58]

Early challenges to the constitutionality of section 425.16 were unsuccessful. The statute has withstood arguments that it deprived a plaintiff of equal protection, violated the right to a jury trial, and denied due process by precluding discovery.[59] Moreover, despite arguments by SLAPPers that section 425.16 protects only private citizens, the courts have applied the statute to SLAPPees including corporations,[60] politicians and their supporters,[61] contributors to political organizations,[62] labor unions,[63] tenant counseling

57. *See* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 864, 44 Cal. Rptr. 2d 46, 51 (Ct. App. 1995) (finding that news reporting about governmental hearing is free speech protected by section 425.16); *accord* Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1045, 61 Cal. Rptr. 2d 58, 62 (Ct. App. 1997).

58. In California, the supreme court can order a court of appeal opinion not to be published. This is commonly referred to as "depublication." *See* CAL. R. CT. 976(c)(2); Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 CAL. L. REV. 514 (1984). Once a case is depublished, it usually cannot be cited as authority in any other action. *See* CAL. R. CT. 977(a). A number of the SLAPP court of appeal decisions have been depublished. However, since this Article's purpose is to provide an overview of the full use and judicial interpretation of section 425.16, the author has chosen to cite and discuss SLAPP decisions even where they have been depublished.

59. *See Lafayette Morehouse*, 37 Cal. App. 4th at 865-70, 44 Cal. Rptr. 2d at 52-55; Dixon v. Superior Court, 30 Cal. App. 4th 733, 746, 36 Cal. Rptr. 2d 687, 696 (Ct. App. 1994); *see also* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 964, at 429 (4th ed. 1997 & Supp. 1999) [hereinafter WITKIN PROCEDURE].

60. *See* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Ct. App. 2000) (protecting pharmaceutical company's activities); *Marich*, 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406 (protecting media entities' activities); Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999) (protection of publisher's activities); *Lafayette Morehouse*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (protecting of corporate newspaper's activities).

61. *See* Beilenson v. Superior Court, 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357 (Ct. App. 1996).

62. *See* Matson v. Dvorak, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880 (Ct. App. 1995).

63. *See* Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees

organizations,[64] and government entities and their representatives.[65] The statute's protection has even been afforded to someone who did not personally petition a governmental agency but who was allegedly behind others' petitioning activity.[66]

The California Courts of Appeal have applied section 425.16 in a variety of contexts since its enactment.[67] A review of those cases shows that, for the most part, the appellate courts have interpreted section 425.16 in the spirit of the legislative history of the statute. Thus, they have recognized that SLAPP suits are not brought to vindicate legitimate rights, but "rather to interfere with the defendant's ability to pursue his or her interests," and that the SLAPP suit "achieve[s] its objective if it depletes defendant's resources or energy."[68] Most courts have therefore been willing to use section 425.16 as the legislature had intended—as a procedural remedy to resolve a lawsuit expeditiously[69]—but only if the SLAPPee meets the burden of showing the lawsuit is within the provision's coverage and the SLAPPer fails to show a probability of prevailing on the

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Local 483, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 (Ct. App. 1999).

64. *See* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999).

65. *See* Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), *disapproved on other grounds by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471; Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (Ct. App. 1996).

66. *See* Ludwig v. Superior Court, 37 Cal. App. 4th 8, 17, 43 Cal. Rptr. 2d 350, 357 (Ct. App. 1995) ("[t]here is no requirement that the writing or speech be promulgated directly *to* the official body").

67. There has also been one California Supreme Court case that dealt substantively with section 425.16. *See Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471. *Briggs* resolved a conflict between several court of appeal decisions as to section 425.16's scope. *See infra* notes 100-21 and accompanying text. Two other California Supreme Court cases have referred only generally to section 425.16's coverage. *See* Rosenthal v. Great W. Fin. Serv. Corp., 14 Cal. 4th 394, 411-12, 926 P.2d 1061, 1071, 58 Cal. Rptr. 2d 875, 885 (1996) (comparing section 425.16 with CAL. CIV. PROC. CODE §§ 1281.2, 1290.2); College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 718, 882 P.2d 894, 902, 34 Cal. Rptr. 2d 898, 907 (1994) (comparing section 425.16 with CAL. CIV. PROC. CODE § 425.13).

68. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 645, 49 Cal. Rptr. 2d 620, 629-30 (Ct. App. 1996); *accord* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 815-17, 33 Cal. Rptr. 2d 446, 450 (Ct. App. 1994).

69. *See Church of Scientology*, 42 Cal. App. 4th at 645, 49 Cal. Rptr. 2d at 630.

claims asserted.[70] After a few courts narrowly interpreted the scope of the statute,[71] the legislature recognized the split among the courts of appeal[72] and enacted the 1997 amendment to make explicit that the courts are to construe section 425.16 broadly.[73]

This Part will summarize the interpretations of the various cases as they provide guidance on the procedural use and applicability of section 425.16.

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70. Appendix 2 provides a summary of the situations where the courts have found the SLAPPee's burden met or not met.

It should be noted that when the lawsuit is in the form of a separate action that a SLAPPer brings against a SLAPPee, the SLAPPer will be the plaintiff and the SLAPPee the defendant. However, as noted in Part I (Background), SLAPP actions can be in other forms. *See supra* notes 21-23 and accompanying text. In such instances, the SLAPPer might be the defendant in the underlying suit who brings a counterclaim against the plaintiff, who would then be the SLAPPee. In one California case, the SLAPPee was a non-party. *See Wilcox*, 27 Cal. App. 4th at 814-15, 33 Cal. Rptr. 2d at 449. The 1997 amendment to section 425.16 made explicit that the statute applies to such other action forms. *See* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296 (May 13, 1997); CAL. CIV. PROC. CODE § 425.16(h) (West Supp. 1997) ("For purposes of this section, 'complaint' includes 'cross-complaint' and 'petition,' 'plaintiff' includes 'cross-complainant' and 'petitioner,' and 'defendant' includes 'cross-defendant' and 'respondent.'").

71. *See* Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (Ct. App. 1996); Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (Ct. App. 1996); Zhao v. Wong, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996). *Briggs* disapproved each of these decisions. *See* 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471; *see also supra* notes 100-21 and accompanying text. *Briggs* also disapproved Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), to the extent it accepted *Ericsson*'s analysis.

72. *See* ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF SB 1296, at 4 (July 2, 1997); SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296, at 4 (May 13, 1997).

73. *See* SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296, at 3-4 (May 13, 1997); CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 1997) (adding a final sentence: "To this end, this section shall be construed broadly").

A. The Special Motion to Strike Procedure

The statute provides that the SLAPPee may file a special motion to strike "within 60 days of the service of the complaint"[74] or later if the court deems it proper.[75] The motion must be noticed for hearing within thirty days after its service unless the court's docket requires a later date.[76] As in a summary judgment motion, the pleadings in a section 425.16 case merely frame the issues to be decided. However, "a party cannot simply rely on the allegations in its own pleadings, even if verified, to make the evidentiary showing" necessary to support or rebut a section 425.16 motion.[77] Thus, similar to a summary judgment motion, it is typical that the parties to a section 425.16 motion will submit affidavits to accompany and support their motion filings. By these submissions, the SLAPPer will be attempting to demonstrate a prima facie case against the SLAPPee, and the SLAPPee will be attempting to rebut that showing. "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based,"[78] but this determination does not involve a weighing of the evidence.[79] Rather, the court will accept all evidence as true and decide if the SLAPPer has made a sufficient showing of a probability that the claim will prevail at trial.[80] If the trial court grants the SLAPPee's motion to strike, a court of appeal

74. As part of the 1997 amendment, the legislature more fully defined the term "complaint" to include cross-complaints and petitions. *See supra* note 70.

75. CAL. CIV. PROC. CODE § 425.16(f) (West Supp. 2000). In *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999), the court interpreted the statutory filing deadline as running from the filing of an amended complaint where the section 425.16 motion to strike was filed within 60 days from the filing of challenged amended counterclaims.

76. *See* CAL. CIV. PROC. CODE § 425.16(f).

77. Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 656, 49 Cal. Rptr. 2d 620, 637 (Ct. App. 1996); *see also* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Ct. App. 2000) (ruling that surviving a demurrer was insufficient to substantiate that a claim was legally sufficient under the standard of section 425.16).

78. CAL. CIV. PROC. CODE § 425.16(b)(2).

79. *See* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 2d 446, 454 (Ct. App. 1994); *see also Church of Scientology*, 42 Cal. App. 4th at 654, 49 Cal. Rptr. 2d at 635; Dixon v. Superior Court, 30 Cal. App 4th 733, 746, 36 Cal. Rptr. 2d 687, 696 (Ct. App. 1994).

80. *See Dixon*, 30 Cal. App. 4th at 745-46, 36 Cal. Rptr. 2d at 696-97.

reviews that decision as a question of law.[81] Should the trial court deny the motion, the SLAPPee also has an immediate right of appeal.[82]

B. *The SLAPPee's Burden of Proof*[83]

Section 425.16's procedures are aimed at providing protection against lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances . . . in matters of public significance."[84] The statute permits a special motion to strike to be brought whenever the lawsuit involves "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue."[85] Where a SLAPPee files such a motion, the statute provides that it shall be granted unless the SLAPPer establishes a probability of prevailing on the claim.[86]

Thus, the statute provides some definition of the SLAPPer's burden of proof. The statute also makes clear that the SLAPPer's burden should not arise unless the lawsuit is within the statute's

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81. *See* Matson v. Dvorak, 40 Cal. App. 4th 539, 548, 46 Cal. Rptr. 2d 880, 886 (Ct. App. 1995); *see also* CAL. CIV. PROC. CODE § 425.16(j) (making an order granting a special motion to strike expressly appealable under CAL. CIV. PROC. CODE § 904.1).

82. *See* CAL. CIV. PROC. CODE § 425.16(j) (making an order denying a special motion to strike immediately appealable under CAL. CIV. PROC. CODE § 904.1).

83. For a general discussion of the SLAPPee's burden of proof, see 5 WITKIN PROCEDURE, *supra* note 59, § 963(a)(3).

84. CAL. CIV. PROC. CODE § 425.16(a).

85. *Id.* § 425.16(b)(1).

86. *See id.* Over the three-year period that the legislature considered enacting anti-SLAPP legislation, serious debate surrounded the issue of the standard of proof to be required of SLAPP plaintiffs. Alternatives proffered during the debate included requiring proof of a "substantial probability," a "substantial possibility," or a "probability" of success. *See* Barker, *supra* note 11, at 411-12. Another alternative was to search for "evidence to substantiate the claim." *Id.* The resulting "probability" standard poses potential constitutional due process problems by requiring of plaintiffs proof "by preponderance" well before they get to trial. *Id.* at 412. The "probability" standard seems to represent a compromise with business interests. *See id.*

scope. There is no specification of who has the burden of establishing that the action arises out of acts in furtherance of the SLAPPee's First Amendment rights. However, the courts, beginning with *Wilcox v. Superior Court*,[87] have required the SLAPPee-movant to demonstrate that the statute applies,[88] given that it is the SLAPPee who will benefit if it does.

What constitutes "[any] act in furtherance of a person's right of petition or free speech . . . in connection with a public issue" is further defined in subsection (e), which notes that such an act includes:

> (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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[89]

To demonstrate how the statute applies to the SLAPPee's motion, the SLAPPee must make a prima facie showing that the SLAPPer's claims arose from the SLAPPee's lawful act and that the act either falls within one of section 425.16(e)'s definitions[90] or is the type of act which should be considered protected under the statute.[91] The

87. 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

88. *See id.* at 819, 33 Cal. Rptr. 2d at 452 ("[I]t is fundamentally fair that before putting the plaintiff[-SLAPPer] to the burden of establishing probability of success on the merits the defendant[-SLAPPee] be required to show imposing that burden is justified by the nature of the plaintiff's complaint."); *see also* Matson v. Dvorak, 40 Cal. App. 4th 539, 547, 46 Cal. Rptr. 2d 880, 885 (Ct. App. 1995) (noting that the "threshold requirement" is the movant's "show[ing that the] claims arose from an act in furtherance of his right of free speech").

89. CAL. CIV. PROC. CODE § 425.16(e).

90. *See, e.g.*, *Wilcox*, 27 Cal. App. 4th at 819, 33 Cal. Rptr. 2d at 452.

91. *See* Averill v. Superior Court, 42 Cal. App. 4th 1170, 1175, 50 Cal. Rptr. 2d 62, 65 (Ct. App. 1996) (observing that the categories in section 425.16(e) are not all-inclusive).

remaining subsections of Part III will explore the SLAPPee's differing burden of proof depending on which type of protected act is alleged. Appendix 2 provides a summary of circumstances where the SLAPPee's burden was met or not met.

1. Acts "in connection with a public issue"

Since the language of section 425.16(b)(1) appears to limit its protection to suits involving First Amendment activity "in connection with a public issue,"[92] there were early fears that courts would interpret the "public issue" language narrowly.[93] These initial fears were based on the concern that any display of self-interest by a SLAPPee would be used to defeat section 425.16 motions, since almost everyone would have some self-interest in any activist activity.[94] It was thus hoped that the public interest factor would be broadly construed.

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92. CAL. CIV. PROC. CODE § 425.16(b)(1). The legislative intent stated in section 425.16(a) also refers to "[e]ncourag[ing] continued participation in *matters of public significance*." *Id.* (emphasis added). In discussing how to harmonize this language in the preamble with that of "public interest" in subsections 425.16(b) and (e), one court provided the following analysis prior to the 1997 addition of clause (4) to subsection (e):

> [T]he meaning ascribed to the concept of "public significance" in the preamble must accommodate the singular, clearly defined[,] protected activities set forth in each clause of section 425.16 subdivision (e). To harmonize the two provisions, the term "significance" should be read as simply the meaning or import of a particular matter. Thus a matter has *public* meaning or significance within the language of section 425.16, subdivision (a) because and solely because (1) it occurs within the context of the proceedings delineated in clause one [of subdivision (e)] (i.e. "any statement or writing made before . . . ."); or (2) it occurs in connection with an issue under consideration or review by one of the bodies or proceedings delineated in clause two; or (3) it is an issue of public interest that is aired to the public or in a public forum.

Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1048, 61 Cal. Rptr. 2d 58, 64-65 (Ct. App. 1997); *see also* Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1118-19, 969 P.2d 564, 571-72, 81 Cal. Rptr. 2d 471, 478 (1999) (quoting with approval *Braun*'s analysis).

93. *See* Barker, *supra* note 11, at 400-01.

94. *See id.* at 401.

Initially, the fears appeared to be groundless. One of the early cases to interpret section 425.16, *Ludwig v. Superior Court*,[95] showed that self-interest would not necessarily defeat a section 425.16 claim. In that case, Ludwig, a real estate developer, wanted to build an outlet mall near Barstow, California.[96] The City of Barstow sued Ludwig for interference with contractual relations, interference with prospective economic advantage, and unfair competition after Ludwig had sent a number of his employees to various public hearings to protest the development of a similar mall proposed by the City on environmental grounds.[97] Notwithstanding Ludwig's obvious self-interest, the court upheld his right to use section 425.16.[98] Additionally, other courts have shown a willingness to apply section 425.16 to situations where the communications underlying the SLAPPer's claims were between private parties, including those in which the issue of public concern was not obvious.[99]

In 1996, however, three cases took a narrower approach, concluding that the statute applied only if the "in connection with a public interest" factor was separately met.[100] Each of these cases

95. 37 Cal. App. 4th 8, 34 Cal. Rptr. 2d 350 (Ct. App. 1995).

96. *See id.* at 12, 34 Cal. Rptr. 2d at 353.

97. *See id.*, 34 Cal. Rptr. 2d at 353-54.

98. *See id.* at 16, 34 Cal. Rptr. 2d at 356. Another example of a self-interested SLAPPee can be found in *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996) (ruling on behalf of plaintiff, a former member who sued the church and finally won the judgment after a 15-year litigation battle, and finding that plaintiff's motion to strike the church's action to set the judgment aside on the basis of the judge's bias fell within section 425.16).

99. *See, e.g.*, *Averill*, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (finding that SLAPPee's private communications arose in the context of a public issue and were within the statute, either expressly because the matter was still under review by the city, or implicitly because the statutory definitions were not exclusive); *Wilcox*, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (finding that SLAPPee's dissemination of a memo to fellow court reporters regarding a private group's contractual practices and urging support for litigation challenging those practices fell within the statute).

100. *See* Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (Ct. App. 1996) (reversing motion to strike against securities broker-dealers who had sued a company that provided assistance and representation to individual investors who pursued arbitration claims against the broker-dealers contending the company was engaged in unauthorized practice of law, and holding that private arbitration matters did not involve public issues); Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms.

reversed a trial court's granting of a section 425.16 motion to strike. The SLAPPee's acts underlying each of the lawsuits were of the type that section 425.16(e)(2) described: "written or oral statement[s] . . . 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."[101] Although these courts recognized that the second clause contained no reference to "public issue" or an analogous phrase, they nevertheless concluded that section 425.16(e)(2) terminology did not eliminate the "in connection with a public issue" requirement. "The operative language in subdivision (b), partially exemplified by [clause (2)], continues to require that the issue in question, i.e. 'an issue under consideration or review by a legislative, executive, or judicial body, or any other official

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Eng'rs, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (Ct. App. 1996) (reversing motion to strike against communications company that had lost bid to supply and install systems for county and that had sued the consultant who recommended that the county accept another company's proposal for intentional interference with economic advantage; consultant's report to county client was not speech in connection with public issue); Zhao v. Wong, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996) (reversing motion to strike against a decedent's girlfriend-business partner who sued decedent's brother for slander based on statements he had made to a reporter implicating plaintiff in decedent's death and forging of his will, even though the brother alleged that his statements were efforts to influence both the coroner's investigation and a will contest; no public issue found). Each of these cases was disapproved by *Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471, in its reversal of a 1997 court of appeal decision that had espoused a similar perspective as the three 1996 cases. *See id.* at 1113-17, 969 P.2d at 568-71, 81 Cal. Rptr. 2d at 475-77 (reversing motion to strike against landlord who sued for defamation and other claims against a nonprofit organization that provided counseling, mediation, and referral services concerning landlord-tenant disputes; organization's activities were of private, not public, significance), *rev'g*, 54 Cal. App. 4th 1237, 63 Cal. Rptr. 434 (Ct. App. 1997).

Briggs also disapproved of *Mission Oaks Ranch, Ltd. v. County of Santa Barbara*, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), apparently because it accepted the conclusion of *Ericsson* that section 425.16 does not encompass disputes between private parties, even when the dispute involves a decision-making process by a governmental agency. *See Briggs*, 19 Cal. 4th at 1106, 969 P.2d at 564, 81 Cal. Rptr. 2d at 471. *Mission Oaks Ranch* did uphold the dismissal of a SLAPPer's claim, but only by distinguishing its facts from those of *Ericsson*. *See* 65 Cal. App. 4th at 728-29, 77 Cal. Rptr. 2d at 10-11.

