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S262032

In the
Supreme Court
of the
State of California

GREGORY GEISER,

Plaintiff/Petitioner, Appellant, and Cross-Respondent, and Respondent,

v.

PETER KUHNS, PABLO CAAMAL, MERCEDES CAAMAL,

Defendants/Respondents, Respondents, and Cross-Appellants, and Petitioners.

APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B279738
SUPERIOR COURT OF LOS ANGELES COUNTY, NOS. BS161018, BS161019& BS161020

GREGORY GEISER'S ANSWER BRIEF

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CERTIFICATION OF
INTERESTED ENTITIES OR PERSONS

S262032 - GEISER v. KUHNS

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
Gregory L. Geiser	X		Party (Respondent)
Peter Kuhns	X		Party (Petitioner)
Mercedes Caamal	X		Party (Petitioner)
Pablo Caamal	X		Party (Petitioner)

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I. ISSUES

1. How should it be determined what public issue or issue of public interest is implicated by speech within the meaning of the anti-SLAPP statute (Code of Civ. Proc., § 425.16, subd. (e)(4)) and the first step of the two-part test articulated in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149-150?

2. Should deference be granted to a defendant's framing of the public interest issue at this step?

II. INTRODUCTION

In 2015, Plaintiff Gregory L. Geiser's ("Plaintiff" or "Mr. Geiser") company, Wedgewood, purchased Defendants Pablo Caamal's ("Mr. Caamal") and Mercedes Caamal's ("Ms. Caamal") (collectively, the "Caamals") former property (the "Property") at a lawful, nonjudicial foreclosure. In separate incidents, the Caamals, along with Defendant Peter Kuhns ("Mr. Kuhns") [1] and other persons, showed up at Mr. Geiser's office and home to coerce Mr. Geiser and Wedgewood to sell the Property back to the Caamals.

Out of fear of his and his wife's safety, Mr. Geiser filed civil harassment petitions against each Defendant. (1 JA, 21-63.) In each petition, Mr. Geiser sought: a) to keep the Defendants from harassing, intimidating, molesting, attacking, striking, stalking, threatening, assaulting …, or disturbing the peace of him and his wife, and b) an order that the Defendants not contact him, directly or indirectly, in person or via mail or electronic communications, and c) that Defendants stay at least 100 yards away from

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[1] Mr. Kuhns, Pablo Caamal, and Mercedes Caamal are hereinafter collectively referred to as "Defendants".

him and his wife. (See 1 JA 25.) Defendants moved to strike the petitions pursuant to Code of Civil Procedure Section 425.16 (the "Anti-SLAPP statute"). (1 JA, 64-225.) The Trial Court held that Defendants' conduct at issue was not protected by the Anti-SLAPP statute. In 2018, the Court of Appeal, Second Appellate District, affirmed the Trial Court's ruling. (Opinion of California Court of Appeal in Geiser v. Kuhns ("Opn."), p. 1.) Defendants then petitioned this Court for review. (Id.) This Court granted review while deferring the matter pending the consideration and disposition of *FilmOn.com Inc. v. DoubleVerify, Inc.* 7 Cal.5th 133 (*FilmOn*).

In *FilmOn*, this Court established a two-part test to be applied by courts to determine whether statements or conduct were made or engaged in "in furtherance of free speech in connection with a public issue" so as to merit protection under the Anti-SLAPP statute. (See *FilmOn*, *supra*, 7 Cal. 5th at 149-150.). The *FilmOn* test requires the reviewing court to examine: 1) What public issue or issue of public interest" the speech at issue implicates (i.e., a question answered by looking at the *content* of the speech); and 2) what functional relationship exists between the speech and the public conversation about the matter of public interest. (*Id.*) This Court then remanded the case to the Court of Appeal for further consideration in light of the test articulated in *FilmOn*.

The Court of Appeal then reconsidered its earlier ruling, applying the first part of the *FilmOn* test, and found that Defendants' speech or conduct did not implicate a public issue. The Court of Appeal also conducted the analysis called for in the second part of the *FilmOn* test and found that the context of Defendants' speech or conduct failed to establish that the speech or conduct furthered the public discourse on any public issue. As a result, the Court of Appeal affirmed its prior holding that Defendants' conduct was

not protected under the Anti-SLAPP statute and that the Trial Court did not err. (Opn., p. 7.)

