

S214058

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PATRICIA J. BARRY

Plaintiff and Appellant,

v.

THE STATE BAR OF CALIFORNIA,

Defendant and Respondent.

SUPREME COURT
FILED

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After a Published Decision by the Court of Appeal Second Appellate District, Division Two Case No. B242054, Reversing a Judgment Entered by the Superior Court for the County of Los Angeles, Case No. BC452239, The Honorable Deirdre Hill presiding

OPENING BRIEF OF DEFENDANT AND RESPONDENT
(The Petitioner in this Court)

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I. ISSUES FOR REVIEW

Are attorneys' fees under the anti-SLAPP statute recoverable under Code of Civil Procedure section 425.16, subdivision (c), where the reason why a plaintiff has no reasonable probability of prevailing on the merits is a determination that the court lacks subject matter jurisdiction over the dispute?

II. SUMMARY OF ARGUMENT

Decisions about attorney licensing and discipline ultimately rest within the sole judicial control of this Court. As a result, the lower California courts have no subject matter jurisdiction to hear attorney admissions and discipline cases. Nonetheless, plaintiffs who feel aggrieved by the State Bar's proceedings or with the decisions of this Court in admissions or disciplinary matters bring civil actions in superior court to enjoin the State Bar from carrying out its functions, to reverse this Court's final decisions in those proceedings, or to obtain damages, even though such actions are clearly barred by the lack of subject matter jurisdiction and well-established governmental immunities. These meritless actions are often brought to harass and retaliate against the employees of the State Bar and the judges of the State Bar Court who are carrying out their functions as the administrative arm of this Court.

One of the most effective tools California law provides against meritless lawsuits is the anti-SLAPP statute, Civil Code section 425.16 *et*

seq. The anti-SLAPP statute is designed to provide for fast, low cost dismissal of suits brought in response to constitutionally protected speech and petitioning activities (such as, here, bringing disciplinary charges against an attorney). The anti-SLAPP statute not only stays discovery and requires a plaintiff to show that his or her case is meritorious, it also provides for attorneys' fees and costs to the prevailing party. Those fee awards serve as a meaningful deterrent to a litigant that brings lawsuits, not to win, but to harass and burden the defendant.

That is what happened here.

After disciplinary charges were brought against her, Patricia Barry *stipulated* to a two month suspension of her law license and probation. She then attempted to recant her stipulation and asked this Court to set it aside and dismiss the underlying disciplinary charges against her. The Court denied Ms. Barry's petition and imposed the agreed to discipline. Ms. Barry then sued the State Bar of California in superior court, seeking restoration of her license and monetary damages. The trial court correctly found that Ms. Barry's lawsuit falls within the anti-SLAPP statute, and that she had no probability of success because the superior court had no power to grant the requested relief. It awarded \$2,575 in attorneys' fees to the State Bar.

Ms. Barry did not appeal the anti-SLAPP dismissal, but did appeal the award of attorneys' fees, contending that because her lawsuit was not one the superior court had the power to hear, the court could not award fees

against her under the anti-SLAPP statute. The court of appeal agreed and reversed the fee award (and awarded Ms. Barry her costs on appeal).

In doing so, the court opened an enormous hole in anti-SLAPP jurisprudence, essentially finding that a SLAPP plaintiff can avoid the anti-SLAPP statute by bringing suit in a court without jurisdiction.

The court of appeal's decision is wrong on several levels. First, the court misunderstood the function of an anti-SLAPP motion. The anti-SLAPP motion is one of many procedural vehicles for challenging a complaint. Just like demurrers, motions to strike, and summary judgment motions, an anti-SLAPP motion should be allowed where the basis for dismissal is that the lawsuit was brought in the wrong court even though, like those other motions, an anti-SLAPP motion is often dispositive of the merits of the suit. Thus, although an order of dismissal in granting an anti-SLAPP motion may sometimes constitute a decision "on the merits" for res judicata purposes, it does not follow that the anti-SLAPP statute is unavailable if a SLAPP plaintiff asserts a claim that the trial court is without jurisdiction to hear.