101. CAL. CIV. PROC. CODE § 425.16(e)(2).

proceeding authorized by law,' be a public issue."[102] These opinions concluded that a SLAPPee must show not only that the SLAPPee's act was a statement defined under clause (1)[103] or in connection with an issue under consideration by an authorized official proceeding, as defined by clause (2), but also that the statement concerned a public issue.

These courts also viewed the statute's coverage as applicable only "to a limited sphere of activities," based on the language of the then-legislative purpose of section 425.16(a).[104] The statute was therefore characterized "as providing an extraordinary remedy for a narrowly defined category of litigation."[105] In particular, the statute was not seen as applying "broadly" to defamation actions.[106] Within this narrowed frame of reference, only those activities "closely tied to the right to petition and the freedom of speech" were acts protected by the statute.[107] This restricted view of which activities Section 425.16 covered became merged with the requirement that a SLAPPee show the existence of a public issue when one court construed the term "public interest" "as referring [only] to matters occupying 'the highest rung of the heirachy [sic] of First Amendment values,' that is, to speech pertaining to the exercise of democratic self-government."[108]

Although other courts declined to take up this mantle of more narrowly interpreting section 425.16's coverage,[109] not surprisingly those courts that did began reversing trial courts which had granted

102. *Zhao*, 48 Cal. App. 4th at 1127, 55 Cal. Rptr. 2d at 917; *accord Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1639, 58 Cal. Rptr. 2d at 616-17; *Ericsson*, 49 Cal. App. 4th at 1601-02, 57 Cal. Rptr. 2d at 496-97.

103. It should be noted that section 425.16(e)'s clause (1), CAL. CIV. PROC. CODE § 425.16(e)(1), like its clause (2), *id.* § 425.16(e)(2), contains no reference to "public issue" or an equivalent phrase.

104. *Zhao*, 48 Cal. App. 4th at 1129, 55 Cal. Rptr. 2d at 918; *accord Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1638, 58 Cal. Rptr. 2d at 616; *Ericsson*, 49 Cal. App. 4th at 1601, 57 Cal. Rptr. 2d at 497-98.

105. *Zhao*, 48 Cal. App. 4th at 1133, 55 Cal. Rptr. 2d at 921.

106. *See id.* at 1130, 55 Cal. Rptr. 2d at 919.

107. *Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1638, 58 Cal. Rptr. 2d at 616; *accord Zhao*, 48 Cal. App. 4th at 1129, 55 Cal. Rptr. 2d at 918.

108. *Zhao*, 48 Cal. App. 4th at 1122, 50 Cal. Rptr. 2d at 913.

109. *See, e.g., Braun*, 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58.

SLAPPees' motions to strike.[110] The California legislature was quick to react to that trend, however, and in 1997, it unanimously amended section 425.16's legislative purpose statement to emphasize that the "section shall be construed broadly."[111] Then, in 1999, the California Supreme Court in *Briggs v. Eden Council for Hope and Opportunity*[112] definitively put to rest the idea that there was any proof requirement for the SLAPPee as to "public issue" where the act underlying the lawsuit was an activity falling under section 425.16(e), clause (1) or (2).[113]

The *Briggs* court made its point in several ways. It contrasted the difference between the language in clauses (1) and (2) and in clauses (3) and (4).[114] It thus observed that in the later definitions of communications made in a public forum and "other conduct" involving speech or petition rights, there is explicit language requiring that the acts be in connection with a public issue or an issue of public interest.[115] In the earlier clauses, which describe communications

110. *See supra* note 100 and accompanying text.

111. *See supra* notes 71-73 and accompanying text. In their consideration of the 1997 amendments, both legislative houses noted the conflicting opinions in the courts of appeal as to whether the legislature had intended the statute to be construed narrowly, citing *Zhao*, or broadly, citing, for example, *Church of Scientology*. *See* ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF SB 1296, at 4 (July 2, 1997); SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF SB 1296, at 4 (May 13, 1997). The 1997 amendment clarified the legislature's intent that the broad interpretation was the proper one.

112. 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999) (disapproving *Zhao, Ericcson, Linsco/Private Ledger, Inc.*, and *Mission Oaks Ranch, Ltd.*); *see* 5 WITKIN PROCEDURE, *supra* note 59, § 962A (discussing the *Briggs* decision).

113. There was a strong dissent in *Briggs* which, while agreeing with the reversal of the decision below as to the particular defendant's activities, expressed a concern that the majority's broad conclusion "will authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply." 19 Cal. 4th at 1124, 969 P.2d at 576, 81 Cal. Rptr. 2d at 482 (Baxter, J., concurring and dissenting); *see also* Matthew Heller, *Who's SLAPPing Whom?*, 17 CAL. LAW. 17 (Nov. 1997) ("'You can bet every [defense] attorney is going to try to shoehorn their case into a motion to strike,' says Michael G. Reedy, one of the successful plaintiff's lawyers in the Zhao appeal.").

114. *See Briggs*, 19 Cal. 4th at 1117, 969 P.2d at 571, 81 Cal. Rptr. 2d at 477.

115. *See* CAL. CIV. PROC. CODE § 425.16(e)(3) ("any written or oral state-

made before or in connection with matters under review by official proceedings, there is no similar delimiting public issue language.[116] As a result of this difference, the California Supreme Court concluded that, for clauses (1) and (2),

> "Under the plain terms of the statute it is the context or setting itself that makes the issue a public issue: all that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding."[117]

The *Briggs* court believed that the legislature, in drafting these two definitions, had "equated a public issue with the authorized official proceeding to which it connects."[118] Consequently, the court also concluded that the definitions of clauses (1) and (2) were not limited only to certain types of petitioning activity. In particular, the courts of appeal were incorrect in deciding "that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government."[119] The *Briggs* court found that the legislature had intended subsections (e)(1) and (2) to be interpreted in a manner that "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on 'public' issues."[120]

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ment or writing made in a place open to the public or a public forum in connection with an issue of public interest"); *id.* § 425.16(e)(4) ("any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest").

116. *See id.* § 425.16(e)(1) ("any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law"); *id.* § 425.16(e)(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").

117. *Briggs*, 19 Cal. 4th at 1116, 969 P.2d at 570, 81 Cal. Rptr. 2d at 477 (quoting *Braun*, 52 Cal. App. 4th at 1047, 61 Cal. Rptr. 2d at 64).

118. *Id.* at 1117, 969 P.2d at 570, 81 Cal. Rptr. 2d at 477 (quoting *Braun*, 52 Cal. App. 4th at 1047, 61 Cal. Rptr. 2d at 64) (emphasis omitted).

119. *Id.* at 1116, 969 P.2d at 570, 81 Cal. Rptr. 2d at 477 (quoting *Braun*, 52 Cal. App. 4th at 1046-47, 61 Cal. Rptr. 2d at 63).

120. *Id.* at 1118, 969 P.2d at 571, 81 Cal. Rptr. 2d at 478. The *Briggs* court invited the legislature to respond, if the court's conclusions were inappropriate. *See id.* at 1123, 969 P.2d at 575, 81 Cal. Rptr. 2d at 481 ("If we today mistake the Legislature's intention, the Legislature may easily amend the statute.").

The court's decision was reinforced by the fact that narrow judicial decisions of the type *Briggs* reversed or disapproved had prompted the legislature's 1997 amendment mandating broad construction of the statute.[121]

In contrast to the bright-line test of the "official proceeding" context in clauses (1) and (2) of section 425.16, the *Briggs* court noted that there was no clear demarcation in clauses (3) and (4), covering respectively "a place open to the public or a public forum" and "other conduct."[122] In those clauses, the legislature included an "issue of public interest limitation."[123] The court, however, did not provide any further discussion of clauses (3) and (4).

The cases decided to date have found that a range of activities meets the public interest or public issue factor: a union election affecting 10,000 members,[124] a townhouse owner's protest against a management assessment,[125] development of a discount mall with its potential effects of increased traffic and environmental impacts,[126] placement of a shelter in a residential neighborhood,[127] statements made during a political campaign,[128] inquiry as to "whether money designated for charities was being received by those charities,"[129] and the practice of "direct contracting" by certified shorthand reporters, which involved an exclusive contract between reporters and a major consumer of reporting services.[130] All these cases have

121. *See id.* at 1120, 969 P.2d at 573, 81 Cal. Rptr. 2d at 479-80; *see also supra* note 111 and accompanying text.

122. 19 Cal. 4th at 1123, 969 P.2d at 575, 81 Cal. Rptr. 2d at 481.

123. *Id.*; *see* CAL. CIV. PROC. CODE § 425.16(e)(3) ("in connection with an issue of public interest"); *id.* § 425.16(e)(4) ("in connection with a public issue or an issue of public interest").

124. *See* Macias v. Hartwell, 55 Cal. App. 4th 669, 673-74, 64 Cal. Rptr. 2d 222, 225 (Ct. App. 1997).

125. *See* Foothills Townhome Ass'n v. Christiansen, 65 Cal. App. 4th 688, 695-96, 76 Cal. Rptr. 2d 516, 520 (Ct. App. 1998).

126. *See Ludwig*, 37 Cal. App. 4th at 15, 43 Cal. Rptr. 2d at 355.

127. *See Averill*, 42 Cal. App. 4th at 1175, 50 Cal. Rptr. 2d at 65.

128. *See* Conroy v. Spitzer, 70 Cal. App. 4th 1446, 1448, 83 Cal. Rptr. 2d 443, 445 (Ct. App. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539, 548, 46 Cal. Rptr. 2d 880, 885-86 (Ct. App. 1995).

129. Dove Audio, Inc. v. Rosenfeld, Mayer & Susman, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830, 834 (Ct. App. 1996).

130. *See Wilcox*, 27 Cal. App. 4th at 821, 33 Cal. Rptr. 2d at 453.

approached the public interest/issue factor in the spirit of the statute's mandate of broad construction.[131] One of the early decisions described the mandate in this manner: "Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals. Examples are product liability suits, real estate or investment scams, etc."[132]

Two of the most recent cases involving the public interest issue provide good examples of this expansive judicial view concerning the public interest/issue factor. In the first, a nationally known political consultant sued a magazine publisher for libel and other claims after the magazine published an article focusing on a custody dispute between the plaintiff and his first wife.[133] The article reported that both the first and second wives had testified at the custody hearing that plaintiff had physically and verbally abused them.[134] In opposition to the publisher's motion to strike, the plaintiff argued that his treatment of his former wives was not a public issue and thus the article was not within the scope of section 425.16.[135] The court, however, disagreed, noting first that generally "[d]omestic violence is an extremely important public issue in our society,"[136] and then concluding specifically that "the details of appellant's career and appellant's ability to capitalize on domestic violence issues in his advertising campaigns for politicians known around the world, while allegedly committing violence against his former wives, are public issues" within the protection of section 425.16.[137]

131. *See* CAL. CIV. PROC. CODE § 425.16(a).
132. *Church of Scientology*, 42 Cal. App. 4th at 650, 49 Cal. Rptr. 2d at 633.
133. *See* Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999).
134. *See id.* at 230, 83 Cal. Rptr. 2d at 679.
135. *See id.* at 236, 83 Cal. Rptr. 2d at 682.
136. *Id.* at 238, 83 Cal. Rptr. 2d at 684; *see also* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 567, 92 Cal. Rptr. 2d 755, 759 (Ct. App. 2000) (finding that the issue of the equivalency of a medication with its generic counterpart was one of public interest because of "[b]oth the number of persons allegedly affected and the seriousness of the conditions treated").
137. *Sipple*, 71 Cal. App. 4th at 239-40, 83 Cal. Rptr. 2d at 685.

The second case concerned a television program that covered law enforcement activities in connection with a drug overdose death, including a telephone call to the parents of the victim.[138] The parent-plaintiffs sued for invasion of privacy, intentional infliction of emotional distress, and other claims.[139] The defendants' motion to strike urged in part that their television program "'concerned the consequences of drug abuse and the duties of law enforcement, both of which are "issues of public interest"' which [fell] within subdivision (e)(4)."[140] The trial court agreed and granted the motion.[141] The appellate court also found that the defendants' acts were within the statute, equating "issues of public interest" with newsworthiness.[142] However, the appellate court reversed the trial court's granting of the motion upon a finding that the plaintiffs had met their burden of showing a probability of prevailing on one claim, but had failed to meet the burden for certain other claims.[143]

2. Statements in a public place or forum (section 425.16(e)(3))

A SLAPPee may also seek protection for an act covered by section 425.16(e)(3): a "written or oral statement . . . [on a matter of public interest] made in a place open to the public or a public forum."[144] With respect to the meaning of "public forum" in clause (3), *Zhao* is the only California appellate case that has examined the term in any detail.[145] Drawing upon definitions already provided

138. *See* Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 316, 86 Cal. Rptr. 2d 406, 418-19 (Ct. App. 1999).

139. *See id.* at 307, 86 Cal. Rptr. 2d at 412.

140. *Id.*

141. *See id.* at 309-10, 86 Cal. Rptr. 2d at 413-14.

142. *See id.* at 316, 86 Cal. Rptr. 2d at 418-19.

143. *See id.* at 316-19, 86 Cal. Rptr. 2d at 419-21.

144. CAL. CIV. PROC. CODE § 425.16(e)(3).

145. *See Zhao*, 48 Cal. App. 4th at 1125-27, 55 Cal. Rptr. 2d at 916-17. The *Zhao* court discussed the term in 1996, before section 425.16(e) included clause (4), which was added as part of the 1997 amendment. *See supra* note 38 and accompanying text.

Two federal district court cases have considered the nature of "public forum." In *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127 (N.D. Cal. 1999), the plaintiff moved to strike certain counter-

for the term in an earlier California case and by an author, *Zhao* declared:

> "The term 'public forum' . . . refers typically to those places historically associated with First Amendment activities, such as streets, sidewalks, and parks." In the words of a seminal law review article, "in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and empathy with which such facilities are made available is an index of freedom."[146]

The *Zhao* court also noted that another California court had described the concept of a public forum as "'a continuum, with public streets and parks at one end and government institutions like hospitals and prisons at the other.'"[147] Within the continuum are libraries and schools, "where free expression may be regulated to the extent that it is 'incompatible with the normal activity of a particular place at a particular time.'"[148] But the *Zhao* court specifically concluded

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claims pursuant to section 425.16. *See id.* The claims were based upon statements the plaintiff had made "to the market" about its competitor-defendants. *See id.* at 1130. The court observed that since the statements "were not made during or in connection with an official proceeding . . . the statements come within the protection of the anti-SLAPP statute only if they can be characterized as statements made in a place open to the public or a public forum in connection with an issue of public interest." *Id.* The court refused to find section 425.16 applicable because it was unable to find any California case concluding that "the 'issue of public interest' test is met by statements of one company regarding the conduct of a competitor company." *Id.* The court also expressed its disbelief that the California legislature intended the statute to apply to commercial competition claims such as trade libel and false advertising. *See id.* By contrast, in *Metabolife Int'l, Inc. v. Wornick*, 72 F. Supp. 2d 1160 (S.D. Cal. 1999), the court had no difficulty finding a widely disseminated television program to be a public forum where the plaintiff's claims were all based on statements made in that broadcast and where the plaintiff conceded that the program's topic was a matter of public concern. *See id.* at 1165.

146. *Zhao*, 48 Cal. App. 4th at 1126, 55 Cal. Rptr. 2d at 916 (citations omitted) (quoting Prisoners Union v. Department of Corrections, 135 Cal. App. 3d 930, 934-35, 185 Cal. Rptr. 634, 636 (Ct. App. 1982)) (citing Adderley v. Florida, 385 U.S. 39, 48 (1966) (Douglas, J., dissenting)).

147. *Id.* (quoting U.C. Nuclear Weapons Labs. Conversion Project v. Lawrence Livermore Lab., 154 Cal. App. 3d 1157, 1164, 201 Cal. Rptr. 837, 843 (Ct. App. 1984)).

148. *Id.* (quoting United States v. Douglass, 579 F.2d 545, 548-49 (9th Cir.

that "private newspaper publishing falls outside of this concept of a public forum."[149]

In *Zhao*, the defendant was sued for statements made to a reporter which the plaintiff alleged were slanderous.[150] Given the court's perspective on the scope of a public forum, it concluded that clause (3) of section 425.16 was inapplicable because the defendant had not made statements "'in a place open to the public or a public forum' but rather . . . in a private setting to a reporter."[151]

While *Zhao* was later disapproved, that disapproval was not based on its interpretation and conclusions concerning clause (3) of section 425.16(e), but only for its erroneous requirement of a public interest under clauses (1) and (2).[152] Thus, its views on clause (3) are yet to be tested. Only two other courts have found the existence of a public forum for purposes of clause (3), but both courts were conclusory in their findings and provided little analysis.[153]

1978)).

149. *Id.* In reaching this conclusion, the *Zhao* court relied on dictum from *Lafayette Morehouse*. *See id.* The *Lafayette Morehouse* court had declined to consider whether a newspaper article that was the basis of a claim of libel fit clause (3) of subsection 425.16(e). *See Lafayette Morehouse*, 37 Cal. App. 4th at 863 n.5, 44 Cal. Rptr. 2d at 51 n.5. However, the *Lafayette Morehouse* court did note:

> No authorities have been cited to us holding a newspaper printing allegedly libelous material is a "place open to the public or a public forum." Newspaper editors or publishers customarily retain the final authority on what their newspapers will publish in letters to the editor, editorial pages, and even news articles, resulting at best in a controlled forum not an uninhibited "public forum."

Id. (finding protection for a newspaper publisher from a libel suit under subsection 425.16(e)(2)).

150. *See Zhao*, 48 Cal. App. 4th at 1119, 55 Cal. Rptr. at 911.

151. *Id.* at 1131, 55 Cal. Rptr. 2d at 919.

152. *See supra* notes 100-21 and accompanying text.

153. *See Foothills Townhome Ass'n*, 65 Cal. App. 4th at 695-96, 76 Cal. Rptr. 2d at 520 (finding that although homeowner's continuing dispute with a townhome association over a special assessment was a matter of sufficient public interest made in a sufficiently public forum to invoke the protection of section 425.16, defendant did not demonstrate that the lawsuit was brought against him to chill his First Amendment rights); *Macias*, 55 Cal. App. 4th at 673-74, 64 Cal. Rptr. 2d at 225 (finding speech by mail to be a public forum and union election to be of public interest).