Mr. Geiser respectfully submits that the Court of Appeal correctly decided that Defendants' small-scale protests in the lobby of Mr. Geiser's office and at night in front of Mr. Geiser's home were not protected conduct, because they did not fall under the "catchall provision" of the Anti-SLAPP statute. To wit, the Court of Appeal found that the content of Defendants' speech (i.e., demanding a meeting to force Geiser and Wedgewood to sell the Property back to the Caamals, proclaiming that Mr. Caamal would not leave the Property alive, and demanding that Geiser exit his home) only implicated a private dispute between the Parties over the Property. (Opn., p. 7.) The Court of Appeal further held that even if Defendants' conduct tangentially implicated broader issues of gentrification and wrongful foreclosures and evictions, consideration of the context of Defendants' conduct confirmed that protection under the Anti-SLAPP statute was not warranted. (Opn., p. 11.)

This Court has now granted the Petition for Review, requesting the parties to brief two issues: 1) How to determine what issue of public interest is implicated by speech for purposes of the Anti-SLAPP statute and 2) Whether any deference should be accorded to the defendant in that analysis.

Defendants contend that, in order to preserve the statute's primary purpose and avoid an overly narrow construction, "A simple and effective way […] is to begin with appropriate deference to the defendant's identification of the public issue or issue of public interest." (Petitioners' Opening Brief ("P.O.B."), p. 14.) Defendants argue that: 1) Deference "makes sense because the defendant is in the best position to identify the issue his speech implicated"; 2) This Court's recent Anti-SLAPP decisions appear to apply such deference and criticize decisions that refused to do so;

3) Deference promotes *FilmOn's* two-step framework; 4) Deference advances the statute's legislative purpose and promotes judicial efficiency; and 5) Even if a public issue was loosely tied speech or conduct via the "synecdoche theory", the context prong of *FilmOn* would screen out purely personal matters. (P.O.B., pp. 33-34.)

Incredibly, Defendants appear to support going even beyond granting deference to the Anti-SLAPP defendant's framing of the public issue. (P.O.B., p. 49.) Defendants actually suggest that lawyers and judges, in retrospect, should be allowed to draw connections to public issues without being tethered to the pleadings and evidence before them, even if the Anti-SLAPP defendant originally did not invoke the public issue or did not even mean to invoke the public issue. (P.O.B., p. 49.) However, Defendants' arguments: a) are not supported by the legislative history of the Anti-SLAPP statute, b) are contrary to the clear language of Anti-SLAPP language, c) undermine the structure of the Anti-SLAPP analysis, d) do not provide for judicial efficiency, and e) do not leave any protection against tangentially connecting non-public speech or conduct to public issues.

Neither side of this case, and no case law, endorses the notion that speech can *only* have a single purpose. Defendants' discussions and attacks on this notion are nothing more than a red herring.

This Court should reject Defendants' proposed test that would grant deference to an Anti-SLAPP defendant's framing of the public issue implicated by speech or conduct in the context of an Anti-SLAPP motion because each of Defendants' arguments fails. First, deferring to a speakers' purported subjective intent after the commencement of litigation opens the door to fabrication. Second, both the framework of the Anti-SLAPP statute and this Court's most recent decisions demonstrate that courts deciding Anti-

SLAPP Motions are instructed to begin their analysis by looking at the specific speech and conduct at issue and evaluate whether a reasonable person would see any connection between that speech and/or conduct and the alleged public issue. Courts should carry out this analysis without deference to the framing of the public issue by either party. In this case, the Court of Appeal correctly took into account all of the evidence in the record.[2] Third, deference fails to promote *FilmOn's* two-step framework because it essentially allows the first step to proceed without critical analysis.[3] Fourth, deference fails to advance the statute's legislative purpose because it eliminates a judge's analysis as to the first prong of the *FilmOn* test and creates obvious opportunities for abuse. Fifth, deference to the Anti-SLAPP defendant's framing of the public issue does nothing to promote judicial efficiency. Sixth, relying on the context step of the *FilmOn* test to screen out purely personal disputes disregards the purpose of the test to begin with. If this Court had intended that public issues or matters of public interest were meant to be identified or screened out under step two, it would have done so.