Second, the court of appeal's reasoning disregards analogous circumstances in cases where the courts have awarded fees, costs, or other sanctions despite a lack of subject matter jurisdiction in the underlying claims. The court always has jurisdiction to evaluate its jurisdiction, and

that authority includes awarding costs, fees, sanctions, and other remedies directed at improperly filed lawsuits.

Third, the court of appeal's unprecedented decision creates an enormous breach in the protection provided by the anti-SLAPP statute. A SLAPP plaintiff is less interested in winning than in harassing the defendant or chilling the defendant's future conduct. Under the logic applied by the court of appeal, a SLAPP plaintiff will avoid the anti-SLAPP statute by bringing an action in a court without jurisdiction. Such a result cannot be squared with the purpose or language of the anti-SLAPP statute.

For these reasons, the State Bar respectfully requests this Court to reverse the decision of the court of appeal and affirm the trial court's fee award in favor of the State Bar.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. CALIFORNIA'S ATTORNEY DISCIPLINARY SYSTEM

No one may practice law in California without being an active member of the State Bar of California, admitted to practice by the California Supreme Court. (Bus. & Prof. Code, §§ 6064, 6125.) This Court controls both admissions and attorney discipline (including suspension and disbarment).(*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557-58 [216 Cal.Rptr. 367].) This Court's control over these issues is absolute. (*Ibid.*)

The State Bar of California acts as this Court's administrative arm for purposes of admission, discipline, and regulation of attorneys. (*In re*

Rose (2000) 22 Cal.4th 430, 438-446 [93 Cal.Rptr.2d 298]; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599-600 [79 Cal.Rptr.2d 836].) Attorney discipline proceedings are prosecuted by the State Bar's Office of Chief Trial Counsel ("OCTC") before the State Bar Court. (Bus. & Prof. Code, § 6079.5; Rules Proc. of State Bar, rule 5.4, subd. (16).) The State Bar Court provides trial and appellate proceedings, resulting in findings and a disciplinary recommendation to this Court. (Cal. Rules of Court, rule 9.12; Rules Proc. of State Bar, rules 5.111, 5.151, 5.155.) The State Bar Court does not actually impose any discipline. (*In re Rose, supra*, 22 Cal.4th at p. 439.) All State Bar Court recommendations are subject to review by this Court, which makes the actual and final disciplinary decision. (*Id.* at pp. 443-45.)

B. MS. BARRY'S STIPULATED DISCIPLINE AND SUBSEQUENT SLAPP SUIT

In April 2010, Ms. Barry and OCTC entered into a Stipulation Re Facts, Conclusions of Law and Disposition related to two State Bar disciplinary cases against Ms. Barry. (Respondent's Appendix ["RA"] pp. 1-24.) The Stipulation provided for a two-year suspension stayed with actual suspension of 60-days of Ms. Barry's license, and a two year probationary period. (RA p. 4.) On October 6, 2010, the recommendation was transmitted to this Court for appropriate disposition. (Docket, Case S187076.)

By December 2010, however, Ms. Barry had changed her mind and she filed a petition for review with this Court challenging the disciplinary recommendation to which she had stipulated. A week later, while her petition for review was pending,¹ she filed this superior court action, which seeks the same relief as well as monetary damages, a jury trial on the State Bar disciplinary charges, and a host of structural changes to the State Bar. (Appellant's Appendix ["AA"] pp. 1-7.)

The State Bar filed a demurrer to the complaint, as well as a special motion to strike under the anti-SLAPP statute. (AA pp. 8-12.) The superior court granted the motion to strike, and overruled the demurrer as moot. (AA pp. 16-23.) The State Bar then requested \$2,575.04 in attorneys' fees under Code of Civil Procedure section 425.16, subdivision (c), which requires the award of attorneys' fees to the defendant if the anti-SLAPP motion is granted. (AA p. 26.) After the superior court granted that fee motion and awarded the amount requested (AA p. 44), Ms. Barry appealed from that order.