Concerning the possible scope of the term "public forum" in section 425.16, however, it should be noted that the protection of free speech under the California Constitution is broader than under the U.S. Constitution.[154] The California courts have rejected a rigid formulation of the concept of public forum in cases involving constitutional protection.[155] Courts have found the existence of a public forum in places such as a privately owned railway station,[156] a private sidewalk leading to a large supermarket,[157] the parking lot of a prison,[158] and in a prison newspaper.[159] After analyzing a number of these California cases, the Ninth Circuit Court of Appeal stated:

> [F]or the purposes of the California Liberty of Speech Clause, the "public forum" doctrine is not limited to traditional public forums such as streets, sidewalks, and parks or to sites dedicated to communicative activity such as municipal theaters. Rather the test under California law is whether the communicative activity "is basically incompatible with the normal activity of a particular place at a particular time."[160]

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154. *See* Griset v. Fair Political Practices Comm'n, 8 Cal. 4th 851, 866 n.5, 884 P.2d 116, 126 n.5, 35 Cal. Rptr. 2d 659, 669 n.5 (1994) ("As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart."); Wilson v. Superior Court, 13 Cal. 3d 652, 658, 532 P.2d 116, 120, 119 Cal. Rptr. 468, 472 (1975) (California's constitutional protection of speech is "more definitive and inclusive than the First Amendment").

155. *See, e.g.*, *In re* Hoffman, 67 Cal. 2d 845, 850, 434 P.2d 353, 356, 64 Cal. Rptr. 97, 100 (1967) (First Amendment activities cannot be prohibited solely because the property involved is not maintained primarily as a forum for such activities); *U.C. Nuclear Weapons*, 154 Cal. App. 3d at 1164, 201 Cal. Rptr. at 843 ("public forum" concept is a continuum).

156. *See In re* Hoffman, 67 Cal. 2d at 847, 434 P.2d at 354, 64 Cal. Rptr. at 98.

157. *See In re* Lane, 71 Cal. 2d 872, 873, 457 P.2d 561, 562, 79 Cal. Rptr. 729, 730 (1969); *see also* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910 n.5, 592 P.2d 341, 347 n.5, 153 Cal. Rptr. 854, 860 n.5 (1979) (finding that in modern society, large private shopping malls are becoming 'miniature downtowns' where large groups of citizens congregate).

158. *See* Prisoners Union v. Department of Corrections, 135 Cal. App. 3d 930, 185 Cal. Rptr. 634 (Ct. App. 1982).

159. *See* Bailey v. Loggins, 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).

160. Carreras v. City of Anaheim, 768 F.2d 1039, 1045 (9th Cir. 1985)

Given these precedents, the fact that a central purpose of section 425.16 is to protect free speech, and in light of the legislative directive to construe the statute broadly, it would not be unexpected for the California Supreme Court to define public forum more broadly in the context of clause (3) than did the *Zhao* court.

3. Protection for conduct (section 425.16(e)(4))

The original statute expressly provided for protection only of certain written or oral statements.[161] However, in an early interpretation of section 425.16, one court observed that "an 'act in furtherance of' a person's First Amendment rights is not limited to oral and written statements" but can also include constitutionally protected *conduct*, such as a peaceful boycott.[162] Section 425.16(e)'s use of the word "includes" was also found to make the enumeration of types of protected acts non-exclusive; thus, other categories of acts could be within the statute's coverage as well.[163] In the 1997 amendment to section 425.16, the legislature made explicit that "other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest" was also a protected activity.[164]

Only one appellate decision prior to the 1997 amendment considered the application of the statute to a SLAPPee's actual conduct.[165] In *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.*,[166] securities broker-dealers brought two separate lawsuits against Investors Arbitration Services, Inc. (IAS), a company

(quoting *Prisoners Union*, 135 Cal. App. 3d at 939, 185 Cal. Rptr. at 639).

161. *See supra* notes 38-39 and accompanying text.

162. *Wilcox*, 27 Cal. App. 4th at 820-21, 33 Cal. Rptr. 2d at 452-53 (also noting that burning down a SLAPPer-developer's office as a political protest would not be protected conduct).

163. *See Averill*, 42 Cal. App. 4th at 1175, 50 Cal. Rptr. 2d at 65.

164. CAL. CIV. PROC. CODE § 425.16(e)(4) (West 1997).

165. The facts of the cases decided by the two courts that took a broad view of section 425.16(e)'s coverage did not involve conduct. *See supra* notes 162-63 and accompanying text.

166. 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (Ct. App. 1996), *disapproved by* Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999).

that provided investors with assistance and representation in pursuing an arbitration claim against a securities broker.[167] The broker-dealer plaintiffs sought injunctions against IAS alleging they were unlawfully practicing law, as well as other claims, including civil conspiracy.[168] IAS moved to strike under section 425.16 in both suits, and the trial court granted both motions. On appeal, the matters were consolidated, and the appellate court reversed the trial court on the basis that the lawsuits did not qualify as SLAPP suits.[169]

In reaching its conclusion, the court applied the narrow perspective of *Zhao* and found that the defendant had failed to meet its burden of proof on two levels.[170] First, although apparently acknowledging that arbitration proceedings qualify as "judicial proceedings" under section 425.16(e), the court did not find that the plaintiffs' claims fell within either clause (1) or (2). The plaintiffs' claims did not restrict the petition rights of the investors because they still had access to the arbitration forum.[171] Moreover, the lawsuits did not implicate IAS's freedom of speech because the plaintiffs' challenge was to "IAS's *conduct*, its activities in a representative capacity on

167. *See Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1635, 58 Cal. Rptr. 2d at 614. As a practice, the securities industry includes binding arbitration clauses in contracts between investors and brokers. The courts have enforced such arbitration contracts. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995). The National Association of Securities Dealers (NASD) drafted both a Code of Arbitration Procedure and an Arbitrators' Manual, with the approval of the Securities Exchange Commission. Both guidelines permit an investor to be represented by a non-attorney for arbitration proceedings. *See Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1636 & n.4, 58 Cal. Rptr. 2d at 614-15 & n.4. No doubt unhappy with the development of firms such as the instant defendant, which had developed expertise in assisting investors, the Securities Industry Conference on Arbitration has concluded that the activities of non-attorney representatives constitute the practice of law and may therefore be illegal under state law. The Conference has thus recommended that the NASD adopt a rule prohibiting representation that would violate state law. However, the NASD has taken no action on that recommendation. *See id.* at 1636, 58 Cal. Rptr. 2d at 615. The resultant lawsuits were apparently attempts to achieve the same result as the proposed rule against the defendant, one of the largest of the arbitration advisor firms.

168. *See id.* at 1637 & n.5, 58 Cal. Rptr. 2d at 615 & n.5.

169. *See id.* at 1637, 58 Cal. Rptr. 2d at 615.

170. *See id.* at 1638, 58 Cal. Rptr. 2d at 616.

171. *See id.*

behalf of its investor-clients."[172] Second, the court found the absence of a public issue because "disputes over individual investment losses are matters of private, not public, concern."[173]

Given the legislature's express inclusion of "other conduct" in the 1997 amendment, the court's dismissal on the basis of the plaintiffs' claims being beyond the scope of section 425.16(e) is no longer tenable. However, the court's conclusion about the lack of "public interest" would have to be reexamined given the requirement of a "public issue/interest" factor in section 425.16(e)(4). Such a reexamination would need to consider the legislature's other amendment mandating a broad construction of the statute, as well as the overall tone of *Briggs*, which also directed the statute's broad construction.[174] Thus, it is likely that a current court would view IAS's conduct as being within section 425.16(e)(4)'s protections. First, the court could find that aiding investors to maneuver through the arbitration would be "conduct in furtherance of the [investors'] exercise of the constitutional right of petition."[175] Second, the court would be

172. *Id.*

173. *Id.* at 1639, 58 Cal. Rptr. 2d at 617.

174. *See generally Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 471.

175. CAL. CIV. PROC. CODE § 425.16(e)(4) (West Supp. 2000). In this regard, the facts of *Briggs* can be instructive. There, the defendant was a nonprofit corporation that advised tenants and mediated landlord-tenant disputes. *See Briggs*, 19 Cal. 4th at 1109, 969 P.2d at 566, 81 Cal. Rptr. 2d at 472. The landlord-plaintiffs based their claims on defendant's statements and, arguably, on its conduct, including "assisting of tenant Ford 'to institute legal action with . . . HUD . . . against the plaintiffs.'" *Id.* at 1114, 969 P.2d at 569, 81 Cal. Rptr. 2d at 476 (omissions in original). The plaintiffs argued that "tenant counseling activities like [the defendant's] are not protected by section 425.16 because they neither promoted [the defendant's] own constitutional right of free speech nor informed the public about possible wrongdoing." *Id.* at 1116, 969 P.2d at 570, 81 Cal. Rptr. 2d at 477. The *Briggs* court replied:

> Even assuming, for purposes of argument, that plaintiffs accurately have characterized [the defendant's] activities as constituting neither self-interested nor general political speech, we cannot conclude such activities thereby necessarily fall outside the protection of the anti-SLAPP statute. Contrary to plaintiffs' implied suggestion, the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its cli-

more inclined to find the existence of the public issue/interest factor, given the imbalance of power between individual investors operating without the aid of a firm such as IAS, and the broker-dealer corporations which are aided by their organized associations.[176]

Not long after the legislature's amendment of section 425.16, but before the *Briggs* decision, another appellate court decided a case involving conduct.[177] The facts of this case involved two developers

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ents or the general public).

Id. (emphasis omitted).

176. *See Church of Scientology*, 42 Cal. App. 4th at 650, 49 Cal. Rptr. 2d at 633 ("Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals. Examples are product liability suits, real estate or investment scams, etc.").

Briggs can also be instructive on the scope of public interest. Citing *Zhao's* reasoning, the *Briggs* plaintiffs argued that "section 425.16 does not apply to events that transpire between private individuals" because the statute applied only to a limited category of First Amendment activities. *Briggs*, 19 Cal. App. 4th at 1116, 969 P.2d at 570, 81 Cal. Rptr. 2d at 476; *see also supra* notes 100-21 and accompanying text (discussing *Zhao's* faulty reasoning). The *Linsco/Private Ledger, Inc.* court used a similar analysis to conclude that there was no "public issue" present in disputes between individual investors and their brokers. *See Linsco/Private Ledger, Inc.*, 50 Cal. App. 4th at 1639, 58 Cal. Rptr. 2d at 617. The *Briggs* court, however, stated: "Zhao is incorrect in its assertion that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government." 19 Cal. App. 4th at 1116, 969 P.2d at 570, 81 Cal. Rptr. 2d at 477 (quoting *Braun*, 52 Cal. App. 4th at 1046-47, 61 Cal. Rptr. 2d at 63).

177. *See* Los Carneros Community Assocs. v. Penfield & Smith Eng'rs, Inc., 65 Cal. App. 4th 278, 76 Cal. Rptr. 2d 396 (Ct. App. 1998), *review granted and action deferred pending disposition of Briggs*, 966 P.2d 441, 79 Cal. Rptr. 2d 407 (1998), *review dismissed and cause remanded*, 970 P.2d 409, 81 Cal. Rptr. 2d 835 (1999). Although the *Los Carneros* court ultimately concluded that conduct was at issue, *see* 76 Cal. Rptr. 2d at 401, the court did not actually apply subsection 425.16(e)(4), the amended provision, in its analysis; rather, it quoted only the original provision, section 425.16(e), clauses (1)-(3). *See id.* at 398-99.

A more recent case, *Marich*, 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406, concerning the making of a television show, allegedly involved section 425.16(e)(4) conduct. In moving to dismiss claims arising out of this program, the defendants urged in part that it "'concerned the consequences of drug abuse and the duties of law enforcement, both of which are "issues of public interest"' which [fell] within subdivision (e)(4)." 86 Cal. Rptr. 2d at 412. The trial court in *Marich* had granted the special motion to strike after finding that the defendants had acted "in furtherance of their rights of free speech . . . in con-

who individually desired to build commercial and residential complexes on separate acreages near Goleta, California.[178] The community plan would not support both developments. The plaintiff-company hired an expert to perform certain services and also to lobby for the project before the appropriate government agencies.[179] The defendant-company hired the same expert for the same type of services.[180] When confronted with the conflict, the expert decided to continue with the plaintiff-company and end the relationship with the defendant-company.[181] However, a few months later, the expert again contacted the defendant-company seeking work. When the defendant-company complained that an employee of the expert assigned to work with the plaintiff-company was criticizing its project publicly, the expert sent a letter to the defendant-company indicating that its employee would no longer participate in activities opposing the defendant's project.[182] Viewing this letter as a secret contract, the plaintiff-company sued both the expert and the defendant-company for interference with prospective business advantage, breach of contract, and equitable relief to prevent the continued relationship between the defendants.[183] Both defendants filed SLAPP motions to strike the complaint.[184] Noting the expansive interpretation of the statute, the trial court granted the motions.[185]

On appeal, the defendants focused on the letter-contract and argued that section 425.16 was applicable because it covers any written or oral statement concerning a public issue "made in connection with an issue under consideration or review" by a governmental body,

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nection with issues of public interest" and that the plaintiffs had not established a probability of prevailing on their claims. *Id.* at 413-14. The *Marich* appellate opinion agreed that the defendants' acts were within subsection 425.16(e)(4), equating "issues of public interest" with newsworthiness. *See id.* at 418-19. Nevertheless, the appellate court reversed the trial court after providing an extensive analysis of why the plaintiffs had met their burden. *See id.* at 414-21.

178. *See Los Carneros*, 76 Cal. Rptr. 2d at 397-98.
179. *See id.*
180. *See id.* at 398.
181. *See id.*
182. *See id.*
183. *See id.* at 398.
184. *See id.* at 397.
185. *See id.*

"even if the statement is made privately and concerns commercial speech."[186] After reviewing the various appellate decisions, the *Los Carneros* court concluded:

> The common thread among the cases is that the statements or acts which formed the gravamen of the plaintiffs' complaints were directly related to a matter of some public interest, and the litigation was designed to stifle a citizen's right to free speech or to extinguish the public's participation in the public process.[187]

Recognizing that SLAPP suits often have claims relating to breach of contract or other valid causes of action, the court noted that it must examine the underlying goal of the lawsuit and grant a section 425.16 motion to strike only if the true objective is to interfere with or burden a defendant's First Amendment rights.[188] The court then found that the *Los Carneros* defendants' conduct—the alleged agreement that the expert would not oppose the defendant-company's project as a promise for future work—was not intended to advance free speech or petition rights.[189] The court also found that the defendants' conduct did not implicate a public issue, notwithstanding that the conduct (or promise not to act) would occur before a governmental agency.[190] The court therefore concluded that the defendants had not met their burden of showing that the conduct was within section 425.16's protection.[191]

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186. *Id.* at 399 (citing *Averill*, 42 Cal. App. 4th at 1174-75, 50 Cal. Rptr. 2d at 64-65). Defendants' argument would require that the letter-contract be viewed as an example of the exercise of free speech or petition by a written statement concerning the competitive projects (i.e., the "public issue") made in connection with securing the approval of the governmental agency charged with deciding between the projects. This seems a bit of a stretch.

187. *Id.* at 400.

188. *See id.* at 401-02; *see also Foothills Townhome Ass'n*, 65 Cal. App. 4th at 696, 76 Cal. Rptr. 2d at 520.

189. *See Los Carneros*, 76 Cal. Rptr. 2d at 401.

190. *See id.* Indeed, the court believed that the effect of the alleged contract would "stifle[] the open public debate the anti-SLAPP statute was designed to encourage" because it would silence any criticism of the defendant-company's project by the expert. *Id.*

191. *See id.* at 402.

The California Supreme Court accepted review of *Los Carneros*, then deferred action while it considered *Briggs*.[192] A few months later the court dismissed the review and remanded the case to the court of appeal pursuant to a settlement notice and request for dismissal by the parties.[193] Given the settlement, there will be no reconsideration by the appellate court. However, the original view of the *Los Carneros* court that "not every lawsuit between parties who appear before legislative or executive bodies on some common issue is a SLAPP suit"[194] would still seem sound, given the legislative intent of section 425.16(a): to attack the "increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[195]

C. The SLAPPer's Burden of Proof[196]

Once the defendant shows that the lawsuit is within section 425.16 and thus subject to the motion to strike, the court should grant the motion unless the plaintiff can show a probability of prevailing.[197] Although the statute provides no explanation of the standard the courts should use in making that determination, courts have accepted the analysis of *Wilcox v. Superior Court*,[198] which held that the legislature did not intend a lower standard than "reasonable probability."[199] The *Wilcox* court concluded that section 425.16 required

192. *See* Los Carneros Community Assocs. v. Penfield & Smith Eng'rs, Inc., 966 P.2d 441, 79 Cal. Rptr. 2d 407 (1998).

193. *See* Los Carneros Community Assocs. v. Penfield & Smith Eng'rs, Inc., 970 P.2d 409, 81 Cal. Rptr. 2d 835 (1999).

194. *Los Carneros*, 76 Cal. Rptr. 2d at 402.

195. CAL. CIV. PROC. CODE § 425.16(a) (West Supp. 2000).

196. For a general discussion of the SLAPPer's burden of proof, see 5 WITKIN PROCEDURE, *supra* note 59, § 963(a)(5).

197. *See* CAL. CIV. PROC. CODE § 425.16(b)(1).

198. 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

199. *Id.* at 823-25, 33 Cal. Rptr. 2d at 454-55. The court in *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620 (Ct. App. 1996), stated that the following cases have adopted the *Wilcox* analysis: Evans v. Unkow, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (Ct. App. 1995), Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 39 Cal. App. 4th 1379, 46 Cal. Rptr. 2d 542 (Ct. App. 1995), Ludwig v. Superior Court, 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995), Robertson v. Rodriguez, 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464 (Ct. App. 1995), and Dixon v. Superior Court, 30 Cal. App. 4th 733,

"the plaintiff to demonstrate sufficient facts to establish a prima facie case,"[200] including "showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses."[201]

Concerning the SLAPPer's burden of proof, the California Supreme Court has noted:

> The Legislature . . . has provided, and California courts have recognized, substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism. As we [previously] recognized[,] . . . "This court and the Courts of Appeal, noting the potential deprivation of jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to prove the specified claim to the trial court, have instead read the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim."[202]

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36 Cal. Rptr. 2d 687 (Ct. App. 1994). *See Church of Scientology*, 42 Cal. App. 4th at 654, 49 Cal. Rptr. 2d at 635.

200. The *Wilcox* reading of the "probability" standard as requiring only a "prima facie" showing of proof has been criticized as wrong, too lenient, and contrary to the legislative intent. *See* PRING & CANAN, *supra* note 29, at 198; Mark Goldowitz, *The Practitioner: Recent Appellate Case Upholds California's Anti-SLAPP Law*, L.A. DAILY J., Sept. 27, 1994, at 7.

201. *Wilcox*, 27 Cal. App. 4th at 824, 33 Cal. Rptr. 2d at 455. The plaintiff made this type of showing in *Peters v. Saunders*, 58 Cal. Rptr. 2d 690, 696 (Ct. App. 1996), by demonstrating that some of the defendant's statements were defamatory and thus not in furtherance of his First Amendment rights. Interestingly, in *Marich v. QRZ Media, Inc.*, 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406 (Ct. App. 1999), plaintiffs failed to offer any declaration or affidavit to meet their burden of proof. Nevertheless, the court found that a videotape, of which the court had taken judicial notice at the defendant's request, demonstrated a prima facie case of invasion of privacy by intrusion as well as a violation of the California statute proscribing nonconsensual recording of a conversation. *See id.* at 307, 318-19, 86 Cal. Rptr. 2d at 412, 420.

202. Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1122-23, 969 P.2d 564, 574-75, 81 Cal. Rptr. 2d 471, 481 (1999) (quoting Rosenthal v. Great W. Fin. Sec. Corp., 14 Cal. 4th 394, 412, 926 P.2d 1061, 1071, 58 Cal. Rptr. 2d 875, 885 (1996)) (citations and emphasis omitted); *see also Marich*, 73 Cal. App. 4th at 306 n.2, 86 Cal. Rptr. 2d at 411 n.2 ("This procedure does not deny the constitutional right to a jury trial because the court does not weigh the evidence in ruling upon the motion; instead, it simply determines

To be of benefit to SLAPPees, the procedure for deciding the motion is supposed to be fast and inexpensive.[203] However, to meet due process considerations, the plaintiff's burden must be compatible with the fact that the motion is brought within sixty days of the complaint's filing.[204]

The SLAPPer's showing must be made by "competent admissible evidence within the personal knowledge of the declarant."[205] Averments on information and belief are thus insufficient,[206] as is hearsay and irrelevant information.[207] Each being inadmissible at trial, they cannot be used to show a probability of prevailing. If the SLAPPer presents competent, admissible evidence of the probability of prevailing, the court will then consider any defenses raised in the SLAPPee's affidavits in reaching its final determination of the SLAPPer's probability of success.[208] If it is determined that a SLAPPer has a probability of prevailing, that determination is not

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whether a prima facie case has been made which warrants the lawsuit going forward.").

203. *See Wilcox*, 27 Cal. App. 4th at 823, 33 Cal. Rptr. 2d at 454 (noting that the statute was intended to provide "a fast and inexpensive unmasking and dismissal of SLAPPs").

204. *See* CAL. CIV. PROC. CODE § 425.16(f) (West Supp. 2000). The motion may be brought at a later point with the court's permission. *See id.*

205. Ludwig v. Superior Court, 37 Cal. App. 4th 8, 15, 43 Cal. Rptr. 2d 350, 356 (Ct. App. 1995); *accord Church of Scientology*, 42 Cal. App. 4th at 654, 49 Cal. Rptr. 2d at 635; *see also* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 567-68, 92 Cal. Rptr. 2d 755, 759-60 (Ct. App. 2000) (requiring plaintiffs to substantiate their claim with more than the mere argument that judges in similar cases had denied motions to dismiss and motions for summary judgment; nor could plaintiffs substantiate their claim with the argument that the instant complaint had survived a demurrer).

206. *See Evans*, 38 Cal. App. 4th at 1498, 45 Cal. Rptr. 2d at 629.

207. *See Church of Scientology*, 42 Cal. App. 4th at 656-57, 49 Cal. Rptr. 2d at 637.

208. *See id.* at 658, 49 Cal. Rptr. 2d at 638; *see also* CAL. CIV. PROC. CODE § 425.16(b)(2) (noting that the court shall consider both "supporting and *opposing* affidavits stating the facts upon which the liability or *defense* is based") (emphasis added); *Wilcox*, 27 Cal. App. 4th at 824, 33 Cal. Rptr. 2d at 455 (finding that section 425.16 requires the SLAPPer to establish a prima facie case, including "showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses").

admissible at any later stage of the matter, nor does it alter the burden or degree of proof at such later stage.[209]

D. Stay of Discovery[210]

Section 425.16(g) provides that "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section."[211] However, subsection (g) also allows that "[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision."[212] The provision allowing discovery for good cause was the legislature's way of balancing a SLAPPee's interest in a speedy decision on the nature of the suit without causing undue prejudice to the SLAPPer.[213]

Unless the SLAPPer makes a timely request for discovery pursuant to subsection (g), there is no entitlement to discovery,[214] and

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209. *See* CAL. CIV. PROC. CODE § 425.16(b)(3).

210. For a brief discussion of the stay of discovery under section 425.16, see 5 WITKIN PROCEDURE, *supra* note 59, § 962(e), at 423.

211. CAL. CIV. PROC. CODE § 425.16(g).

212. *Id.*

213. *See* Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 647 n.3, 49 Cal. Rptr. 2d 620, 631 n.3 (Ct. App. 1996).

214. *See* Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 309 n.5, 86 Cal. Rptr. 2d 406, 413 n.5 (Ct. App. 1999) (holding that the trial court's denial of discovery was proper where plaintiffs had not brought a noticed discovery motion and only mentioned their discovery request in their opposition motion; therefore, the request did not demonstrate good cause that discovery was needed); Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1052, 61 Cal. Rptr. 2d 58, 67 (Ct. App. 1997) (holding that where plaintiff orally requested discovery at the hearing on defendant's motion to strike, it "was not a timely and properly noticed motion for discovery, supported by a showing of good cause" and "failure to comply with [section 425.16(g)] dooms the discovery request"); Evans v. Unkow, 38 Cal. App. 4th 1490, 1499, 45 Cal. Rptr. 2d 624, 630 (Ct. App. 1995) (finding a lack of timely compliance with the statute and a lack of good cause shown for untimeliness where the SLAPPer-plaintiff had not requested discovery until he moved for reconsideration of the trial court's granting of defendant's motion to strike and where his sole excuse for the belated request was his assumption that he would prevail on the motion); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 867, 44 Cal. Rptr. 2d 46, 53-54 (Ct. App. 1995) (holding that where plaintiff has failed to make a timely notice for specified discovery, due process rights are not violated despite the lack of opportunity for discovery); Robertson v. Rodriguez, 36 Cal. App. 4th 347, 357, 42 Cal. Rptr. 2d 464, 469 (Ct. App. 1995) (holding that plaintiff does not adequately comply with section

discovery will be barred until the entry of the order on the motion to strike.[215] If the motion is granted, the lawsuit will end. Even where a proper motion is made, the courts must examine the nature of the discovery requested to see if its extent "would subvert the intent of the anti-SLAPP legislation."[216] As one court has noted: "Obviously, the purpose of the statute would be frustrated if the plaintiff could drag on proceedings for many months by claiming a need to conduct additional investigation."[217] Thus, requiring a SLAPPer to have sufficient facts to support a claim before filing a lawsuit supports section 425.16's statutory purpose.[218] However, another court has emphasized in dictum that a court should "liberally exercise its discretion" to allow specified discovery, especially "when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant[-SLAPPee] or its agents and employees."[219]

425.16(g)'s requirement of a noticed motion by merely asserting in an opposition to a motion to strike the need for more time to ascertain facts and take depositions).

215. *See* CAL. CIV. PROC. CODE § 425.16(g).

216. Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999) (affirming the trial court's denial of discovery where plaintiff sought both written discovery and depositions of 16 people with no explanation of what he intended to uncover or why he needed "such far-ranging discovery," except for an argument that "he should be 'permitted to test respondents' self-serving declarations and elicit circumstantial evidence through discovery'"); *see also* Nicosia v. DeRooy, 72 F. Supp. 2d 1093, 1111 (N.D. Cal. 1999) (granting a section 425.16 motion to strike and refusing to permit discovery where the plaintiff's allegations of malice failed to state a claim, and where he also failed to demonstrate that either the defendant or a witness possessed evidence to support his allegations).

217. Ludwig v. Superior Court, 37 Cal. App. 4th 8, 16, 43 Cal. Rptr. 2d 350, 356 (Ct. App. 1995).

218. *See id.* at 23 n.23, 43 Cal. Rptr. 2d at 361 n.23.

219. *Lafayette Morehouse*, 37 Cal. App. 4th at 867-68, 44 Cal. Rptr. 2d at 54 (finding that plaintiff had not been disadvantaged by section 425.16(g)'s discovery limitations where plaintiff failed to make a timely motion and never sought any discovery, even though the case had been pending one year); *see also Judge Reverses Court Victory of Former Police Chief Willie Williams; Says Williams Must be Deposed in $20 Million Slander/Invasion of Privacy Lawsuit Brought by Two Veteran LAPD Detectives*, PR NEWSWIRE (Feb. 23, 1999) (discussing the reversal of a trial judge's decision that plaintiffs had insufficient evidence to establish the probability of prevailing on claims of slander and invasion of privacy; the appellate court found the decision premature where plaintiffs had had no chance to depose defendant to explore his motives).

E. Attorney's Fees[220]

Section 425.16(c) provides:

> [A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.[221] If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.[222]

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220. For a brief discussion on the right to attorney's fees and costs under section 425.16, see 5 WITKIN PROCEDURE, *supra* note 59, § 962(c), at 422.

221. Some commentators have suggested that this remedy for the SLAPPee of attorney's fees and costs may not be enough. *See* Barker, *supra* note 11, at 452 (suggesting that damages, over and above mere litigation costs and attorney's fees, should be included in a prevailing party's recovery to compensate for legitimate emotional distress and other actual tort injury); Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1062 (1999) (proposing an amendment to section 425.16 that would echo the verification and sanction requirements of Rule 11 of the Federal Rules of Civil Procedure). Other useful modifications to assist a SLAPPee could include requiring specific pleading, eliminating the public interest connection requirement, heightening the plaintiff's burden to a showing of substantial probability, providing the state with the discretion to intervene on behalf of the defendant if the state would statutorily be a necessary party to the action, and having defendant's discovery costs advanced by the plaintiff where the plaintiff survives the initial motion but the court still sees the possibility of a SLAPP motive. *See also infra* Appendix 3, notes 388-95 and accompanying text (discussing JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Recommendation 7, to amend statute to increase sanctions).

222. CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 2000). The phrase "pursuant to Section 128.5" may cause problems, as the referenced provision applies only to cases filed before 1995. *See* CAL. CIV. PROC. CODE § 128.5(b)(1); *see also In re* the Marriage of Drake, 53 Cal. App. 4th 1139, 1169, 62 Cal. Rptr. 2d 466, 486 (Ct. App. 1997) (finding a sanctions award proper in a proceeding arising out of a 1995 petition for increased child support because the underlying divorce occurred prior to 1961, when sanctions were not yet barred by a time limit). It is unclear whether the legislature intended section 425.16(c) to apply by reference only to cases filed before 1995, or whether it meant that "frivolous" and "unnecessary delay" in section 425.16(c) should be interpreted the same way as in section 128.5. If the latter is true, case law under section 128.5 shows that courts award sanctions only in particularly egregious circumstances. *See* Tenderloin Hous. Clinic, Inc. v. Sparks, 8 Cal. App. 4th 299, 308, 10 Cal. Rptr. 2d 371, 375-76 (Ct. App. 1992) (sanctioning plaintiff's attorney for "frivolous actions and tactics" when he engaged in a strategy that forced the defendant's attorney to pre-

Despite the absence of the term "reasonable" in connection with the amount of attorney's fees a prevailing *defendant* can recover, the *Robertson v. Rodriguez*[223] court concluded that either prevailing party is limited to an award of reasonable fees, which amount is within the court's discretion.[224] A prevailing defendant is entitled to attorney's fees even if a third party paid defense costs.[225]

A SLAPPee can be considered the prevailing party and entitled to attorney's fees even where a SLAPPer voluntarily dismissed the claims before the hearing on the SLAPPee's motion to strike.[226] However, a SLAPPer's voluntary dismissal after the filing of a section 425.16 motion neither automatically mandates an award of attorney's fees, nor automatically precludes it. There must be a hearing to determine who is the prevailing party.[227] Also, governmental

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maturely return from a long-scheduled vacation of which plaintiff's attorney was well aware). This could work to the advantage of SLAPP defendants, however.

223. 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464 (Ct. App. 1995).

224. *See id.* at 360-62, 42 Cal. Rptr. 2d at 471-72. The *Church of Scientology* court accepted the reasonableness standard, stating:

> In determining what constitutes a reasonable compensation for an attorney who has rendered services in connection with a legal proceeding, the court may and *should* consider "the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded . . . ; the intricacies and importance of the litigation, the labor and necessity for skilled legal training and ability in trying the cause, and the time consumed."

Church of Scientology, 42 Cal. App. 4th at 659, 49 Cal. Rptr. 2d at 638-39 (quoting Stokus v. Marsh, 217 Cal. App. 3d 647, 656-67, 266 Cal. Rptr. 90, 96 (Ct. App. 1990)).

225. *See* Macias v. Hartwell, 55 Cal. App. 4th 669, 675-76, 64 Cal. Rptr. 2d 222, 226 (Ct. App. 1997).

226. *See* Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600, 608 (Ct. App. 1998); *see also* Kyle v. Carmon, 71 Cal. App. 4th 901, 917-18, 84 Cal. Rptr. 2d 303, 313-15 (Ct. App. 1999) (finding that an order granting a SLAPP motion following plaintiff's voluntary dismissal is void, but that the adjudication supported an award of attorney's fees without need for remand); Liu v. Moore, 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807 (Ct. App. 1999) (holding that where the alleged SLAPPer dismisses the suit before the hearing on the SLAPPee's motion to strike, the SLAPPee has the right to have a hearing so that attorney's fees and cost can be awarded if the SLAPPee prevails).

227. *See Liu*, 69 Cal. App. 4th at 752, 81 Cal. Rptr. 2d at 812. It should also

agencies are viewed as persons under section 425.16 and can thus be prevailing SLAPPee defendants entitled to attorney's fees.[228] Awards for attorney's fees for motions to strike have ranged from a low of $3000[229] to a high of $130,506.71.[230] The average attorney fee awards range from $15,000 to $40,000.[231]

By its terms, section 425.16 neither expressly includes nor excludes costs and attorney's fees incurred prior to an order granting or denying a special motion but not directly attributable to it.[232] One

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be noted that the statute of limitations for a SLAPPee's commencing a malicious prosecution action begins when the hearing determines the SLAPPee is the prevailing party, not when the voluntary dismissal occurs. *See* Garrison v. Baker, No. 98-17038, 2000 WL 206575, at *1 (9th Cir. Feb. 23, 2000) (holding that "[if] the dismissal terminated the action, we would be allowing the plaintiff to unilaterally prevent a decision on the merits, thereby precluding the defendant in the underlying suit from ever asserting a malicious prosecution claim").

228. *See* Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 729-30, 77 Cal. Rptr. 2d 1, 11 (Ct. App. 1998), *disapproved on other grounds by* Briggs v. Eden Council for Hope & Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999).

229. *See* Matson v. Dvorak, 40 Cal. App. 4th 539, 545-46, 46 Cal. Rptr. 2d 880, 884-85 (Ct. App. 1995) (awarding a SLAPPee $2200 and $800, respectively, in attorney's fees for the two motions to strike that he had to bring against claims in the original and amended complaints, plus costs).

230. *See Church of Scientology*, 42 Cal. App. 4th at 658-59, 49 Cal. Rptr. 2d at 638-39 (Ct. App. 1996) (finding that substantial evidence supported the six-figure award, and noting that the court had declined the movant's request to double the "lodestar" amount).

231. *See Macias*, 55 Cal. App. 4th at 675-76, 64 Cal. Rptr. 2d at 226 (awarding $44,445); Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1052-53, 61 Cal. Rptr. 2d 58, 67 (Ct. App. 1997) (awarding $17,879); Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830, 835 (Ct. App. 1996) (awarding over $27,000); *Rodriguez*, 36 Cal. App. 4th 347, 360-61, 42 Cal. Rptr. 2d 464, 471-72 (awarding $15,000, reduced from a claim of $23,847). Consultants for the Judicial Council's report to the legislature on SLAPPs noted that in six SLAPP cases where the motion to strike had been granted, attorney's fees and cost awards ranged from zero to $37,000. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 4 (commenting on Attachment 5).

232. *See* CAL. CIV. PROC. CODE § 425.16(c) (West Supp. 2000) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs."). Examples of actions for which attorney's fees and costs may be incurred, but which are not directly attributable to the special motion to strike, are preparing and filing an answer in order to preserve defenses, transferring the case to the proper venue, and responding to discovery, if allowed. *See* Telephone Interview with Mark Goldowitz, Director of the

court has limited the award of attorney's fees and costs to only those spent on the special motion to strike, reversing the award for costs and fees associated with other aspects of the case.[233] Yet the court of appeal, on remand, granted recovery of costs associated with discovery in the *Briggs* case[234] because "[w]here, as here, discovery is allowed for the purpose of assisting the plaintiff in defending against the motion, the fees attributable to such discovery are directly related to the motion to dismiss, and are recoverable under the anti-SLAPP statute."[235]

Section 425.16 also does not expressly provide for an award of attorney's fees and costs for any appeal of an order granting or denying a special motion to strike. However, the courts of appeal have allowed prevailing SLAPPees to recover attorney's fees and costs for both the motion and the successful appeal.[236]

California Anti-SLAPP Project and sole practitioner specializing in section 425.16 defense (Jan. 4, 2000).

233. *See* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 39 Cal. App. 4th 1379, 1383-84, 46 Cal. Rptr. 2d 542, 544 (Ct. App. 1995). In reaching this conclusion, the *Lafayette Morehouse* court quoted the legislative history for section 425.16(c): "'[SB 1264] would provide attorney's fees and costs to a prevailing defendant in a motion to strike. . . . The provision applies only to the motion to strike, and not to the entire action.'" *Id.* at 1383, 46 Cal. Rptr. 2d at 544 (quoting SENATE JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, ANALYSIS OF SB 1264, at 5 (1991-92 Reg. Sess.)).

234. In *Briggs*, the trial judge had allowed discovery after the SLAPPee filed its section 425.16 special motion to strike. The SLAPPer took twelve depositions. *See* Briggs v. Eden Council for Hope & Opportunity, No. A072446 & A074357, slip op. at 14 (Cal. Ct. App. Oct. 19, 1999) [hereinafter *Briggs II*]. On remand, the plaintiffs tried to argue that the SLAPPee should bear the costs of complying with discovery requests, but the appellate court disagreed and affirmed the trial court's original award of over $70,000 for costs and attorney fees. *See id.* at 15.

235. *Id.* at 14. In order to fully implement the purposes of the statute, SLAPPees should be able to recover all costs and fees associated with a lawsuit found to be a SLAPP. George W. Pring and Penelope Canan, consultants for the Judicial Council's SLAPP report, recommended that the statute be amended "to extend attorney's fees to cover the full costs that filers have imposed on targets." JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 4 & Attachment 2, at 12; *see infra* Appendix 3, notes 364-65 and accompanying text (discussing Recommendation 2).