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[2] As noted by the Court of Appeal, Defendants failed to enter into evidence during the trial court proceedings or in assembling the record for this appeal, the original newspaper and internet articles. Defendants' belated attempt, requesting judicial notice of versions of the articles as of October 19, 2020 and October 20, 2020, should be rejected for all of the reasons set forth in Respondent's Opposition To Petitioners' Motion For Judicial Notice filed concurrently herewith.

[3] Defendants characterize the Court of Appeal Majority Opinion as granting deference to Geiser's framing of the public issue. (P.O.B., p. 47.) However, this characterization is unsupported by the actual opinion. A court is not "deferring" to an opposing party merely because it finds that the underlying speech failed to implicate a public issue. In addition, the Majority Opinion analyzed the context of the speech and conduct and found that they did not advance the public discourse on the public issues identified by Defendants.

Furthermore, Defendants have not identified any compelling rationale for how knowing the context of the speech can "smok[e] out" fabricated issues of public interest.

A court evaluates an Anti-SLAPP motion in two steps. "Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.'" *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*). If the plaintiff fails to meet that burden, the court will strike the claim. (See Code Civ. Proc., § 425.16(b)(1).)

Granting deference to the Anti-SLAPP defendant for any part of step one, where they would normally bear the burden of proof, would essentially create a rebuttable presumption in the moving party's favor and eliminate a part of the Anti-SLAPP defendant's burden. Such an approach would substantially change the Anti-SLAPP analysis in a way contrary to the burdens imposed by the statute as enacted by the legislature.

Since the first step of the *FilmOn* test asks courts to look at the content of the speech to determine if one or more public issues or issues of public interest are implicated, this Court should clarify that in conducting the first part of the *FilmOn* test, courts should employ an objective approach, one in which courts look at the evidence and pleadings from both sides and determine if a reasonable person would understand the content of the Anti-SLAPP defendant's speech or conduct to implicate a public issue. If courts find that a public issue is implicated by the content of the speech, courts would then perform a similar analysis, looking at the evidence and pleadings from both sides and determine if a reasonable person would understand that

the context of the Anti-SLAPP defendant's speech or conduct furthered public discussion of that public issue. Only if a court found that the Anti-SLAPP defendant had met their burden on both parts of the *FilmOn* test, would the burden shift to the Anti-SLAPP plaintiff to demonstrate that its claims had at least "minimal merit."

Plaintiff does not dispute that speech or conduct can often be "about" more than one thing, and that attempting to divine a single issue in a complex setting can range from unsatisfying to outright impossible. However, the solution is not deference to the moving party's framing of an issue, since this approach can allow the moving party to gild an otherwise ordinary lawsuit with the veneer of constitutional importance. The moving party should have to vindicate their argument to the Court. To give deference to a defendant's framing of the public issue, without requiring any objective evidence of speech that relates to the public issue would essentially eliminate the first prong of the *FilmOn* test. It is going to be the very rare instance where an attorney, in retrospect, would be unable to come up with some connection between the speech and a public issue, unless they are required to be tethered to evidence of the content of an actual statement.

III. STATEMENT OF THE CASE

A. The Caamals Lose The Property In Foreclosure.

On May 26, 2006, the Caamals purchased the Property (i.e., a triplex in Rialto, California), secured by two deeds of trust for a total purchase price of $450,000. (1 JA, 262-63, 281-82.) As of March 9, 2012, the Caamals were in default on their mortgage payments in the amount of $46,007.22. (1 JA, 292.) By May 17, 2013, the amount in default had reached $69,263.22. (1 JA, 296.) On August 28, 2015, the trustee under the deed of trust recorded

a Notice of Trustee's Sale, which stated that the Property would be sold at auction on September 23, 2015. (2 JA, 305.) By then, the total debt secured by the Property had reached $500,425.61. (*Id.*) At the trustee's sale, the Property was sold for $284,000 to Eagle Vista Equities, LLC, an affiliate of Wedgewood. (2 JA, 308-09.) Wedgewood is a real estate company primarily in the business of buying, rehabilitating, and selling distressed residential real estate. (1 JA, 29.) Plaintiff Gregory Geiser is the CEO of Wedgewood. (*Id.*)