On appeal, the Second Appellate District recognized that superior courts have no power to review attorney disciplinary actions. The court of appeal proceeded then to conclude that "[t]he trial court's lack of subject

¹ This Court denied Ms. Barry's writ and suspended her from the practice of law pursuant to the terms of the stipulation. (Docket, Case No. S187076 [6/29/2011]).

matter jurisdiction in this case precluded it from ruling on the State Bar's anti-SLAPP motion, an adjudication that necessarily involved a determination of the merits of plaintiff's claims." (*Barry v. State Bar of California* (2013) 161 Cal.Rptr.3d 117, 119, review granted November 26, 2013 and opinion superseded, 312 P.3d 1071.) Then, the court of appeal reversed the fee award in favor of the State Bar and awarded Barry her costs on appeal, reasoning that "Because the trial court had no jurisdiction to rule on the anti-SLAPP motion, it also lacked jurisdiction to award attorney fees under section 425.16, subdivision (c)." (*Id.* at p. 120.)

On November 26, 2013, this Court granted the State Bar's Petition for Review. (Docket, Case No. S214058.)

IV. ARGUMENT

A. THE ANTI-SLAPP STATUTE IS DESIGNED TO PREVENT ABUSE OF THE JUDICIAL SYSTEM

Enacted in 1992, California's anti-SLAPP statute, Code of Civil Procedure section 425.16, was designed to combat the "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." (Code Civ. Proc., § 425.16, subd. (a).) The Legislature was attempting to prevent such suits from chilling rights "through abuse of the judicial process." (*Ibid.*) As this Court has explained,

While SLAPP suits masquerade as ordinary lawsuits ... they are generally meritless suits brought primarily to chill the

exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right.

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 [109 Cal.Rptr.3d 329] [citation omitted].)

The ordinary deterrents to meritless litigation are insufficient to deter SLAPP suits because the purpose of a SLAPP suit is not winning, but rather harassment of the defendant. “Because winning is not a SLAPP plaintiff’s primary motivation, defendants’ traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.” (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 817 [33 Cal.Rptr.2d 446], overruled on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53 [124 Cal.Rptr.2d 507].)

As a result, the anti-SLAPP statute provides three additional protections to defendants. First, the statute “set[s] up a mechanism through which complaints that arise from the exercise of free speech rights ‘can be evaluated at an early stage of the litigation process’ and resolved expeditiously.” (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [112 Cal.Rptr.2d 397] [citation omitted].) The Legislature intended the anti-SLAPP statute “to prevent SLAPPs by ending them early and without great cost to the SLAPP target.” (*Equilon Enterprises, supra*, 29 Cal.4th at p. 65 [citation omitted].)

Second, the anti-SLAPP statute imposes an automatic stay of discovery upon filing of an anti-SLAPP motion.² (Code Civ. Proc., § 425.16, subd. (g).) Discovery may only be conducted during the pendency of the motion by leave of court. (*Ibid.*) This discovery stay furthers the legislative goal of protecting SLAPP targets from the cost of litigation. (See *Equilon Enterprises, supra*, 29 Cal.4th at p. 65 [noting that the “short time frame for anti-SLAPP filings and hearings” and the “stay of discovery” pending resolution of the motion evidences the Legislature’s intent to minimize the litigation costs of SLAPP targets].)

Third, the anti-SLAPP statute provides for mandatory fees where an anti-SLAPP motion is granted. (Code Civ. Proc., § 425.16, subd. (c)(1).) “The anti-SLAPP statute reflects the Legislature’s ‘strong preference for awarding attorney fees to successful defendants.’” (*City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 782 [142 Cal.Rptr.3d 74] [citations omitted]; see *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 [46 Cal.Rptr.3d 606] [“the Legislature has directed that the statute ‘be broadly construed.’”] [citation omitted].)