236. *See Church of Scientology*, 42 Cal. App. 4th at 658-59, 49 Cal. Rptr. 2d at 638-39; Evans v. Unkow, 38 Cal. App. 4th 1490, 1499-1500, 45 Cal. Rptr. 2d 624, 630 (Ct. App. 1995). Both courts relied on the principle that a statute

The granting of SLAPPee attorney's fees has raised most of the issues concerning this part of the legislation. There is very little law concerning the award of attorney's fees and costs to the SLAPPer probably because more often than not the California courts have ultimately ruled in favor of the SLAPPee. Even in those cases pre-*Briggs* which reversed the granting of a SLAPPee's motion to strike on the basis that the acts were outside of section 425.16, only one case was remanded to the trial court with instructions to consider the SLAPPer's entitlement to attorney's fees and costs.[237] Recently a federal district court concluded that section 425.16 did not apply to state law counterclaims that a plaintiff had attempted to strike by special motion.[238] Nevertheless, the court declined to award attorney's fees to the defendants because it was unclear whether the

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authorizing attorney's fees at the trial court level includes appellate fees unless the statute specifically provides otherwise. *See Church of Scientology*, 42 Cal. App. 4th at 659, 49 Cal. Rptr. 2d at 639; *Evans*, 38 Cal. App. 4th at 1499, 45 Cal. Rptr. 2d at 630; *see also Liu*, 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807 (noting that while a prevailing SLAPPee is entitled to attorney's fees—including appellate fees—such fees are not rewardable for interim appellate success but are deferred until final resolution of the matter); *Dove Audio*, 47 Cal. App. 4th at 785, 54 Cal. Rptr. 2d at 835 (explaining that since a statute provides for attorney's fees to the prevailing movant and does not proscribe appellate fees, those fees are recoverable); *accord Briggs II*, No. A072446 & A074357, slip op. at 17.

237. *See* Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs, 49 Cal. App. 4th 1591, 1604, 57 Cal. Rptr. 2d 491, 498 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999). In the other cases reversed or disapproved by *Briggs*, the remand simply directed the trial court to award the SLAPPer costs of appeal. *See* Briggs v. Eden Council for Hope & Opportunity, 54 Cal. App. 4th 1237, 63 Cal. Rptr. 2d 434, 439 (Ct. App. 1997), *rev'd*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999); Linsco/Private Ledger, Inc. v. Investors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 1640, 58 Cal. Rptr. 2d 613, 617 (Ct. App. 1996); Zhao v. Wong, 48 Cal. App. 4th 1114, 1133, 55 Cal. Rptr. 2d 909, 921 (Ct. App. 1996). Both the *Linsco/Private Ledger, Inc.* and *Zhao* cases were disapproved by *Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471. *Briggs* also disapproved *Mission Oaks Ranch*, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), but *Mission Oaks Ranch* had actually affirmed the judgment of dismissal under section 425.16. *See supra* note 100. However, the trial court in *Mission Oaks Ranch* had denied attorney's fees and costs to the SLAPPee because it was a government agency; thus the remand instructed the trial court to determine and award attorney's fees. *See* 65 Cal. App. 4th at 730-31, 77 Cal. Rptr. 2d at 12.

238. *See* Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 1999).

motion was frivolous or intended to cause delay, given that several of the plaintiff's arguments involved unsettled federal and state law issues.[239]

F. Appeals

Until passage of the October 1999 amendment, a SLAPPee had no right of appeal if the special motion to strike was denied.[240] The SLAPPee could seek a writ of mandate, but, as noted in the amendment's legislative history, courts rarely granted such writs.[241] By contrast, if the motion was granted, a SLAPPer could always appeal the dismissal of the case. Section 425.16(j) now levels that playing field.[242]

G. Summary of Ninth Circuit Case Law Pertaining to Section 425.16

Together, the United States Court of Appeals for the Ninth Circuit and the Ninth Circuit's United States district courts in California issued a combined total of six reported decisions in 1999 concerning section 425.16's applicability to cases brought in federal court.[243] In these cases, section 425.16 has been applied to state law issues, but

239. *See id.*

240. *See* CAL. CIV. PROC. CODE § 425.16 (West Supp. 1997).

241. *See* ASSEMBLY JUDICIARY COMMITTEE, CALIFORNIA ASSEMBLY, COMMITTEE ANALYSIS OF AB 1675, at 2-3 (Apr. 20, 1999); SENATE JUDICIARY COMMITTEE, CALIFORNIA SENATE, COMMITTEE ANALYSIS OF AB 1675, at 4 (June 29, 1999); *see also supra* note 42.

242. *See* CAL. CIV. PROC. CODE § 425.16(j) (West Supp. 2000) ("An order granting or denying a special motion to strike shall be appealable under § 904.1.").

243. *See infra* notes 244-91 and accompanying text. A seventh federal opinion, *Garrison v. Baker*, No. 98-17038, 2000 WL 206575 (9th Cir. Feb. 23, 2000), dealt with section 425.16 in a procedural, not substantive way. *Garrison* was a malicious prosecution action brought in federal court by a SLAPPee following a California trial court's ruling that a libel suit was a section 425.16 SLAPP and award of SLAPPee attorney's fees despite the SLAPPer's voluntary dismissal. *See id.* at *1. The Ninth Circuit in *Garrison* only discussed section 425.16 in the context of determining that the SLAPPee had timely filed the malicious prosecution action given that the statute of limitations did not begin running until the trial court's ruling on the merits of the SLAPP. *See id.* at *1-2.

its full efficacy is in question because some district courts have been inclined to view the statute narrowly. This section summarizes those decisions.

1. Ninth Circuit decisions

In *Frias v. Los Angeles County Metropolitan Transportation Authority*,[244] the Ninth Circuit considered, inter alia, an appeal by the plaintiff of the district court's order dismissing his state tort action for failure to state a claim and granting two defendants attorney's fees under section 425.16; the court also granted two defendants' cross-appeal of the reduction of their claimed attorney's fees.[245] Without much discussion, the Ninth Circuit ruled that the two defendants were entitled to attorney's fees because they had prevailed in their dismissal motion, notwithstanding that the district court had not specifically referred to section 425.16 in its order.[246] The court also agreed that the district court had abused its discretion by reducing the attorney's fee claim by over fifty percent.[247] The court remanded the matter for more careful consideration of the claim.[248]

By contrast, *United States* ex rel. *Newsham v. Lockheed Missiles & Space Co.*[249] considered in depth the application of section 425.16 to state law counterclaims in an action by *qui tam* plaintiffs under the False Claim Act.[250] The Ninth Circuit carefully considered whether section 425.16 would conflict with Federal Rules of Civil Procedure 8, 12, and 56. The only parts of section 425.16 at issue were subsections (b) (the motion to strike) and (c) (the availability of attorney's fees and costs).[251] Although noting that there was some similarity in purpose—"the expeditious weeding out of meritless claims before trial"—the court concluded that Rules 8, 12, and 56 were not "intended to 'occupy the field.'"[252] Finding no "direct collision" between the state provision and the Federal Rules, the court concluded

244. No. 97-56078, 1999 WL 273152 (9th Cir. Mar. 11, 1999).
245. *See id.* at *1.
246. *See id.* at *2.
247. *See id.*
248. *See id.* at *3.
249. 171 F.3d 1208 (9th Cir. 1999), *amended by* 190 F.3d 963 (9th Cir. 1999).
250. 31 U.S.C. §§ 3729-3733 (1994).
251. *See Lockheed*, 190 F.3d at 972 & n.11.
252. *Id.* at 972.

that the *qui tam* plaintiffs could assert a motion to strike the defendants' counterclaims and claim attorney's fees and costs under the California anti-SLAPP statute.[253] In so ruling, the court noted that if the anti-SLAPP statute did not apply in federal court, "a litigant interested in bringing meritless SLAPP claims would have a significant incentive to shop for a federal forum," and conversely a SLAPPee would be considerably disadvantaged in federal court.[254] The court saw this as an inappropriate result under the *Erie* doctrine.[255]

2. District court decisions in the Ninth Circuit

In addition to the federal district court opinions underlying the Ninth Circuit opinions discussed above,[256] four other Ninth Circuit district courts have applied California's anti-SLAPP statute since *Lockheed*.[257] Two of these district court opinions took a narrower view of the applicability of section 425.16 in federal court cases than might be expected after the analysis afforded by *Lockheed*.

Citing *Lockheed*, the United States District Court for the Northern District of California, in *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*,[258] agreed that section 425.16 is applicable to state law claims.[259] The court declined, however, to apply the California provision to federal question claims in a case where there were also pendent state claims, noting only a lack of support for this conclusion in the *Lockheed* court's *Erie* analysis or any other authority

253. *See id.* at 973.
254. *Id.*
255. *See id.*
256. Only *Lockheed* had a reported district court opinion. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., No. C88-20009JW, 1995 WL 470218 (N.D. Cal. Aug. 2, 1995) (applying the *Erie* doctrine and denying plaintiffs' motion to strike and for attorney's fees pursuant to section 425.16 of the California Code of Civil Procedure on the basis that the statute conflicted with Rules 8, 1, and 56 of the Federal Rules of Civil Procedure), *rev'd in part*, 190 F.3d 963 (9th Cir. 1999).
257. While the *Lockheed* opinion was amended after both of these district court opinions were issued, the discussion of section 425.16 in the revised *Lockheed* decision was not altered. *See Lockheed*, 190 F.3d 963 (9th Cir. 1999), *amending* 171 F.3d 1208 (9th Cir. 1999).
258. 63 F. Supp. 2d 1127 (N.D. Cal. 1999).
259. *See id.* at 1130.

known to the court.[260] The court then examined the statements underlying the claims at issue in the section 425.16 motion to strike; the plaintiff had made these statements "to the market" about the products of its competitor defendants.[261] The court observed that the statements "were not made during or in connection with an official proceeding" and thus could be protected by the statute "only if they [could] be characterized as statements made in a place open to the public or a public forum in connection with an issue of public interest."[262] Unable to locate any similar California case and expressing disbelief that the California legislature intended the statute to attack as a SLAPP "any lawsuit alleging trade libel, false advertising or the like in the context of commercial competition," the court declined to apply section 425.16 to plaintiff's statement.[263] However, the court also refused to award attorney's fees and costs to the defendants because it was unclear that plaintiff's motion was frivolous or intended for delay.[264]

The United States District Court for the Central District of California was the other federal district court which took a narrow view of section 425.16. In *Rogers v. Home Shopping Network, Inc.*,[265] one defendant, the *National Enquirer*, had published an article containing allegedly known false statements about the plaintiff.[266] When plaintiff sued for libel, the *National Enquirer* brought a section 425.16 motion to strike.[267] The plaintiff filed an ex parte application seeking a continuance of the motion hearing, arguing that she had insufficient time for discovery and identifying specific discovery that she needed, including information from the defendant concerning its knowledge at the time it published the article.[268] Although the *Rogers* court recognized that *Lockheed* had held that section 425.16 fell within an

260. *See id.*
261. *See id.* The court did not give any other factual detail about the claims because the full factual background had been provided in prior orders. *See id.* at 1128.
262. *Id.* at 1130.
263. *Id.*
264. *See id.*; *see also supra* notes 238-39 and accompanying text.
265. 57 F. Supp. 2d 973 (C.D. Cal. 1999).
266. *See id.* at 974.
267. *See id.*
268. *See id.* at 974, 985.

Erie exception, it chose to view *Lockheed*'s consideration of only sections 425.16(b) and (c) very narrowly in considering the applicability of section 425.16(f) (the timing of the special strike motion's filing and hearing) and (g) (the discovery stay).[269] The court then concluded that while a special motion to strike can be available in federal court, "the manner in which these motions are presented and considered must comport with federal standards."[270] The court found that the federal standards were different from those of section 425.16.[271] In particular, the court ruled:

> If a defendant makes a [section 425.16] special motion to strike based on alleged deficiencies in the plaintiff's complaint, the motion must be treated in the same manner as a motion under [Federal Rule of Civil Procedure] 12(b)(6) except that the attorney's fee provision of § 425.16(c) applies. If a defendant makes a special motion to strike based on the plaintiff's alleged failure of proof, the motion must be treated in the same manner as a motion under Rule 56 except that again the attorney's fees provision of § 425.16(c) applies.[272]

Based on its views that there were colliding differences between the standards of section 425.16 and the standards of the federal rules, the court continued the motion to strike hearing to allow the plaintiff time for discovery.[273]

The *Rogers* court's conclusion is troubling because it totally misunderstands the unique nature of the section 425.16 special

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269. *See id.* at 979-80; *see also supra* note 251 and accompanying text.

270. *Rogers*, 57 F. Supp. 2d at 981.

271. *See id.* at 981-82 (finding that section 425.16 and Rule 56(f) have different purposes, the former being discovery-limiting and the latter being discovery-allowing); *id.* at 982-83 (also determining that section 425.16 was in conflict with Federal Rules of Civil Procedure 8 and 12).

272. *Id.* at 983. In particular, the court noted that "[i]f a defendant desires to make a special motion to strike based on the plaintiff's lack of evidence, the defendant may not do so until discovery has been developed sufficiently to permit summary judgment under Rule 56." *Id.* at 982.

273. *See id.* at 985. Besides having the costs of discovery imposed on it, the defendant *National Enquirer* was also subject to a motion to compel disclosure of confidential sources, which it was able to successfully defend. *See* Rogers v. Home Shopping Network, Inc., 73 F. Supp. 1140 (C.D. Cal. 1999).

motion to strike, which *Lockheed* expressly recognized.[274] A defendant does not bring a special motion because of deficiencies in the complaint or because of the plaintiff's alleged lack of proof. The defendant brings the motion to allege that the plaintiff is suing because the defendant has made some statement or taken some action that is protected under section 425.16 as a furtherance of the right to petition or free speech. Therefore, to try to shoehorn a section 425.16 motion into either a Rule 12(b)(6) motion to dismiss or a Rule 56 summary judgment is inappropriate.

The *Rogers* court's decision to grant discovery is also troubling because of its breadth. The court did not limit the granting of a discovery continuance of a section 425.16 hearing to the instant situation where the plaintiff claimed to be in need of information in the defendant's control. It did not recognize that its broad ruling about the method of handling discovery requests by a party served with a section 425.16 motion in federal court undermines the statute's unique purpose. Under the *Rogers* ruling, any SLAPPer subject to a special motion to strike in federal court will be able to seek a continuance of the hearing in order to conduct discovery and thus will be able to harass the SLAPPee with expensive discovery; the SLAPPee, in turn, has no ability to get an early determination of the merits of the SLAPP suit. The *Rogers* ruling will therefore encourage the very kind of forum-shopping that *Lockheed* had tried to eliminate by ruling that section 425.16 applied to state law claims in federal cases.[275] Had the *Rogers* court actually appreciated the purpose and operation of section 425.16(g) within the scheme of the statute, it could have simply applied the section to the instant case. Given that the *Rogers* plaintiff had made an application for discovery and identified specific discovery items, including an apparent explanation for why at least one item was needed, the court could have determined whether good cause was shown.[276] If good cause was shown, any discovery

274. *See Lockheed*, 190 F.3d at 973 (noting that "[t]he Anti-SLAPP statute . . . is crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional rights of freedom of speech and petition for redress of grievances'").

275. *See id.*

276. *See supra* text accompanying note 219 (quoting the exhortation of *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46, 54 (Ct. App. 1995), that courts should be liberal in allowing dis-

the court deemed necessary could have been granted under the statute's standards.[277]

Rogers's granting of discovery stands in contrast to the ruling in *Nicosia v. DeRooy*,[278] another opinion by the United States District Court for the Northern District of California. In *Nicosia*, the plaintiff sued the defendant for slander and libel based on statements the defendant had published about him on her Web site.[279] The defendant moved to dismiss for failure to state a claim under federal rules of procedure and to strike under section 425.16.[280] One ground of the defendant's motion to dismiss under the federal rules was that the plaintiff had insufficiently pled actual malice, a pleading requirement in this situation, with which the court agreed.[281] As a result, the court also concluded that the plaintiff had failed his burden of proof under section 425.16, which required him to show that he would probably prevail on his claims.[282] In considering the plaintiff's request to conduct limited discovery on the issue of actual malice, the court noted that section 425.16 had been interpreted to allow trial courts to "liberally allow requests for discovery."[283] However, since the court had already found plaintiff's allegations of actual malice insufficient to state a claim, the court concluded that any evidence marshaled to support such allegations could not establish malice and thus could not meet his burden of proof.[284] The court therefore found that the plaintiff had failed to satisfy the requirement that he

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covery "when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant[-SLAPPee] or its agents and employees").

277. *See* CAL. CIV. PROC. CODE § 425.16(g) (West Supp. 2000).

278. 72 F. Supp. 2d 1093 (N.D. Cal. 1999).

279. *See id.* at 1096.

280. *See id.* at 1095.

281. *See id.* at 1108-09.

282. *See id.* at 1110.

283. *Id.* at 1111 (relying on *Lafayette Morehouse*, 37 Cal. App. 4th at 868, 44 Cal. Rptr. 2d at 54).

284. *See id.* The *Nicosia* court acknowledged that discovery might allow the plaintiff to uncover evidence to support a different theory of malice than he had pled. However, the court concluded that "[t]he mere possibility that this might occur . . . does not satisfy the standard articulated in [*Lafayette Morehouse*] and [*Sipple v. Foundation for National Progress*]." *Id.* at n.12.

demonstrate "'that a defendant or a witness possesses evidence needed by plaintiff to establish a prima facie case.'"[285]

Nicosia predated *Rogers* by a couple of weeks, although it was submitted for publication some time later.[286] However, the fourth federal district court opinion considering a section 425.16 special motion to strike, *Metabolife International, Inc. v. Wornick*,[287] was aware of and seemed to accept the views of the *Rogers* court concerning the supposed collision between federal motion rules and section 425.16's standards.[288] As a result of the *Rogers* perspective, the United States District Court for the Southern District of California in *Metabolife* believed that it could not consider issues "for which [the plaintiff] should be granted discovery prior to a decision" because discovery had been stayed after the filing of the defendant's special motion to strike.[289] While the court thus felt it could not examine whether Metabolife had established a prima facie case of actual malice, it was nevertheless willing to consider the defendant's legal defenses and whether Metabolife had met the required proof of falsity in support of its claims of slander and defamation.[290] After a careful analysis of each of the plaintiff's claims, the court ultimately concluded that Metabolife did not meet its burden of showing a probability of prevailing on any of them.[291]

These four federal district court decisions suggest that the various California district courts' handling of section 425.16 special

285. *Id.* at 1111 (citing Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999)).

286. *Nicosia* was decided on July 7, 1999, *see* 72 F. Supp. 2d at 1093, while *Rogers* was decided on July 22, 1999, *see* 57 F. Supp. 2d at 973.

287. 72 F. Supp. 2d 1160 (S.D. Cal. 1999). In *Metabolife*, the plaintiff sued a television station and others for slander, defamation and other claims after the broadcast of a three-part report questioning the safety of the plaintiff's herbal diet pills. *See id.* at 1162-63.

288. *See id.* at 1166 (quoting *Rogers*, 57 F. Supp. 2d at 982, for the principle that "[i]n federal court, 'if a defendant desires to make a special motion to strike based on the plaintiff's lack of evidence, the defendant may not do so until discovery has been developed sufficiently to permit summary judgment under Rule 56'").

