UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JOHN D. HAYWOOD, Plaintiff, v. ST. MICHAEL'S COLLEGE, LOGAN R. SPILLANE and CHRISTOPHER HARDY, Defendants.	**Docket No. 2:12-CV-164**

SUPPLEMENTAL FILING REGARDING ANTI-SLAPP MOTION PROCEDURE

NOW COMES St. Michael's College ("St. Michael's" or "Defendant"), by and through its attorneys, and files this Supplemental Filing Regarding SLAPP Motion Procedure, as requested by the Court at Oral Argument on November 28, 2012. The Court requested further information regarding the procedures and burdens under similar anti-SLAPP statutes around the country, the application of constitutional defamation burdens to the Vermont anti-SLAPP statute, and which defendants may be allowed to utilize the anti-SLAPP statute. Defendant provides answers below.

MEMORANDUM

I. Defendants Have Made An Adequate Showing For This Court To Proceed With Deciding Anti-SLAPP Motion.

The burden that a Defendant must meet to file a special motion to strike under Vermont's anti-SLAPP statute is extremely low both as defined in the statute itself and in comparison to other anti-SLAPP statutes around the country. Defendant has met that burden, and Plaintiff has

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not even attempted to meet his burden on rebuttal. Accordingly, this motion is ripe for a decision in movant's favor.

As an initial matter, there are no anti-SLAPP statutes drafted exactly like Vermont's. Broadly speaking, however, the anti-SLAPP statutes break down into two categories. First, there are those that require an initial showing by the defendant (the anti-SLAPP movant) that the speech, or other constitutionally protected activity, be conducted in the course of petitioning the government, either in a legislative or regulatory matter. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-752; *Tennenbaum v. Arizona City Sanitary Dist.*, 799 F. Supp. 2d 1083, 1086 (D. Ariz. 2011); Ark. Code Ann. § 16-63-503; Mo. Ann. Stat. § 537.528; Del. Code Ann. tit. 10, § 8136; Mass. Gen. Laws Ann. ch. 231, § 59H; Me. Rev. Stat. tit. 14, § 556. Absent such a showing a defendant may not bring an anti-SLAPP motion.

The second category of anti-SLAPP statute has a broader definition that allows anti-SLAPP motions to be filed in cases where defamation has been alleged in the context of speaking about any matter of public interest, not simply during the course of petitioning the government. *See, e.g.*, Cal. Civ. Proc. Code § 425.16; IL ST CH 735 § 110/15; *Wright Dev. Group, LLC v. Walsh*, 238 Ill. 2d 620, 639, 939 N.E.2d 389, 399 (2010). Vermont falls within this second, broader category.

Ultimately, the pleadings in this case paint a vivid picture of an outlier case that can be addressed within the standards of a Motion to Dismiss, based on the verified pleadings and exhibits as filed. However, if the Court believes that further evidence is necessary the defendants request the matter be set for submission of further affidavits or an evidentiary hearing.[1]

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[1] Where a Court has decided the issue, defendants have been allowed to continue litigating a special motion to strike even after a plaintiff has voluntarily withdrawn a defamation suit with prejudice. *Coltrain v. Shewalter*, 66 Cal.

No further evidence, however, should be necessary. Defendant elucidated in its original Special Motion to Strike the low bar it needs to reach in order to file an anti-SLAPP motion as set forth in 12 V.S.A. § 1041—essentially, simply that the speech be about a matter of public interest. Nothing other than Plaintiff's Complaint, taken as true, is necessary to show that the published homework assignment in question falls within this category and thus meets the initial test for filing a special motion to strike. The Complaint, brought by a former candidate for president of the United States and concerning a student journalism assignment describing his positions, has provided this Court with all that is necessary and no further evidence is needed.

II. Plaintiff Must Meet the Heightened Sullivan Standard In Order To Overcome the Burden Imposed by the Anti-SLAPP statute.

Plaintiff has failed to meet his burden under the anti-SLAPP statute because he has not submitted any responsive legal or evidentiary argument. This should end the inquiry.

However, to the extent the Court considers the burden the Plaintiff must meet to overcome the motion to strike, this Court should conclude that the Plaintiff must be able to show he had an arguable basis in law to overcome the heightened *Sullivan* standard placed upon public figure libel plaintiffs. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Plaintiff cannot do so.