² This stay is particularly important to the State Bar as the pro se litigants who frequently sue it commonly seek wide ranging discovery from State Bar prosecutors, investigators, and the Judges of the State Bar Court under the guise of challenging the attorney admissions and disciplinary system.

B. MS. BARRY'S SUIT WAS A SLAPP SUIT

An anti-SLAPP motion requires the court to engage in a two-step process. First, the court must decide whether the defendant “has made a threshold showing that the challenged cause of action is one arising from protected activity,” that is, that the particular causes of action to be stricken are covered by the anti-SLAPP statute. (*Equilon Enterprises, LLC, supra*, 29 Cal.4th at p. 67.) Once the court determines that the defendant has made that prima facie showing, as here, the burden shifts to the plaintiff to “demonstrate[] a probability of prevailing on the claim.” (*Ibid.*)

Each prong was clearly met here. The State Bar disciplinary proceedings Ms. Barry was suing to stop (and seek damages for) were clearly protected by the right to petition. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [81 Cal.Rptr.2d 471]; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929 [116 Cal.Rptr.2d 187]; *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1111 [57 Cal.Rptr.2d 207].) As the court of appeal recognized, Ms. Barry clearly had no probability of prevailing on her claims, because only this Court has jurisdiction concerning State Bar Court proceedings. (*Obrien v. Jones* (2000) 23 Cal.4th 40, 48 [96

Cal.Rptr.2d 205]; *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1710 [71 Cal.Rptr.3d 207].)³

C. MS. BARRY'S CASE IS FAR FROM UNIQUE

Regrettably, Ms. Barry is not the first, nor will she be the last, of the State Bar's constituency to seek to interfere with this Court's original jurisdiction over attorney admissions and discipline and with the State Bar's function as this Court's administrative arm by filing suit against the State Bar, and its officials and employees. As described in the request for judicial notice submitted with the petition for review (which was granted on November 26, 2013), in the last six years alone the State Bar has been sued more than 20 times in state superior court – in some cases by the same disgruntled disciplined attorney filing suit over and over again, despite this Court's original jurisdiction over attorney admissions and discipline. In all of these cases, the State Bar is subject to the normal burdens of litigation – evidentiary preservations, discovery, including depositions, document productions and propounded written discovery, and motion practice – until such time as the case is dismissed, all for a case where the superior court lacks jurisdiction.⁴

³ Of course, the holding that this lawsuit qualifies as a SLAPP and lacks any merit is fixed and not presented for further review here. Ms. Barry did not challenge these holdings on appeal.

⁴ The State Bar is also routinely sued by individuals who file complaints with the State Bar regarding either their own attorney or

D. LACK OF SUPERIOR COURT JURISDICTION TO INTERFERE WITH ATTORNEY ADMISSIONS AND DISCIPLINARY PROCEEDINGS DOES NOT IMMUNIZE A SLAPP PLAINTIFF FROM FEES UNDER THE ANTI-SLAPP STATUTE

While not questioning the superior court's finding that Ms. Barry's case falls within the anti-SLAPP statute, the court of appeal held that the superior court's lack of power to review disciplinary proceedings also meant the superior court had no power to grant the anti-SLAPP motion⁵ or to award anti-SLAPP fees. That holding misconstrues the nature of both an anti-SLAPP motion and an anti-SLAPP fee and cost award.

1. *A dismissal under the anti-SLAPP statute is not barred where the plaintiff's lack of probability of prevailing arises from an absence of jurisdiction*

The court of appeal's opinion is based on the view that a decision on an anti-SLAPP motion "necessarily involved a determination on the merits of plaintiff's claims." (*Barry v. State Bar of California* (2013) 218 Cal.App.4th 1435, 1437 [161 Cal.Rptr. 1435], citing *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 [25 Cal.Rptr.3d 298]

sometimes opposing counsel, and when they are dissatisfied with the resolution of their complaint, they, too, file suit in the superior court. Disciplined attorneys, unsuccessful applicants, and members of the public alike also file suit in federal court challenging the State Bar's performance of its function as this court's administrative arm in attorney admissions and discipline.