289. *See id.* at 1165. In fact, the court had first stayed all discovery, then had ordered limited discovery, but later stayed all discovery again. *See id.* at 1164-65.

290. *See id.* at 1165-66 & n.3.

291. *See id.* at 1166-76.

motions to strike may lack uniformity unless and until the Ninth Circuit deals with the issue more substantively than it did in *Lockheed.* Until then, one can expect that forum shopping will occur because of the dissimilar approaches taken by the different federal district courts in ruling on section 425.16 special motions.

IV. JUDICIAL COUNCIL REPORT ON SECTION 425.16

Pursuant to the directive in section 425.16(i), the Judicial Council submitted a report to the legislature in 1999 concerning the operation of the statute.[292] The statute called for a report "on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section."[293] The Judicial Council interpreted that mandate, in part, as requesting a report on the statute's effectiveness.[294] It therefore used several different types of data collection in order to make an assessment of the statute's use and operation.[295] The Judicial Council's research efforts were not very scientific, partly because the legislature initially provided no funding for the study it had ordered.[296] However, the legislature apparently did finally provide some funds to the Judicial Council in order to hire SLAPP experts George W. Pring and Penelope Canan as consultants to analyze the collected data.[297]

Based on their analysis of the limited data collected by the Judicial Council, the consultants made seven recommendations to enhance the statutory protections of section 425.16:

(1) require the filing of a form for every special motion to strike to permit reliable future research;

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292. *See generally* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8.

293. CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 2000).

294. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 1; *see also id.*, Attachment 7 (copy of form letter sent to counsel known to have litigated SLAPP motions, asking their opinion on section 425.16's effectiveness "in preventing or eliminating SLAPPs").

295. A full description of the Judicial Council's research methods can be found in Appendix 3 *infra.*

296. *See* Telephone Interview with Mark Goldowitz, Director of the California Anti-SLAPP Project and sole practitioner specializing in section 425.16 defense (Oct. 13, 1999).

297. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 2.

(2) expand the attorney's fees section to cover all costs "reasonably incurred in defending against the action";
(3) provide more discretion for the court concerning the motion-filing deadline;
(4) permit an immediate appeal of a denial of a special motion to strike;
(5) clarify that the special motion to strike is inapplicable to a SLAPP-back suit;
(6) clarify that discovery is disfavored by stating specific factors to consider before lifting the discovery stay imposed by the filing of a special motion to strike; and
(7) expand the discretion of the court to impose additional sanctions on SLAPPers and their attorneys or law firms.[298]

Although acknowledging that the consultants were the preeminent experts on SLAPP suits,[299] the Judicial Council surprisingly rejected most of their recommendations. It took the position that recommendations 1 and 3-6 were unnecessary.[300] As to recommendation 2, the Judicial Council conceded that section 425.16 was unclear concerning the extent of attorney's fees and therefore agreed that a clarification would be useful. However, the Judicial Council took no position on what that clarification should be, declining to support the consultants' specific recommendation.[301] The Judicial Council also did not endorse recommendation 7 and "[took] no position on the substantive legal issue of whether additional sanctions should be authorized."[302] A complete analysis of the seven recommendations and a critique of the Judicial Council's reactions to them are provided in Appendix 3 to this Article.

V. ISSUES IN SECTION 425.16'S OPERATION AND SCOPE

Since the publication of the Judicial Council's report, the legislature has amended section 425.16 in a form that adopts Pring and

298. *See id.*, Attachment 2, at 12.
299. *See id.* at 2.
300. *See id.* at 4-6.
301. *See id.* at 4-5.
302. *Id.* at 6.

Canan's recommendations 1 and 4, allowing better future data collection on SLAPP suits and immediate appeal of any order concerning a special motion to strike.[303] However, there still remain several areas in which section 425.16's provision of protections may be deficient to meet the statute's stated purpose. The consultants' recommendations to the Judicial Council highlight some of these areas. These areas are discussed more fully in the Appendix 3 analysis. Key among them are: (1) the need to clarify that costs and attorney's fees can be awarded for defending the entire action;[304] (2) the need to clarify that discovery is disfavored and to provide guidelines as to when it would be appropriate to grant limited discovery;[305] and (3) the need to clarify that the statute does not apply to SLAPP-backs.[306] Another suggestion of the consultants is to amend the statute to provide for additional sanctions, as appropriate, to enhance SLAPP suit deterrence.[307]

Other issues have arisen in the statute's interpretation and are currently unresolved.[308] Primary among those areas is the overall breadth of the statute's applicability. The California legislature has given section 425.16 much broader parameters than some other anti-SLAPP provisions.[309] When a few appellate decisions attempted to interpret section 425.16 consistently with the more usual breadth of anti-SLAPP statutes, the legislature stepped in and amended the act with the express intent of overruling those decisions.[310] One consequence of California's having such a broad statute is that any

303. *See supra* notes 40-45 and accompanying text.

304. *See infra* Appendix 3, notes 364-65 and accompanying text (discussing Recommendation 2).

305. *See infra* Appendix 3, notes 377-87 and accompanying text (discussing Recommendation 6).

306. *See infra* Appendix 3, notes 372-76 and accompanying text (discussing Recommendation 5).

307. *See infra* Appendix 3, notes 388-95 and accompanying text (discussing Recommendation 7).

308. The question of the federal courts' acceptance of section 425.16 in its entirety for application to state law claims brought in federal court cannot be controlled by the California legislature, but it is something to watch because of the possibility of forum shopping. *See supra* Part III.G.

309. *See supra* notes 53-57 and accompanying text.

310. *See supra* notes 71-73 and accompanying text.

individual who alleges libel, invasion of privacy, or intentional infliction of emotional distress against a newspaper, publishing, or other media company can expect to be quickly served with a special motion to strike, as the media defendant characterizes itself as a SLAPPee.[311] While initially such motions were filed in cases where the media coverage was of petitioning activity,[312] of late the motions have come even when the coverage is of "ordinary" news.[313] This turn of events has been viewed by some as changing the law of libel and defamation and has raised questions about whether that should really be a purpose of section 425.16.[314] Concerns have also arisen over the statute's application in so-called private actions and private disputes or other communications or acts that do not involve

311. *See* James E. Grossberg & Dee Lord, *California's Anti-SLAPP Statute*, 13 COMM. LAW. 3 (1995) (noting that media attorneys believe the anti-SLAPP statute is "an important defensive tool"); *see also* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8, at 2 (Letter from Michael Reedy to Judicial Council of California (Jan. 23, 1998)) ("There is a reason that newspaper publishers support Section 425.16 so vehemently, whether conservative or liberal. They certainly have First Amendment concerns, but they also appreciate the fact that this law makes it extremely difficult for anyone to win a defamation case against them.").

312. *See, e.g.*, Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1997) (defamation action for articles about state auditor probe of the finances of a hospital research and training center at the University of California at San Francisco); Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (Ct. App. 1995) (libel lawsuit based on series of articles describing public hearings over activities of nontraditional university).

313. *See* Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973 (C.D. Cal. 1999) (libel lawsuit for article in *National Enquirer*); Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406 (Ct. App. 1999) (lawsuit alleging invasion of privacy, intentional infliction of emotional distress, and illegal eavesdropping for coverage on TV show, "LAPD: Life on the Beat," of discovery of son's body after drug overdose and telephone notification to parents of death).

314. A number of the attorneys who responded to the Judicial Council with comments, particularly those representing the SLAPP filers, had concerns that some broad appellate interpretations of section 425.16 were rewriting the law of defamation and libel. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Michael Reedy to Judicial Council of California (Jan. 23, 1998); Letter from Barbara Lawless to James Brighton (Jan. 13, 1998); Letter from William Simpich to James Brighton (Jan. 12, 1997 [sic]); Letter from Thomas G. Kieviet to James Brighton (Jan. 15, 1998)).

petitioning.[315] The answer to these questions about the breadth of section 425.16 will lie in further interpretations of the scope of section 425.16(e)(3) and (4), unless the legislature chooses to define such terms as "public forum," "a place open to the public," and "an issue of public interest."[316]

VI. CONCLUSION

California's section 425.16 can provide full protection for the ordinary citizen and others who participate in government petitioning. The provision also is designed to provide protection beyond the traditional scope of an anti-SLAPP statute. The key questions about the operation of section 425.16 are twofold. First, are the trial courts handling special motions to strike in the spirit of the statute? Unfortunately, because of the inadequacy of the Judicial Council's report on SLAPPs to the legislature, it is uncertain whether trial courts are interpreting the statute appropriately. Second, is the very broad scope of section 425.16, especially since the 1997 amendments, the best balance between the rights of speech and petition and the right to sue and get redress for alleged wrongs? To accurately answer those questions, the continued development of the law under section 425.16 should be tracked—and tracked more carefully than is evident from the Judicial Council's report.

315. *See id.*, Attachment 8, at 2 (Letter from Kevin Anderson to James Brighton (Jan. 13, 1998)); *id.*, Attachment 8, at 1 (Letter from Thomas G. Kieviet to James Brighton (Jan. 15, 1998)).

316. One author has made rather extensive suggestions for amending section 425.16 to clarify the public interest issue. *See* Braun, *supra* note 221, at 1058-60.

APPENDIX 1

Section 425.16

The full text of section 425.16 as of the 1999 amendments is as follows:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds

that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (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; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2)The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

APPENDIX 2

Summary of Circumstances Where SLAPPee Has Met or Not Met the Special Motion to Strike Burden of Proof

There have been thirty-one California appellate decisions on special motions to strike under Section 425.16.[317] In most of these cases the SLAPPee ultimately received protection.[318] This Appendix provides a summary of some of the situations considered by the California courts concerning the SLAPPee's burden of proof.

Examples of where the SLAPPee has met the burden of proof include the following circumstances:

- acts and statements supporting and encouraging a lawsuit that alleged improper contracting practices;[319]
- suit over an allegedly libelous political campaign flyer that concerned the quintessential subject of the constitutional right to free speech;[320]
- new litigation which is an attack on the judgment for a SLAPPee in prior litigation;[321]
- private communications regarding a city's initial determination to permit a home to be used as a battered women's shelter;[322]

317. *See infra* Appendix 3, note 345 and accompanying text.

318. *See supra* notes 67-73 and accompanying text.

319. *See* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 821-22, 33 Cal. Rptr. 2d 446, 453-54 (Ct. App. 1994).

320. *See* Matson v. Dvorak, 40 Cal. App. 4th 539, 548, 46 Cal. Rptr. 2d 880, 885-86 (Ct. App. 1995); *see also* Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 1042-43, 61 Cal. Rptr. 2d 58, 61 (Ct. App. 1997) (allegedly libelous accounts of improper management in university medical program contained in a newspaper article are protected free speech "in connection with a public issue"); Beilenson v. Superior Court, 44 Cal. App. 4th 944, 950, 52 Cal. Rptr. 2d 357, 361 (Ct. App. 1996) (allegedly libelous statements made by political candidate against opponent in election are protected political speech).

321. *See* Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 648, 49 Cal. Rptr. 2d 620, 632 (Ct. App. 1996).

322. *See* Averill v. Superior Court, 42 Cal. App. 4th 1170, 1175-76, 50 Cal. Rptr. 2d 62, 65 (Ct. App. 1996).

- a public report issued by the district attorney questioning the truthfulness of a deputy sheriff's search warrant affidavit and his motives;[323]
- a letter from a law firm to prospective clients indicating that the firm intended to file a complaint with the state attorney general regarding non-payment of royalties;[324]
- newspaper articles reporting on various aspects of a governmental investigative audit, even if the auditor's powers did not extend beyond investigatory powers;[325]
- claims of an invasion of privacy for public disclosure of private facts and the intentional infliction of emotional distress arising out of a television show featuring a fire department's response in a death investigation;[326]
- a statement made by a union organizer during a major labor dispute;[327]
- a developer's encouragement of individuals to oppose a competing project before the city council;[328]
- statements made in connection with a recall election or in a notice of intention to circulate a petition for recall;[329]
- comments made to a governmental agency during the statutory public comment period;[330] and

323. *See* Bradbury v. Superior Court, 49 Cal. App. 4th 1112, 1116, 57 Cal. Rptr. 2d 207, 209, 212 (Ct. App. 1996).

324. *See* Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830, 834-35 (Ct. App. 1996).

325. *See Braun*, 52 Cal. App. 4th at 1042-43, 61 Cal. Rptr. 2d at 61; *see also* Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 862, 44 Cal. Rptr. 2d 46, 50 (Ct. App. 1995).

326. *See* Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 316, 86 Cal. Rptr. 2d 406, 418-19 (Ct. App. 1999).

327. *See* Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483, 69 Cal. App. 4th 1057, 1063-64, 82 Cal. Rptr. 2d 10, 14 (Ct. App. 1999).

328. *See* Ludwig v. Superior Court, 37 Cal. App. 4th 8, 14, 43 Cal. Rptr. 2d 350, 355 (Ct. App. 1995).

329. *See* Robertson v. Rodriguez, 36 Cal. App. 4th 347, 356, 42 Cal. Rptr. 2d 464, 468-69 (Ct. App. 1995) (recall election); Evans v. Unkow, 38 Cal. App. 4th 1490, 1495, 45 Cal. Rptr. 2d 624, 627 (Ct. App. 1995) (notice of intent to circulate recall petition).

330. *See* Dixon v. Superior Court, 30 Cal. App. 4th 733, 742-44, 36 Cal. Rptr. 2d 687, 694-95 (Ct. App. 1994).

- claims of false statements made by a corporation in lobbying activities directed toward governmental agencies and legislatures and in advertising and marketing activities to the medical profession and the public.[331]

Instances where California courts have *not* found Section 425.16 applicable (and where they were not reversed or disapproved by *Briggs v. Eden Council for Hope & Opportunity*[332]) include the following situations:

- a media company's planned mini-series on the life of an actress;[333]
- a leaflet distribution by an anti-abortion protester that allegedly contained inaccuracies;[334]
- a challenge by a townhouse owner to an association assessment;[335] and
- a letter that induces a breach of contract even where contract services will be performed before a reviewing government agency.[336]

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331. *See* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 564, 92 Cal. Rptr. 2d 755, 757 (Ct. App. 2000).

332. 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999); *see supra* note 100.

333. *See* Taylor v. National Broad. Co., No. BC110922, 1994 WL 762226, at *7 (Cal. Super. Ct. Sept. 29, 1994). The denial of the motion to strike in *Taylor* was based on the fact that it improperly sought to eliminate only those portions of plaintiff's complaint seeking injunctive relief, as well as on its failure to show facts that the complaint was "filed primarily to chill the valid exercise of constitutional rights." *Id.*

334. *See* Family Planning Specialists Med. Group, Inc. v. Powers, 39 Cal. App. 4th 1561, 1566, 46 Cal. Rptr. 2d 667, 669 (Ct. App. 1995). The basis of the denial of the motion to strike in *Family Planning* is unclear. The appellate court noted that the trial court's ruling indicated a finding "either that respondents' causes of action against [the movant] did not 'aris[e] from any act of that person in furtherance of the person's right of petition or free speech,' or that there was a 'probability that the [respondents would] prevail' on their claims at trial." *Id.* at 1566, 46 Cal. Rptr. 2d at 669.

335. *See* Foothills Townhome Ass'n v. Christiansen, 65 Cal. App. 4th 688, 696, 76 Cal. Rptr. 2d 516, 520 (Ct. App. 1998). In *Foothills*, the court ultimately concluded that the movant had "failed to meet his burden to show the lawsuit was brought to chill his first amendment rights." *Id.* at 696, 76 Cal. Rptr. 2d at 520.

336. *See* Los Carneros Community Assocs., v. Penfield & Smith Eng'rs,

APPENDIX 3

Summary and Analysis of the Recommendations Made by Consultants to the Judicial Council of California Concerning Civil Procedure Code Section 425.16

As background to this summary and analysis of the recommendations made to the Judicial Council concerning section 425.16 by the consultants, George W. Pring and Penelope Canan, some understanding of the methodology used by the Judicial Council in collecting data about section 425.16 and the consultants' analysis of that data is appropriate.

As noted in the Article's text, the Judicial Council employed various data collection methods. These include the following: (1) review of 822 cases randomly selected from those general civil matters filed in 1995 in San Diego, Alameda, and Shasta counties to determine the frequency of section 425.16 special motions to strike, (2) contact with organizations that had supported or opposed the SLAPP legislation to identify counsel involved in SLAPP litigation, (3) contact with the identified attorneys to identify SLAPP cases those attorneys were aware of, (4) contact with named counsel in nineteen appellate cases involving section 425.16 to secure their comments about the statute, both as to effectiveness and need for change, and (5) submission of all information compiled by steps (1) through (4) to SLAPP experts Canan and Pring for their independent analysis and comments.[337] The Judicial Council made the Canan-Pring analysis part of its final report.[338] The Canan-Pring analysis often criticized the Judicial Council's data collection methodology, as is detailed more fully below.

Inc., 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396, 401 (Ct. App. 1998), *review granted and action deferred pending disposition of* Briggs v. Eden Council for Hope & Opportunity, 966 P.2d 441, 79 Cal. Rptr. 2d 407 (1998), *review dismissed and cause remanded*, 970 P.2d 409, 81 Cal. Rptr. 2d 835 (1999); *see supra* notes 177-95 and accompanying text.

337. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 1-4.

338. *See id.*, Attachment 2.

The data collection efforts resulted in the following information:

- The review of the 822 random cases in the three counties revealed no cases involving a section 425.16 special motion to strike. According to this data, the Judicial Council concluded that SLAPP strike motions "occur in 1.3 percent or fewer of cases."[339]

  The Canan-Pring analysis noted that this method of attempting to determine the frequency of special motions "was doomed to failure" because court management systems are not geared to provide this type of information absent a special notice to the courts to create "a retrievable case identifier."[340]

- The Judicial Council also contacted four organizations mentioned in the statute's legislative history as supportive of the legislation, and from them learned of fourteen attorneys who had done SLAPP suit representation. The Judicial Council contacted those attorneys and asked them to complete a survey form for any cases they knew involving a section 425.16 special motion to strike. The attorneys returned forms describing twelve superior court cases. The courts granted the motion to strike in six of these cases, denied the motion in three, left one pending, and dropped the remaining two from the calendar. Several of the cases apparently went up on appeal.[341]

  While the Canan-Pring analysis indicated that this effort to expand the Judicial Council's data collection base was appropriate, the consultants felt the method was "seriously flawed."[342] The consultants noted that there was both a much

339. *Id.* at 3.

340. *Id.*, Attachment 2, at 2.

341. *See id.* at 3 & Attachments 4 and 5. One of the twelve superior court cases included was *Sipple v. Foundation for Nat'l Progress*. *See* 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999).

By contrast, as of this Article's publication date, the Judicial Council had already received filings from 74 cases in the first seven months it has been keeping the log of section 425.16 special motion filings as mandated by the 1999 amendment. *See SLAPP Special Motion Log, available at California Courts: Reference: Courts—How to Use* (last modified May 10, 2000) <http://www.courtinfo.ca.gov/reference/4_courtshowto.htm#SLAPPs>.

342. JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 4.

larger coalition of supporters than the four contacted, as well as a number of opponents to the legislation. Surveying the newspaper coverage at the time of the efforts to pass the legislation could have identified these larger numbers and provided a more balanced group to survey.[343] Additionally, the consultants criticized the survey form for failing to provide key data, such as the case name or the name of the person submitting the form, and thus only limited information could be gleaned from the responses.[344]

- The Judicial Council sent letters to the sixty-five attorneys acting as counsel in nineteen appellate cases involving section 425.16 motions to strike,[345] asking their opinion about

343. *See id.*, Attachment 2, at 3-4. The author's own research into press coverage of SLAPP suits revealed over 250 articles, which often identified attorneys involved in cases where anti-SLAPP motions were filed or commentators who had remarked upon those cases or the statute. *See* Search of LEXIS, News Group File, All (search for records containing "SLAPP or 425.16 and California" and 1-1-93 to 9-30-99 in DATE field).

344. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 4.

345. These 19 cases represent most of the section 425.16 appellate cases decided in the first five years of the statute's operation (1993-97). *See id.*, Attachment 2, at 13, n.ii. The 19 opinions actually represent only 18 separate cases, as *Lafayette Morehouse* produced two appellate decisions. *See* 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46 (Ct. App. 1995) (*Lafayette Morehouse I,* affirming grant of section 425.16 motion to dismiss); 39 Cal. App. 4th 1379, 46 Cal. Rptr. 2d 542 (Ct. App. 1995) (*Lafayette Morehouse II,* ruling on attorneys fees). During the period of 1993-97, courts decided two additional section 425.16 appellate cases that the Judicial Council inexplicably omitted from the list. *See* Peters v. Saunders, 58 Cal. Rptr. 2d 690 (Ct. App. 1996); Family Planning Specialists Med. Group, Inc. v. Powers, 39 Cal. App. 4th 1561, 46 Cal. Rptr. 2d 667 (Ct. App. 1995). From 1998 through January 2000, there have been 11 new appellate cases (not including the Supreme Court's decision in *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999)), an approximately 61% increase in less than two years over the 18 cases counted by the Judicial Council. *See* DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Ct. App. 2000); Marich v. QRZ Media, Inc., 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406 (Ct. App. 1999); Kyle v. Carmon, 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303 (Ct. App. 1999); Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677 (Ct. App. 1999); Conroy v. Spitzer, 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443 (Ct. App. 1999); Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees Local 483, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10 (Ct. App. 1999); Liu v. Moore, 69 Cal. App. 4th 745,

> the effectiveness of the statute and soliciting any suggestions for improving the statute's efficacy. The Council received sixteen written responses.[346]
>
> The consultants made a detailed analysis of the sixteen responses[347] and were pleased that the sixteen returns were split fairly evenly among counsel for SLAPPers and SLAPPees.[348] However, the Canan-Pring analysis also noted certain weaknesses with this information: (1) the sample was neither scientifically nor statistically valid, partly because limiting the survey to appeals created a bias toward parties who were more likely to have resources; and (2) the response rate of sixteen out of sixty-five attorneys was low.[349]

Based on what they viewed as "especially meritorious" suggestions in those sixteen responses, Canan and Pring made a series of six recommendations for amendments to section 425.16 to enhance the statute's protections.[350] A seventh recommendation (actually

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81 Cal. Rptr. 2d 807 (Ct. App. 1999); Coltrain v. Shewalter, 66 Cal. App. 4th 94, 77 Cal. Rptr. 2d 600 (Ct. App. 1998); Mission Oaks Ranch, Ltd. v. County of Santa Barbara, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1 (Ct. App. 1998), *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471; Foothills Townhome Ass'n v. Christiansen, 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516 (Ct. App. 1998); Los Carneros Community Assocs. v. Penfield & Smith Eng'rs, Inc., 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396 (Ct. App. 1998), *review granted and action deferred pending disposition of Briggs*, 966 P.2d 441, 79 Cal. Rptr. 2d 407 (1998), *review dismissed and cause remanded*, 970 P.2d 409, 81 Cal. Rptr. 2d 835 (1999) (pursuant to settlement notice and request for dismissal by parties). An additional 1999 opinion, *Ingram v. Flippo*, 74 Cal. App. 4th 1280, 89 Cal. Rptr. 2d 60 (Ct. App. 1999), notes that the defendants had filed a demurrer and a special motion to strike under section 425.16, but the trial court's granting of the demurrer without leave to amend was the only issue on appeal. *See id.* at 63-64. Therefore, the case has not been counted as one dealing with the anti-SLAPP statute.

346. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 3-4 & Attachments 6-8.

347. *See id.*, Attachment 2, at 4-11.

348. *See id.*, Attachment 2, at 4. Of particular interest is the fact that both the attorneys for filers of SLAPPs and for SLAPP targets rated the statute effective, although many of the attorneys for SLAPP filers "qualified [their] approval by pointing out 'difficulties' or 'abuses'," often in their own cases. *Id.*, Attachment 2, at 5-6.

349. *See id.*, Attachment 2, at 4.

350. *See id.*, Attachment 2, at 11-12. Despite their criticism of this aspect of

Recommendation 1) was related to enhancing the ability of the Judicial Council to do valid future research on cases where Section 425.16 is applicable.[351] The consultants' recommendations[352] and the Judicial Council's reactions[353] to those recommendations are quoted below. The author's comments follow those recommendations and reactions.

Recommendation 1. If the legislature requires knowing how the anti-SLAPP provision is working, it must enable reliable research. At a minimum it should require the filing of a simple form whenever the motion is entered. Then a random sample of these could be selected and various participants interviewed about impacts.

Judicial Council's View. The Judicial Council does not believe that further data collection on special anti-SLAPP motions by the courts is necessary. The information already obtained by staff is adequate to indicate that special anti-SLAPP motions are not very common. Most survey respondents believed the existence of the statute deters SLAPP suits as the Legislature intended. A case-level review is required to collect data on special anti-SLAPP motions. Further tracking of section 425.16 would be burdensome and costly and should not be required.

Author's Comments. The 1999 amendment to section 425.16 adopted Recommendation 1. New subsection (k) requires any party filing or opposing a special motion to strike to submit to the Judicial Council a copy of the motion or opposition cover page, as well as any order and any notice of appeal.[354] The Judicial

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the survey methodology, *see supra* Appendix 3, text accompanying note 349, Canan and Pring found that the 16 responses provided "a wealth of useful information." JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 5.

351. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 11-12.

352. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, at 4-6.

353. *See id.*

354. *See* CAL. CIV. PROC. CODE § 425.16(k)(1) (West Supp. 2000):

> Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-

Council is to maintain these records for at least 3 years.[355]

The legislature thereby overruled the Judicial Council's conclusion that no further data collection is needed. Indeed, the Judicial Council's self-satisfaction with its data collection efforts seems surprising, given that the consultants it hired characterized its methods as "flawed."[356] One can only wonder why the

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mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

Id.

355. *See id.* § 425.16(k)(2) ("The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.").

356. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 4. Another possible manner in which the data collection was flawed was by the selection of counties from which cases were randomly surveyed. The Judicial Council indicated that San Diego, Alameda, and Shasta Counties were chosen "to provide a realistic sample of geographic locations and populations," as well as because of their volume of cases and court automation. *Id.* at 2. The Canan-Pring analysis noted that given their anecdotal knowledge that scores of SLAPPs and special motions to strike had been filed since section 425.16's effective date, *see* PRING & CANAN, *supra* note 29, at 198; Michael Gougis, *SLAPPed with a Lawsuit?*, SAN GABRIEL VALLEY TRIB., May 3, 1995, at A1, "[t]hese three jurisdictions may not be representative of all counties in California . . . in which anti-SLAPP statutes [sic] have been filed." JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 3. Canan and Pring's expertise suggested that "SLAPPs were more likely in counties with high proportions of white urban dwellers and where quality of life, growth, and pressures for land development were at the center of local conflicts." *Id.* They recommended that the Judicial Council consider community characteristics and controversies in the future. *See id.*

This author made a simple analysis of the geographical source of the 31 appellate SLAPP cases decided to date. The analysis showed the following: (1) eight cases were from the First District Court of Appeal; of those, five had been filed in San Francisco County Superior Court: Braun v. Chronicle Publ'g Co., 52 Cal. App. 4th 1036, 61 Cal. Rptr. 2d 58 (Ct. App. 1997); Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs, 49 Cal. App. 4th 1591, 57 Cal. Rptr. 2d 491 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471; Linsco/Private Ledger, Inc. v. In-

vestors Arbitration Servs., Inc., 50 Cal. App. 4th 1633, 58 Cal. Rptr. 2d 613 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr 2d 471; Zhao v. Wong, 48 Cal. App. 4th 1114, 55 Cal. Rptr. 2d 909 (Ct. App. 1996), *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr 2d 471; *Lafayette Morehouse I*, 37 Cal. App. 4th 855, 44 Cal Rptr. 2d 46; two had been filed in Alameda County Superior Court: *Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471; *Family Planning Specialists*, 39 Cal. App. 4th 1561, 46 Cal. Rptr. 2d 667; and one in San Mateo County Superior Court: Evans v. Unkow, 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (Ct. App. 1995); (2) thirteen cases were from the Second District, and of those, eight had been filed in Los Angeles County Superior Court: *Marich*, 73 Cal. App. 4th 299, 86 Cal. Rptr. 2d 406; *Sipple*, 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677; *Liu*, 69 Cal. App. 4th 745, 81 Cal. Rptr. 2d 807; Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (Ct. App. 1996); *Saunders*, 58 Cal. Rptr. 2d 690; *Church of Scientology*, 42 Cal. App. 4th 628, 49 Cal. Rptr. 2d 620; Robertson v. Rodriguez, 36 Cal. App. 4th 347, 42 Cal. Rptr. 2d 464 (Ct. App. 1995); Wilcox v. Superior Court, 27 Cal. App. 4th 809, 33 Cal. Rptr. 2d 446 (Ct. App. 1994); three in Ventura County Superior Court: Macias v. Hartwell, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222 (Ct. App. 1997); Bradbury v. Superior Court, 49 Cal. App. 4th 1108, 57 Cal. Rptr. 2d 207 (Ct. App. 1996); Beilenson v. Superior Court, 44 Cal. App. 4th 944, 52 Cal. Rptr. 2d 357 (Ct. App. 1996); and two in Santa Barbara County Superior Court: *Los Carneros*, 65 Cal. App. 4th 168, 76 Cal. Rptr. 2d 396, *review granted and action deferred pending disposition of Briggs*, 966 P.2d 441, 79 Cal. Rptr. 2d 407 (1998), *review dismissed and cause remanded*, 970 P.2d 409, 81 Cal. Rptr. 2d 835 (1999); *Mission Oaks Ranch*, 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1, *disapproved by Briggs*, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr 2d 471, (3) two cases were from the Third District and, of those, one had been filed in Glenn County Superior Court: Kyle v. Carmon, 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303 (Ct. App. 1999); the other was brought in Nevada County Superior Court, Matson v. Dvorak, 40 Cal. App. 4th 539, 46 Cal. Rptr. 2d 880 (Ct. App. 1995), (4) seven cases were from the Fourth District and of those, five had been filed in Orange County Superior Court: DuPont Merck Pharm. Co. v. Superior Court, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Ct. App. 2000); *Conroy*, 70 Cal. App. 4th 1446, 83 Cal. Rptr. 2d 443; *Foothills Townhome Ass'n*, 65 Cal. App. 4th 688, 76 Cal. Rptr. 2d 516; Averill v. Superior Court, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996); Dixon v. Superior Court, 30 Cal. App. 4th 733, 36 Cal. Rptr. 2d 687 (Ct. App. 1994), and two in Riverside County Superior Court: *Coltrain*, 66 Cal. App. 4th 94, 77 Cal. Rptr. 2d 600; Ludwig v. Superior Court, 37 Cal. App. 4th 8, 43 Cal. Rptr. 2d 350 (Ct. App. 1995), (5) none of the reported cases were from the Fifth District, and (6) one case was from the Sixth District having been filed in Monterey County Superior Court: *Monterey Plaza Hotel*, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10. This simple analysis reveals that of the three counties chosen by the Judicial Council, none of the appellate SLAPP cases were originally filed in either Shasta or San Diego Counties, and only two of the cases were filed in Alameda County. Moreover, 58% of the 31 cases were filed in Los Angeles, Orange, or San Francisco Counties—areas that might

consultants were not hired at the beginning of the process so that their expertise could have been utilized in the data collection process.[357]

Based on its data (qualitative and quantitative), the Judicial Council concluded that "special anti-SLAPP motions are not very common."[358] Since the Judicial Council's conclusion rested on flawed data, it is uncertain whether this conclusion is true. In this regard, it must be emphasized that the consultants noted that "the finding that there were no motions to strike in the three selected jurisdictions does not prove or disprove the effectiveness of 425.16 'to prevent or eliminate SLAPPs.'"[359] In addition, there have been eleven new appellate cases in the short interval since the Judicial Council finished its data collection.[360] Since most cases are not appealed and are therefore unreported, this surge of reported appellate cases must be viewed

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more aptly fit the Canan-Pring criteria than the three chosen. It is also interesting that nearly 58% of the 74 new SLAPP case filings reported to the Judicial Council since November 1999 were also from Los Angeles, Orange, and San Francisco Counties. *See SLAPP Special Motion Log, available at California Courts: Reference: Courts—How to Use* (last modified May 10, 2000) <http://www.courtinfo.ca.gov/reference/4_courtshowto.htm#SLAPPs>.

357. Canan and Pring note that they had earlier learned for themselves that the random case sample approach used by the Judicial Council was not productive. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 2-3; *supra* Appendix 3, note 356 (discussing Canan and Pring's expertise concerning the likely location of SLAPP lawsuits).

358. JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 1, at 6. The Judicial Council also made some mathematical conclusions concerning the SLAPP case data it collected.

> None of the 822 cases examined in Alameda, San Diego, and Shasta Counties was found to involve a special motion to strike a SLAPP. Based on the total number of cases filed, these data suggest that special motions to strike SLAPPs occur in 1.3 percent or fewer of cases. Had these motions been more frequent, [Administrative Office of the Courts] staff would have had a 95% chance of discovering at least one.

Id. at 2. The Canan-Pring analysis suggested this conclusion had a variance factor of "($p<.05$)." *Id.*, Attachment 2, at 2.

359. *Id.*, Attachment 2, at 3.

360. *See supra* Appendix 3, note 345.

as "the tip of the iceberg."[361] Thus, it may well be likely that SLAPP cases and their need for the protections of the anti-SLAPP statute are much more common than the Judicial Council's imperfect data suggest. Hopefully, the enhanced ability to collect data since October 1999 will give a better overall picture of the statute's use. A weakness of the statute's amendment, however, is the almost voluntary nature of the data-filing feature.[362] Given the reluctance of the Judicial Council to be involved in future data collection and the likelihood of budget constraints, one cannot assume that the Council will make much effort to ensure there is compliance with the statute.[363]

Recommendation 2. Amend the statute to extend attorney fees to cover the full costs that filers have imposed on targets. Add "reasonably incurred in defending against the action" to the end of the first sentence of 425.16(c).

Judicial Council's View. As drafted, section 425.16 is unclear as to whether mandatory fees apply only to costs associated with the motion or costs associated with the entire action. The Legislature's clarification of this point would be helpful. Beyond this, the council does not endorse the consultants' specific proposed amendment and takes no position on the substantive issue of the appropriate extent of attorney fees.

Author's Comments. Since one appellate court has concluded that an award of attorney's fees and costs

361. JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 4; *see also supra* Appendix 3, text accompanying note 349 (commenting on other weaknesses in the focus on the 19 appellate decisions between 1993 and 1997).

362. *See supra* notes 46-47 and accompanying text.

363. *See* E-mail from Jacquelyn Harbert, Judicial Council, Administrative Office of the Courts, Research and Planning Unit, to author (Jan. 4, 2000) (on file with the *Loyola of Los Angeles Law Review*) (noting that the Administrative Office of the Courts was "working internally on additional approaches [beyond the information on the California courts' Web site] to publicizing this reporting requirement with administrative personnel in the trial courts"); *see also supra* note 47 and accompanying text (regarding the non-obviousness of the instructions for transmitting the required documents to the Judicial Council on the California courts' Web site).

pursuant to section 425.16 is limited to only those associated with the special motion to strike,[364] some trial courts have refused to make awards that encompass the full costs imposed on the SLAPPee before the order granting the motion to strike is made.[365] To clarify the statute's ambiguity on this point and to fulfill the statute's legislative purpose, there should be an amendment allowing full recovery of both costs and attorney's fees incurred in defending against the SLAPP action.

Recommendation 3. Amend the statute to control the judge's discretion regarding the motion-filing deadline. Add "whenever necessary or desirable to carry out the legislative intent in subsection (a)" to 425.16(f).

Judicial Council's View. The council believes that the legislative action recommended by the consultant[s] is not necessary because the statute already provides the court with sufficient discretion to extend the motion-filing deadlines.

Author's Comments. The issue of the filing deadline for the special motion to strike has not seemed to be a problem in the reported cases. Indeed, noting the provision of section 425.16(a) that the statute be interpreted broadly, one court has construed the statute to permit the filing of a motion to strike within sixty days from the filing of challenged amended counterclaims.[366] However, the Judicial Council's report

364. *See Lafayette Morehouse II*, 39 Cal. App. 4th at 1383-84, 46 Cal. Rptr. 2d at 544; *see also supra* notes 232-33 and accompanying text.

365. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 8 (discussing the consultants' concern about a "developing 'judicial gloss,'" which was limiting fee awards only to attorneys' work on the special motion to strike); *see also* Telephone Interview with Mark Goldowitz, Director of California Anti-SLAPP Project and sole practitioner specializing in section 425.16 defense (Jan. 4, 2000) (observing that not every court was granting discovery costs and attorney's fees associated with discovery).

366. *See* Globetrotter Software, Inc. v. Elan Computer Group, Inc., 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999). *But see DuPont Merck*, 78 Cal. App. 4th at 565, 92 Cal. Rptr. 2d at 758 (appellate court initially denied writ of

provided no clear picture of what is happening at the trial court level, and one cannot assume that there is no problem simply because the appellate decisions have not raised the issue. The consultants noted that SLAPPees and their counsel can take months "to identify their case as a SLAPP."[367] While they acknowledged that trial court judges are given discretion to extend the motion filing deadline, they believed it wise to have "language to guide the trial courts in their exercise of this discretion . . . so that abusive denials do not become a problem."[368] While Recommendation 3 may not be as critical as some others, it would be appropriate to amend the statute as suggested.

Recommendation 4. Amend the statute or the list of appealable orders in the Code of Civil Procedure to permit an immediate appeal of the denial of an anti-SLAPP motion.