B. Defendants' Trespass At Wedgewood's Office – Incident No. 1.

On December 17, 2015, the Caamals marched into Wedgewood's office, accompanied by protestors, and demanded to see Mr. Geiser, who was not there at the time ("Incident No. 1"). (2 JA, 321.) The protestors pitched a tent in Wedgewood's lobby and refused to leave, disrupting Wedgewood's ability to carry on its business. (2 JA, 321.) Alan Dettelbach, Wedgewood's general counsel, attempted to remove the tent but was shoved away by one of the protestors. (1 JA, 29; 2 JA, 321.) While the police were being called, Mr. Dettelbach and Darin Puhl, Wedgewood's Chief Operating Officer, met with Mr. Kuhns and the Caamals in a conference room to discuss Wedgewood potentially selling the Property back to the Caamals. (1 JA, 96; 2 JA, 322.)

C. The Caamals Fail To Complete The Purchase Of The Property From Wedgewood And Again Trespass At Wedgewood's Office – Incident No. 2.

In order to facilitate negotiations, Wedgewood agreed to stay the execution of an unlawful detainer judgment it had already obtained against the Caamals. (*Id.*) In early January, the Caamals returned to Wedgewood's

office and again met with Mr. Puhl. (*Id.*) Mr. Puhl explained to the Caamals that their initial proposal to pay $300,000 for the Property was insufficient, but that Wedgewood would sell them the Property for $375,000. (*Id.*) The Caamals were given additional time to attempt to secure financing for the purchase, with the understanding that they would vacate the Property if they were unable to close the sale within 60 days (i.e., by March 20, 2016.) (*Id.*)

On March 18, 2016, two days before the date by which the Caamals had agreed to either close escrow or vacate the Property, they sent Wedgewood a prequalification letter for a purchase price of $300,000, significantly below the purchase price for the Property previously discussed. (1 JA, 97, 105; 2 JA, 323.) Because the financing was not for the amount Wedgewood had agreed to accept and because the lender and the prequalification did not seem reliable, Wedgewood decided to proceed with the lockout after the agreed-upon stay ended. (2 JA, 323.) On March 23, 2016, the Caamals and the ACCE protestors again barged into Wedgewood's offices, looking for Mr. Geiser and breathing threats.[4] ("Incident No. 2") (1 JA, 30.)

D. Defendants Come To Mr. Geiser's House At Night – Incident No. 3.

On March 30, 2016, after being locked out of the Property, the Caamals came to Mr. Geiser's house at 9:00 o'clock at night., accompanied by Mr. Kuhns and others. ("Incident No. 3.") (1 JA, 30.) The record is limited to evidence of protestors shouting and chanting threats "Greg Geiser, come outside; Greg Geiser, you can't hide!" (4 JA, 1015.) The Manhattan

[4] These included the statement by Mr. Caamal that "You're not getting me out of this property alive" and a statement by one of the activist cohorts that "You're going to get what's coming!" (1 JA 30.)

Beach police were called to the scene but did nothing to intervene. (1 JA, 30.) Mr. Geiser, fearful for his wife's safety, helped her escape through the back door and to safety at a neighbor's house. (*Id.*) Eventually, the protestors left. (*Id.*)

After this incident, Mr. Geiser was "visibly shaken." (2 JA, 324.) He particularly feared for his wife's safety in case she needed to escape Defendants and their cohorts if they returned while he was away, because she had mobility issues caused by multiple sclerosis. (4 JA, 1016.) Fearing for their safety, he retained private security for protection. (1 JA, 30.)

E. Restraining Order Proceedings.

After the March 30 incident, Mr. Geiser's understanding was that the police could not protect him from such an incident in the future without a court order. (1 JA, 30.) Based on that understanding, on April 1, 2016 Mr. Geiser brought petitions for restraining orders against Mr. Caamal, Mrs. Caamal, and Mr. Kuhns under Code of Civil Procedure section 527.6. (1 JA, 22.) Temporary restraining orders were issued, ordering the defendants not to harass, intimidate, threaten, or disturb the peace of Mr. Geiser and his wife and for the Defendants to stay at least 50 yards away from Mr. Geiser's home, workplace, and vehicle. (1 JA, 32.) A hearing was set on his petitions for a date several weeks later. (1 JA, 31.) On April 5, 2016, Wedgewood filed a separate unlimited civil lawsuit against the Caamals, Mr. Kuhns, and ACCE for trespass and sought a restraining order. (1 JA, 87.) On April 7, a temporary restraining order was also issued in that case to enjoin the Defendants and others acting in concert therewith from picketing outside Mr. Geiser's residence. (4 JA, 931.)