⁵ As noted above, that question was not presented to the court of appeal, as Barry did not appeal the granting of the anti-SLAPP motion.

[“*Varian Medical*”].) The court of appeal reasoned that, because a lack of subject matter jurisdiction means a court cannot reach the merits of a claim, the anti-SLAPP statute must be unavailable to correct SLAPP suits brought in courts without jurisdiction to hear them.

The court of appeal’s conclusion was based on an overly literal reading of language in *Varian Medical* without regard to the question at issue in that case. *Varian Medical* concerned the relative power of the superior court and the court of appeal while an appeal is pending. In that case, the trial court denied an anti-SLAPP motion, and then proceeded to conduct a jury trial on the merits despite the defendants’ pending appeal of the anti-SLAPP denial. (*Varian Medical, supra*, 35 Cal.4th at p. 188.) This Court reversed, holding that the appeal of an anti-SLAPP denial stays all proceedings in the superior court. (*Id.* at pp. 192-196.)

This Court’s statement in *Varian Medical* that the anti-SLAPP decision involved determination of the merits of a claim was made in the context of whether trial proceedings continuing during an appeal would interfere with the appeal. The Court went on to analogize an appeal from denial of an anti-SLAPP motion to an appeal from the denial of a motion to compel arbitration, which is plainly not a decision on the merits:

Because granting a motion to strike under section 425.16 results in the dismissal of a cause of action on the merits ..., an appellate reversal of an order denying such a motion may similarly result in a dismissal. Such an appellate outcome is irreconcilable with a judgment for the plaintiff on that cause

of action following a proceeding on the merits. Moreover, such a proceeding is inherently inconsistent with the appeal because the appeal seeks to avoid that very proceeding. Indeed, “[t]he point of the anti-SLAPP statute is that you have a right not to be dragged through the courts because you exercised your constitutional rights.” ... In this respect, an appeal from the denial of an anti-SLAPP motion is no different than an appeal from the denial of a motion to compel arbitration.

(*Varian Medical*, 35 Cal.4th at p. 193 [citations omitted].)

Thus, the point this Court was making in *Varian Medical* was that trial proceedings cannot occur if there is a pending appeal of an anti-SLAPP motion. That is an issue that has nothing to do with this case, where there were only proceedings at one level of court at a time. *Varian Medical* does not hold that a plaintiff can avoid application of the anti-SLAPP statute by filing actions in a court without jurisdiction.

Indeed, the court of appeal appears to have conflated the question of whether an anti-SLAPP motion may be based on jurisdictional grounds with the substantively different question of whether an anti-SLAPP dismissal on jurisdictional grounds would be “on the merits” for purposes of res judicata. It is clear that there is no res judicata if the court lacks subject matter jurisdiction. (See *Burnett v. King* (1949) 33 Cal.2d 805, 807 [205 P.2d 657].) But that in no way suggests that an anti-SLAPP motion cannot be brought and granted based on jurisdiction. It is well recognized that lack of jurisdiction may be raised on a variety of procedural motions including demurrer, motion to strike, motion for judgment on the pleadings,

and motion for summary judgment. (*See Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036 [25 Cal.Rptr.2d 539].) Each of those procedures usually results in a judgment “on the merits” under Code of Civil Procedure section 582, except “where the record affirmatively shows that there was not an actual determination on the merits” such as dismissal for “delay or want of prosecution, improper venue, formal defects in pleadings, lack of jurisdiction, or prematurely filing suit.” (*Kahn v. Kahn* (1977) 68 Cal.App.3d 372, 380 & fn. 4 [137 Cal.Rptr. 332].) The fact that these statutorily authorized motions will often result on a judgment on the merits does not mean they cannot be used to address jurisdictional defects.