A case decided under California's anti-SLAPP statute is persuasive. As in Vermont, California's anti-SLAPP statute is not constrained to the context of petitioning the government. There, a plaintiff sued for libel over speech that concerned a matter of public interest, and the defendant filed a special motion to strike. *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 27 Cal. Rptr. 3d 863 (2005). The Court held that the plaintiff, whom the Court decided was a limited public figure for the purpose of the controversy at issue, could not defeat the motion to

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App. 4th 94, 108, 77 Cal. Rptr. 2d 600, 608 (1998). By analogy, this anti-SLAPP motion should be allowed to be fully litigated even if this Court chooses to dismiss Plaintiff's claims.

strike unless it showed that it could have prevailed in its lawsuit under the heightened *Sullivan* standard required of public figure libel plaintiffs. The Court stated that "[i]n the context of an anti-SLAPP suit, courts must consider the pertinent burden of proof in ascertaining whether the plaintiff has shown a probability of prevailing." The Court went on to explain that, therefore, "limited purpose public figures such as respondents who sue for defamation must establish a probability that they can produce clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity." *Id*. at 1578.

Ampex shows that this Court should use the *Sullivan* constitutional malice standard as the legal standard Plaintiff must show he could meet before he can defeat the Special Motion to Strike, because that is the legal standard that applies to a public figure who brings a libel suit. If he cannot meet the standard he has failed to show that he had "any arguable basis in law" to bring the suit, as required by 12 V.S.A. § 1041(e)(1).

As to the anti-Slapp statute, Haywood must carry two burdens at this point regarding the special motion to strike. He must convince this Court that he pled or could conceivably prove: "(A) the defendant's exercise of his or her right to freedom of speech and to petition was devoid of any reasonable factual support and any arguable basis in law;" *and* "(B) the defendant's acts caused actual injury to the plaintiff." 12 V.S.A. § 1041(e)(l).

Haywood cannot carry either burden, even within the lower standard of a Rule 12 motion. He simply has not alleged any facts or made any evidentiary proffer that would allow him to conceivably carry either of these burdens.

Haywood has not pled or pointed to any argument that the student's homework assignment was "devoid of reasonable factual support and any arguable basis in law" as the

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statute requires. Mr. Haywood acknowledged that the students had reviewed his web site, and conducted interviews of the candidate and the candidate's friends. *As a matter of law*, this is at least *some* "factual support" and is at least an "arguable" basis for the student's summary. Under these facts (as pled and argued), Mr. Haywood is not entitled to go forward on his theory of the case which must be that the student's homework was completely "devoid" of factual or arguable basis.

Secondly, Haywood has not pled or argued any recognizable actual injury. *As a matter of law*, Haywood does not plead or argue any injury which the law allows.

Further, as the pleadings and argument establish that Mr. Haywood has no reasonable probability of proving by a clear and convincing standard actual malice within *Sullivan*, the matter is ripe for dismissal under the anti-SLAPP statute and under the motion to dismiss. Haywood's allegation that the interviews were conducted by the students for the purpose of pressuring Haywood to drop from the race is purely speculative and neither logically nor legally credible. Haywood's oral argument showed that he could offer no motive or proof for this conjecture; it is entirely invented. Haywood's own pleadings admit that the students conducted the interviews for the purpose of completing a homework assignment. This Court should confidently rule that there has been no serious allegation of *Sullivan* malice and no likelihood of Mr. Haywood proving by a clear and convincing standard actual malice.

III. The Term "Defendant" Refers To All Defendants, and Is Not Limited by the Statute.

St. Michael's should not be barred from gaining the relief afforded by a special motion to strike. An extensive review of case law from around the nation does not reveal any precedent that addresses the Court's question as to whether all the defendants may avail themselves of the anti-SLAPP statute, or whether only defendants Spillane and Hardy may. St. Michael's

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reiterates here what it stated at oral argument. First, the statute itself grants the right to bring an anti-SLAPP motion to any "defendant," and never states that a particular type of defendant may not avail itself of the remedy. Second, the purpose of the statute—to protect free speech—would not be furthered by preventing those who provide a forum for speech (whether that forum was online or in a classroom) from availing themselves of the anti-SLAPP motion. A speaker needs a forum in which to speak, and a plaintiff discourages free speech through frivolous litigation against the forum just as surely as a plaintiff discourages free speech through frivolous litigation against the speaker.

Dated at Burlington, Vermont this 5th day of December, 2012.

DINSE, KNAPP & McANDREW, P.C.

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CERTIFICATE OF SERVICE

I, W. Scott Fewell, Esq., certify that on December 5, 2012 , I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

William B. Towle, Esq.

A copy of the foregoing has also been served upon the following parties by mailing a copy thereof via U.S. first class, postage prepaid mail, to counsel of record at:

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