On May 11, 2016, after a hearing, the court issued a preliminary injunction in the unlimited case filed by Wedgewood, restraining Kuhns and

the Caamals from further harassing Wedgewood or Mr. Geiser. (3 JA, 654; 4 JA, 984-85.) The hearings on Mr. Geiser's petitions for restraining orders against the individuals were then continued three times by stipulation so that the parties could attempt to settle the case. (3 JA, 672, 684, 696.)

F. Defendants' Anti-SLAPP Motions.

On April 27, 2016, Defendants filed special motions to strike the petitions under Code of Civil Procedure section 425.16 ("Anti-SLAPP Motions"). (1 JA, 64.) Defendants argued that the allegations set forth in Geiser's petitions "clearly fell within subsections (e)(2)[5], (e)(3), and (e)(4) of section 425.16." (1 JA, 74.)

G. City Council Proceedings and Conversations with the Police Chief.

While pursuing his remedies in court, Mr. Geiser also sought protection from his local elected government. Mr. Geiser reached out to a member of the Manhattan Beach City Council about Incident No. 3. (4 JA, 1021.) The City Council introduced an ordinance on residential picketing, and, during a July 5, 2016 City Council meeting, Mr. Geiser shared his story about Incident No. 3. (4 JA, 1021, 1038-46.) At that meeting, Councilmembers noted that Mr. Geiser's neighbors also felt threatened by the protesters from Incident No. 3. (4 JA, 1090-91.)

At the July 5, 2016 meeting, and in the days following the meeting, Mr. Geiser had several discussions with the Manhattan Beach Police Department – including the Chief of Police, Eve Irvine – and City Council

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[5] Defendants contended that subsection (e)(2) applied because the there was a settlement agrement between the Caamals and Wedgewood arising out of an unlawful detainer. (1 JA 183; 6 JA 1688-1689.)

members. (4 JA, 1021-1022.) Mr. Geiser was repeatedly assured that the police had received further training as a result of Incident No. 3 and that if a similar incident occurred, that there would be a full law enforcement response to the strongest extent under existing laws of the City of Manhattan Beach. (*Id*.)

H. Geiser Dismissed His Petitions And The Trial Court, In Part, Denied Defendants' Motions For Attorneys' Fees.

Mr. Geiser obtained the assurance he sought, that he and his wife would be protected from Defendants and the ACCE in the future. (4 JA, 1022.) Furthermore, settlement discussions with the Caamals regarding the Property had failed, and Mr. Geiser did not want pending litigation to complicate the sale of the Property to a different buyer. (4 JA, 1022-23.) As a result, Mr. Geiser dismissed his three petitions, but he dismissed them without prejudice so that he could file them again if the need arose. (3 JA, 711; 4 JA, 1023.) Based on Mr. Geiser's voluntary dismissals, Defendants brought motions requesting payment of their attorney's fees based on the Anti-SLAPP Motions as well as under Code of Civil Procedure section 527.6, subdivision (s). (3 JA, 719.)

On November 17, 2016, the Trial Court issued its "ORDER ON [Defendants'] MOTIONS FOR ATORNEY FEES AND COSTS," which included within it the Trial Court's analysis and denial of Defendants' Anti-SLAPP Motions. The Trial Court rejected Defendants' argument that subsection (e)(2) applied because nonjudicial foreclosures are private proceedings not subject to the Anti-SLAPP Statute and Defendants failed to adequately connect their activities and statements to Wedgewood's unlawful detainer case against the Caamals. (6 JA, 1688-1689.)