The anti-SLAPP statute is “just one of several California statutes that provide ‘a procedure for exposing and dismissing certain causes of action lacking merit.’” (*Simmons, supra*, 92 Cal.App.4th at p. 1073 [citation omitted].) Like demurrers, summary judgment, and other types of motions, the anti-SLAPP special motion to strike does not itself create the substantive standards applied in determining whether an action should be dismissed. There is no reason why all of these other motions would be appropriate avenues to raise a jurisdictional defect, but not an anti-SLAPP motion. (*See Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1417 [88 Cal.Rptr.2d 828] [“[i]f the lack of subject matter jurisdiction can be raised at any time, it seems to follow no specified procedural vehicle should be required to bring the

matter to the court's attention."]) To the contrary, as discussed above, the anti-SLAPP procedure provides important protections against discovery and for speedy resolution of a meritless claim. Those protections are just as important where the defect in the suit is a lack of jurisdiction.

2. *An anti-SLAPP fee award is fully consistent with dismissal for lack of subject matter jurisdiction*

Ms. Barry's argument, accepted by the court of appeal, that fees cannot be awarded against her for abusing the judicial process as long as her abusive conduct takes the form of a suit where there is a lack of power to grant the relief she seeks, is wholly inconsistent with the Legislative intent behind the anti-SLAPP statute. Although there is no prior published anti-SLAPP case specifically dealing with the limits on superior court power over State Bar disciplinary proceedings, analogous case law supports an award of fees and costs here.

First, anti-SLAPP law is clear that fees can be awarded even if the case is voluntarily dismissed before the anti-SLAPP motion is heard. It is settled law that a trial court loses jurisdiction over an action if the plaintiff enters a voluntary dismissal. (*Gogri v. Jack in the Box, Inc.* (2008) 166 Cal.App.4th 255, 261 [82 Cal.Rptr.3d 629].) In that circumstance, the trial court has no jurisdiction to adjudicate an anti-SLAPP motion. It does, however, have the power to award anti-SLAPP fees and costs even though it has no jurisdiction over the underlying merits:

Upon the proper filing of a request to voluntarily dismiss a matter, the trial court loses jurisdiction to act in the case, “except for the limited purpose of awarding costs and statutory attorney fees.” . . . Thus, here, when plaintiff dismissed its case at a time when defendants’ anti-SLAPP motion was pending, the trial court continued to have jurisdiction over the case only for the limited purpose of ruling on the defendants’ motion for attorney fees and costs.

(*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 876, 879 [100 Cal.Rptr.3d 771] [citations omitted].)

This rule is directly analogous to the situation presented here.

Although the reason why jurisdiction is lacking differs, the result is precisely the same – the court has no power to reach the merits, but does have the power to award fees and costs.

Second, a jurisdictional dismissal generally does not eliminate the power to reach incidental issues such as costs or fees. Thus, in *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733 [122 Cal.Rptr.3d 590], a premises liability and negligence action was dismissed for lack of subject matter jurisdiction after the defendant proved that the claim was within the exclusive jurisdiction of the workers’ compensation system. (*Id.* at p.739.) Like Ms. Barry, the plaintiff urged that the court had no jurisdiction to award costs once it dismissed his case for lack of jurisdiction. Although the trial court accepted that argument, the court of appeal reversed, holding that the court’s jurisdiction to decide its own

jurisdiction necessarily included an award of costs incidental to a jurisdictional dismissal:

[T]he trial court's finding that defendant prevailed on the merits of its jurisdictional defense did not operate as a double-edged sword that brought a complete victory in the lawsuit but, with the same stroke, extinguished the trial court's power to award costs incurred in achieving that victory. . . [T]he trial court's power to award costs *survived* as an *incident of* the resulting judgment of dismissal.