Judicial Council's View. The council believes that the amendment proposed by the consultants is unnecessary because review by writ of mandate, which is currently available, is sufficient.

Author's Comments. The 1999 amendment to section 425.16 adopted Recommendation 4. New subsection (j) provides that any ruling granting or denying a special motion to strike is appealable.[369]

While there have been numerous appeals, the unsuccessful movant (SLAPPee) had no right of appeal prior to the 1999 amendment if the motion was denied. The SLAPPee could petition for a writ of mandate but those were rarely granted.[370] The SLAPPer, however,

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mandamus because the trial court record "failed to demonstrate permission was sought or obtained" to file the special motion to strike after 60 days from service of the complaint).

367. JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 9.

368. *Id.*; *see also supra* note 49.

369. *See* CAL. CIV. PROC. CODE § 425.16(j) ("An order granting or denying a special motion to strike shall be appealable under section 904.1.").

370. *See supra* notes 40-42 and accompanying text. A recent example of a SLAPP case in which a writ of mandate was denied is *DuPont Merck Pharm. Co. v. Superior Court*, 78 Cal. App. 4th 562, 92 Cal. Rptr. 2d 755 (Ct. App. 2000). DuPont Merck filed a special motion to dismiss a consumer fraud case

could appeal if the motion was granted and the complaint was dismissed.[371] The amendment advances the purpose of the statute by protecting the SLAPPee from having to incur defense costs of a full-blown trial until the issue of First Amendment rights is resolved.

Recommendation 5. Amend the statute by adding a sentence to 425.16(d) to clarify that the special motion to strike does not apply to so-called SLAPPbacks.[372] Possible language might be: "This section shall not apply to any cause of action arising from any cause of action which has been dismissed pursuant to a special motion to strike under this section."

Judicial Council's View. The council believes that the amendment proposed by the consultant[s] is unnecessary because the judge hearing the SLAPPback case can determine whether the special motion is meritorious or not.

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against the company on the grounds that it was merely exercising its petition and speech rights when it attempted to convince legislators, doctors, and insurance companies not to prescribe a generic version of the blood thinner Coumadin on the basis that it was dangerous. *See CA Supreme Court Grants Review in Suit Over Warfarin Generic*, 6 ANDREWS ANTITRUST LITIG. REP. 9 (Dec. 1998). The trial court agreed with the plaintiffs that section 425.16 did not apply because the company was only protecting its own interests, not a public interest. *See id.* DuPont Merck then sought a writ of mandate from the appellate court but its petition was denied. *See id.* Fortunately for the company, when it petitioned the California Supreme Court for review, that court directed the court of appeal to vacate its order denying mandate and hear the matter. *See* DuPont Merck Pharm. Co. v. Superior Court, No. S073419, 1999 Cal. LEXIS 1815 (Cal. Mar. 31, 1999). When the court of appeal considered the matter on the merits, it found that the trial court was wrong in concluding there was not a public issue. *See DuPont Merck*, 78 Cal. App. 4th at 566-67, 92 Cal. Rptr. 2d at 759; *supra* note 136. The court of appeal therefore remanded the case for consideration of "whether there was a probability plaintiffs would prevail." *DuPont Merck*, 78 Cal. App. 4th at 568, 92 Cal. Rptr. 2d at 760.

371. *See, e.g., Monterey Plaza Hotel*, 69 Cal. App. 4th 1057, 82 Cal. Rptr. 2d 10; *Macias*, 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222.

372. "SLAPP-backs are separate countersuits or counterclaims to SLAPPs, usually for abuse of process or malicious prosecution, by SLAPP defendants." Barker, *supra* note 11, at 431. An example of a SLAPPback is *Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 555, 264 Cal. Rptr. 883, 886 (Ct. App. 1989), wherein the court ordered Shell Oil to pay the plaintiff a verdict of $5.2 million after it sued for trade libel a consumer advocate who had complained to a state health agency about a Shell product used in home plumbing.

Author's Comments. The existence of section 425.16, permitting a SLAPPee to have a speedier remedy, would seem to obviate the need for bringing a SLAPP-back case.[373] However, currently the anti-SLAPP statute only provides a limited remedy—dismissal of the case and attorney's fees and costs for possibly only the special motion to strike. No remedy is provided for other damages, such as the extreme emotional distress that can be caused to the individual SLAPPee[374] or the loss of time from other endeavors. But recovery of such damages might be secured through a SLAPP-back suit against the SLAPPer.[375]

The problem is that if a prevailing SLAPPee files a SLAPP-back suit, the SLAPP-back defendant could file a special motion to strike under section 425.16. This would be possible because under the terms of subsection (e)(1), the basis of the suit against the SLAPP-back defendant would be "any written or oral statement or writing made before a . . . judicial proceeding"[376]—in other words, for the SLAPPer's acts in the underlying SLAPP case that has been dismissed. While the Judicial Council is right—"the judge hearing the SLAPP-back case can determine whether the special motion is meritorious or not"—the SLAPP-back plaintiff should not have to suffer such further harassment and its attendant costs, financial and otherwise. Since the SLAPP-back defendant would have already been identified by the court as a SLAPPer in the underlying

373. *See* Lucas v. Swanson & Dowdall, 53 Cal. App. 4th 98, 61 Cal. Rptr. 2d 507 (Ct. App. 1997) (noting in a malicious prosecution case brought by a SLAPPee who had been sued for libel and economic interference before the enactment of section 425.16 that if plaintiff had been able to use the anti-SLAPP statute, he likely would not have felt the need to bring the instant action).

374. *See supra* notes 16-19 and accompanying text.

375. *See* Garrison v. Baker, No. 98-17038, 2000 WL 206575 (9th Cir. Feb. 23, 2000) (finding that section 425.16 SLAPPee timely filed malicious prosecution action against SLAPPer).

376. CAL. CIV. PROC. CODE § 425.16(e)(1) (West Supp. 2000).

SLAPP case, he or she does not need protection from the statute. The statute should be amended as recommended by the consultants.

Recommendation 6. Amend the statute to control trial court lifting of the "stay" of all discovery proceedings upon the filing of the notice of the 425.16 motion. We would recommend an amendment deleting the last sentence of subsection (g) and inserting: "Discovery shall be disfavored. In permitting any discovery, the court shall limit it both as to means and subject to only that which is necessary and designed to uncover evidence directly relevant to the special motion to strike, most expeditiously and at least expense to the party from whom discovery is sought. To this end the court shall consider the following factors before permitting discovery: (1) whether the information sought goes to the hear to [sic[377]] the claim or defense of the party seeking discovery; (2) whether the party seeking discovery has made a showing on every other element of the claim or defense before any discovery is conducted; (3) what efforts the party seeking discovery has made to secure the information prior to filing the action; (4) whether the information is uniquely held by the party from whom discovery is sought; and (5) whether the party seeking discovery has exhausted all other sources of obtaining the needed information."

Judicial Council's View. The council believes that the statute currently provides sufficient discretion for judges to permit discovery after the filing of a special motion. Therefore, the consultants' proposed amendment relating to the "stay" of discovery upon the filing of a section 425.16 motion is not necessary.

Author's Comments. The consultants made this recommendation based on their overall research on

377. The original phrasing ("goes to the hear to the claim or defense") is unclear. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 12. The Judicial Council interpreted it as "goes to the hear[ing] to the claim or defense", *see id.* at 5-6, but this too is awkward at best and still somewhat unclear. This author, knowing her own typing foibles, suggests that Canan and Pring may have meant "goes to the *heart of* the claim or defense."

SLAPPs in which they found that "next to the filing of the SLAPP itself, 'discovery' is the most effective chilling abuse [SLAPPers] have."[378] The recommendation seems to be a reaction to the comments of three SLAPPer attorneys who expressed objections to the strictures of section 425.16(g)'s stay of all discovery proceedings.[379] In response to these comments the consultants expressed the view that section 425.16(g) "is already too liberal in allowing the court 'for good cause' (with no guidelines) to lift the stay and allow filers to proceed with discovery before the motion is ruled on."[380]

An examination of California appellate court rulings concerning discovery seems to suggest that the consultants' worries may be overblown. Where these reported opinions have expressly considered discovery, none has been allowed under section 425.16.[381] The appellate courts have also been strict about requiring section 425.16(g)'s procedures be followed and have refused to consider any discovery absent a noticed motion which specifies what and why discovery is needed.[382] Even when there has been a proper notice, the appellate courts have still scrutinized the request carefully with an eye to the purposes of section 425.16.[383]

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378. *Id.*, Attachment 2, at 10; *see also* PRING & CANAN, *supra* note 29, at 37 (discussing discovery abuse in a SLAPP suit filed in California before the enactment of section 425.16).

379. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 10.

380. *Id.*

381. *See generally supra* Part III.D. *But see* Rogers v. Home Shopping Network, Inc., 57 F. Supp. 2d 973, 985 (C.D. Cal. 1999) (allowing discovery before hearing a special motion to strike in federal district court).

382. The fact that the California appellate courts have strictly applied section 425.16(g) seemed influential on a federal court's finding that the anti-SLAPP provision collided with the Federal Rules of Civil Procedure 8, 12 and 56. *See Rogers*, 57 F. Supp. 2d at 978, 982.

383. *See* Sipple v. Foundation for Nat'l Progress, 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677, 690 (Ct. App. 1999) (affirming the trial court's denial of

> However, in the responses to the Judicial Council's survey of attorneys involved in the nineteen SLAPP appellate cases, there is one anecdotal report about a trial court allowing a SLAPPer to engage in discovery which increased the SLAPPee's defense costs substantially.[384] Also, the trial court in *Briggs v. Eden Council of Hope and Opportunity*[385] allowed major discovery—twelve depositions—although this fact only comes out as part of the discussion of attorney's fees and costs award in the unpublished decision on remand following the supreme court opinion.[386] It is thus very likely that the trial courts are allowing discovery more regularly than it appears from a perusal of the appellate decisions,[387] although this cannot be known for certain because of the flawed database relied on by the Judicial Council. If the California trial courts are permitting discovery without regard to the appellate precedents, guidelines such as those suggested by the consultants would be appropriate.

Recommendation 7. Amend the statute to add new remedies. We recommend the language in our "model bill" section (5)(g)(2): "such additional sanctions upon the responding party

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discovery where plaintiff sought far-ranging discovery which would not result in information that would allow plaintiff to meet its burden of proof).

384. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Tony J. Tanke to James Brighton (Jan. 28, 1998)). The suit in which the discovery was allowed was also the second SLAPP action brought by the plaintiff in related matters. The SLAPPee did eventually prevail in the appellate court, but the plaintiff avoided paying attorney's fees and costs in both suits by filing bankruptcy. *See id.*; *infra* Appendix 3, notes 390-92 and accompanying text.

385. *Briggs II*, No. A072446 & A074357, slip op. (Cal. Ct. App. Oct. 19, 1999).

386. *See id.* at 14; *supra* note 234; *see also* Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecomms. Eng'rs, 49 Cal. App. 4th 1591, 1597, 57 Cal. Rptr. 2d 491, 494 (Ct. App. 1996) (permitting limited discovery in trial court), *disapproved on other grounds by* Briggs v. Eden Council of Hope and Opportunity, 19 Cal. 4th 1106, 969 P.2d 564, 81 Cal. Rptr. 2d 471 (1999).

387. As to the possibility that discovery is being allowed more frequently than the appellate decisions suggest, consider *infra*, Appendix 3, note 399.

[plaintiff filer], its attorneys, or law firms as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated."[388]

Judicial Council's View. The council does not endorse the consultants' specific proposed amendment and takes no position on the substantive legal issue of whether additional sanctions should be authorized.

Author's Comments. The consultants believe that the availability of sanctions against both the SLAPP filer and his or her attorney, in addition to attorney's fees and costs for the successful SLAPPee, can act as a deterrent to future SLAPPs.[389] The consultants may have been influenced to make this specific recommendation to the Judicial Council because of a situation related as one response of the surveyed attorneys in the nineteen SLAPP appellate cases. This responding attorney represented the SLAPPee in *Evans v. Unkow*[390] and also represented a different SLAPPee in a related case brought by the *Evans v. Unkow* SLAPPer.[391] The defendant-SLAPPees in both cases prevailed in the court of appeal, yet the SLAPPer avoided paying attorney fees and costs by filing bankruptcy. SLAPPee's counsel was also unsuccessful in a motion for sanctions in the second suit.[392] Not surprisingly the attorney

388. The model bill referred to in Recommendation 7 can be found in PRING & CANAN. *See* PRING & CANAN, *supra* note 29, at 201-05. Delaware's law is an example of a statute that permits additional remedies. *See* 10 DEL. CODE ANN. § 8138(a) (1999) (permitting compensatory damages and even punitive damages in certain situations).

389. *See* PRING & CANAN, *supra* note 29, at 205.

390. 38 Cal. App. 4th 1490, 45 Cal. Rptr. 2d 624 (Ct. App. 1995).

391. In *Unkow*, the SLAPPer, an East Palo Alto Sanitary District Board member, sued Mr. Unkow and nine others who had signed and circulated a recall petition. *See id.* at 1493-94, 45 Cal. Rptr. 2d at 626. In the second suit, the same SLAPPer sued another member of the Sanitary District Board, claiming he was the instigator of the recall campaign and drafter of the recall petition. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Tony J. Tanke to James Brighton (Jan. 28, 1998)).

392. *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Tony J. Tanke to James Brighton (Jan. 28, 1998)). Attorney's

> responding to the Judicial Council's survey suggested that "the SLAPP Suit Statute be amended to provide remedies similar to those in the vexatious litigation statute, i.e., court orders barring further suits, requiring the posting of bonds, etc."
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> While one might hope that such an incident is rare, it does reveal a significant loophole in the deterrence aspects of the anti-SLAPP statute. "If a plaintiff has economic resources, he or she will presumably respond to the mandatory attorney fee provision by refraining from SLAPP suit litigation."[393] But if a person is immune from economic sanctions, he or she can abuse the judicial system with impunity absent some other sanction form. While one might argue that there are existing vexatious litigation statutes that would be available in egregious cases such as the anecdote,[394] providing within the statute itself that a court has the discretion to impose any other necessary sanctions will better alert the courts, the parties and their attorneys to that possibility.[395]

This discussion has provided an overview of the report the Judicial Council prepared for the legislature on SLAPPs. As this author's comments emphasize, the biggest drawback of this report is

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fees in the first case were $35,000 and in the second case, $75,000. The defense of the second case was more costly because the trial court permitted the SLAPPer to engage in discovery. *See id.*; *see also supra* Appendix 3, note 384 and accompanying text.

393. JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 8 (Letter from Tony J. Tanke to James Brighton (Jan. 28, 1998)).

394. *See* CAL. CIV. PROC. CODE § 128.5 (West Supp. 2000) (permitting a trial court to order a party to pay opponent's expenses where there have been bad faith actions or tactics); *id.* § 128.7 (providing for monetary sanctions for unwarranted or harassing pleadings).

395. Other authors have agreed that additional remedies are appropriate. *See* Barker, *supra* note 11, at 452-53; Braun, *supra* note 221, at 1062-64; *supra* note 221; *see also* Richard Zitrin & Carol M. Langford, *Striking Back at SLAPPs*, THE RECORDER, Apr. 28, 1999, at 5 ("[C]urrent ethics rules do little to discipline lawyers for filing a SLAPP. Adding teeth to anti-SLAPP laws through significant disciplinary sanctions for lawyers guilty of filing them would be a step in the right direction.").

its very flawed database. Since the principal charge to the Judicial Council was to report "on the frequency and outcome of special motions made pursuant to [section 425.16],"[396] the flawed database makes any conclusion in the report suspect, especially given that the Judicial Council reaches the determination that all is copacetic. Yet, as the consultants hired by the Judicial Council indicated more than once in their analysis of the data, the Council's two key assumptions are unsupported: (1) that anti-SLAPP motions to strike are uncommon—a conclusion based primarily on a misconceived random court docket search for one year in three counties that may not even be representative of the locales where such cases are likely to be filed;[397] and (2) that what goes on at the trial court level is the same as what goes on in a mere nineteen court of appeal decisions.[398] The consultants had a real concern that the true picture had not been seen by the Judicial Council's efforts,[399] and they tried to provide

396. CAL. CIV. PROC. CODE § 425.16(i) (West Supp. 2000).

397. *See supra* Appendix 3, note 356.

398. *See supra* Appendix 3, note 361 and accompanying text.

399. The consultants were particularly struck by a comment made by one of the responding attorneys who had represented SLAPPees in three other suits besides *Averill v. Superior Court*, 42 Cal. App. 4th 1170, 50 Cal. Rptr. 2d 62 (Ct. App. 1996). *See* JUDICIAL COUNCIL SLAPP REPORT, *supra* note 8, Attachment 2, at 6. That comment was:

> In my view, Code of Civil Procedure § 425.16 is intended to be a powerful tool in dealing with SLAPP suits. From my perspective, however, there has been considerable reluctance by the trial courts to grant special motions to strike. The summary nature of the proceeding is, in my view, what causes the court's reluctance to grant these motions. It is my sense that judges feel it is unfair to plaintiffs to require them to be able to prove a case at the outset without the benefit of extensive discovery. Because of the summary nature of the proceeding, and because it occurs at the outset of the case, it is my impression that judges are not enthused about granting these motions, but would rather allow the case to proceed along the normal course.

Id., Attachment 8 (Letter from Robert A. Walker to Judicial Council of California (Jan. 20, 1998)). The consultants reaction to this comment was:

> This is a significant observation—that trial court judges are "reluctant" to dismiss SLAPPs—and is confirmed by our study [citing to PRING & CANAN, *supra* note 29, Chap. 8 (on "Judicial Cures")]. Needless to say, such reluctance to dismiss would vitiate the Legislature's central purpose in adopting 425.16—to end the chill of SLAPPs on public participation at as early a stage as possible.

See id., Attachment 2, at 6. The reluctance to grant a section 425.16 motion

recommendations to ensure problems did not exist. However, the Judicial Council largely treated those recommendations with a cavalier attitude. Since the legislature has already adopted Recommendations 1 and 4,[400] one can assume that it is viewing the consultants' recommendations with more seriousness. It is therefore likely that there will be additional amendments to California's anti-SLAPP statute.[401]

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before discovery by the trial judge, albeit by a federal district court judge, in *Rogers*, 57 F. Supp. 2d 973, is palpable. That reluctance goes a long way in explaining his misunderstanding of the significance of allowing broad discovery in a SLAPP suit and his strained interpretation of *Erie* to find that the motion hearing timing and discovery provisions of section 425.16 conflicted with the Federal Rules of Civil Procedure. *See supra* notes 265-77 and accompanying text.

400. *See supra* Appendix 3, notes 354-55, 369 and accompanying text.

401. It is also expected that those in favor of amendments to enact these recommendations will continue lobbying efforts with the Legislature. *See* Telephone Interview with Mark Goldowitz, *supra* note 296 (noting that the anti-SLAPP coalition of supporters was growing stronger and stronger).