(*Id.* at p. 741 [emphasis in original]; *cf. Singletary v. Local 18 of the IBEW* (2012) 212 Cal.App.4th 34, 47 [151 Cal.Rptr.3d 107] [reviewing for abuse of discretion decision not to award sanctions for filing of action without jurisdiction].)

Federal cases apply the same rule, recognizing that “there are some circumstances in which federal courts may impose attorney’s fees or costs, even where the court eventually proves to be without subject-matter jurisdiction.” (*Willy v. Coastal Corp.* (1992) 503 U.S. 131, 136 [112 S.Ct. 1076] [holding that a district court can impose Rule 11 sanctions in a case where the court lacked subject matter jurisdiction].) “Thus, even if a court does not have jurisdiction over an underlying action, it may have jurisdiction to determine whether the parties have abused the judicial system and whether sanctions are appropriate to remedy such abuse.” (*Westlake North Property Owners Ass’n v. City of Thousand Oaks* (9th Cir. 1990) 915 F.2d 1301, 1303.)

These rules all support the award of fees here. As discussed above, the purpose of the anti-SLAPP statute is to prevent and remedy abuse of the judicial system. (*Simpson Strong-Tie Co, supra*, 49 Cal.4th at p. 21; Code Civ. Proc., § 425.16, subd. (a).) The mandatory award of attorneys' fees to a defendant who is sued in a meritless SLAPP action is an important part of that Legislative purpose. (*City of Colton, supra*, 206 Cal.App.4th at p. 782.) There is no basis for concluding that the court cannot carry out that Legislative directive when the means by which the judicial system was abused was a lawsuit where the superior court clearly lacked the power to grant the relief sought.

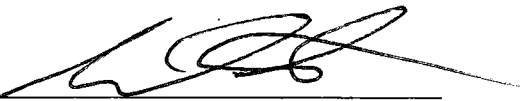
V. CONCLUSION

A plaintiff like Ms. Barry should not be able to evade the anti-SLAPP statute simply because her meritless action was filed in a court without jurisdiction over the ultimate dispute she is attempting to bring. This Court should hold that the mandatory fee and cost award under Code of Civil Procedure section 425.16, subdivision (c) remains available even where the reason why a plaintiff was unable to establish that "there is a probability that the plaintiff will prevail on the claim" is that the superior court lacks subject matter jurisdiction over the action. Accordingly, the State Bar respectfully requests this Court to affirm the order of the trial court awarding fees and costs to the State Bar.

DATED: December 23, 2013

Respectfully submitted,

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By 

Michael von Loewenfeldt
*Attorneys for Defendant and
Respondent*
**THE STATE BAR OF
CALIFORNIA**

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules 8.204(c)(1) and 8.520(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 4,536 words including all footnotes but excluding the table of contents, table of authorities, and signatures, as counted by the computer program used to generate this brief.

DATED: December 23, 2013

KERR & WAGSTAFFE LLP

By



MICHAEL VON LOEWENFELDT
*Attorneys for Defendant and
Respondent*
THE STATE BAR OF
CALIFORNIA

PROOF OF SERVICE

I, Ginie Phan, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 100 Spear Street, 18th Floor, San Francisco, California 94105.

On December 23, 2013, I served the following document(s):

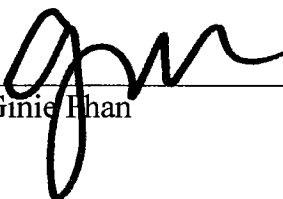
OPENING BRIEF OF DEFENDANT AND RESPONDENT (THE PETITIONOR IN THIS COURT)

on the parties listed below as follows:

Patricia J. Barry 634 Spring Street, #823 Los Angeles, CA 90014	Los Angeles Superior Court Stanley Mosk Courthouse 111 North Hill St. Los Angeles, CA 90012
California Court of Appeal 2nd Appellate District, Division 2 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013 <i>Via Electronic Submission to California Court of Appeal</i>	

By first class mail by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on December 23, 2013 at San Francisco, California.



Ginie Phan