The Trial Court went on to rule that Defendants failed to present evidence that Geiser or Wedgewood were "well-known … in the public conscience." (6 JA, 1690.) After reviewing Defendants' declarations and moving papers, the Trial Court determined that Defendants' conduct did not concern people other than the Caamals:

> Indeed, in their own declarations, Kuhns, Pablo, and Mercedes made clear that the reason they went to Wedgewood's office and petitioner's residence was that they wanted to negotiate an agreement for Pablo and Mercedes to repurchase their Rialto home. (Kuhns Decl., ¶ 5 [Kuhns went "to obtain an answer as to why Wedgewood was refusing to negotiation [sic] with the Camaals in their attempt to repurchase their home"]; Pablo Decl, ¶ 2 [Pablo went "to obtain an answer as to why Wedgewood was refusing to negotiation [sic] with my wife in her attempt to repurchase our home"]; Mercedes Decl., ¶ 5 [Mercedes went "to attempt to prevent the impending eviction and negotiate a re-purchase of me [sic] home"]')
>
> In their correspondence with Wedgewood, respondents discuss their attempt to repurchase the Rialto home; they do not refer to any broader issue affecting other people. Likewise, there is no evidence that at the three incidents, or at any time, respondents made any demands other than a remedy for Mercedes and Pablo. Respondents argued their conduct related to the "widespread public interest" in "the displacement caused by predatory housing market practices." (Motions to Strike, Reply, p. 5.) But there is no evidence that at the three incidents, or at any time, respondents alleged Wedgewood or petitioner committed any wrongdoing against anyone other than Mercedes and Pablo.[6] While there may be widespread interest in public policy issues concerning home mortgages,

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[6] Defendants, at the Trial Court level and through their Motion for Judicial Notice, try to draw the Court's attention to two landlord-tenant lawsuits filed against Wedgewood for habitability and rent control issues. However, neither are relevant to the present case and neither involve Mr. Geiser – indeed, one of them was initiated well after Mr. Geiser filed his restraining order petitions. Both should be disregarded by the Court as irrelevant.

respondents' alleged conduct in this case was focused on a particular transaction.

(6 JA 1690-1691.)

The Trial Court further rejected Defendants contention that subsequent media coverage showed a widespread public interest in the case by correctly noting that "[A] party, however, 'cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.'" (6 JA 1691, quoting *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1133 (*Weinberg*).)

IV. STANDARD OF REVIEW

The appellate court reviews *de* novo a trial court's ruling on Anti-SLAPP motion. *Martinez v. Metabolife Intern., Inc.* 113 Cal App.4th 181, 186. Review of trial court orders is *de novo* and entails an independent review of the entire record. *Park*, *supra*, 2 Cal.5th at 106-107.

V. ARGUMENT

A. In *FilmOn*, This Court Announced That Two Inquiries Should Be Conducted To Determine Whether Conduct Or Speech Merited Anti-SLAPP Protection.

FilmOn involved a lawsuit by FilmOn, an online video distribution service, against DoubleVerify, an online advertising service, for disparaging FilmOn in confidential reports to DoubleVerify's clients. (*FilmOn*, supra, 7 Cal.5th at 140.) The trial court granted DoubleVerify's Anti-SLAPP Motion on the ground that the reports were covered under the statute. (*Id*. at 142.) The Court of Appeal affirmed, analogizing DoubleVerify's confidential reports to the ratings given by the Motion Picture Association of America ("MPAA") by noting that both DoubleVerify and the MPAA rate movies

"concerning their level of adult conduct […] because the public cares about the issue." (*Id.*)

This Court then granted review of *FilmOn,* to decide whether the commercial nature of a defendant's speech is relevant in determining whether that speech merits protection under the catchall provision of the Anti-SLAPP statute. (*Id.* at 140.) More specifically, this Court "granted review to decide if and how the context of a statement— including the identity of the speaker, the audience, and the purpose of the speech—informs a court's determination of whether the statement was made "in furtherance of" free speech "in connection with" a public issue." (*Id.* at 142-143. .) This Court then reversed the *FilmOn* Court of Appeal's decision, holding that the defendant's reports at issue were "too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection under the catchall provision." (*Id.* at 140.)

In its *FilmOn* opinion, this Court established a two-part analysis for determining whether a defendant's conduct merits Anti-SLAPP protection: 1) Identifying what "public issue or issue of public interest," if any, the speech at issue implicates (i.e., a question answered by looking at the *content* of the speech); and 2) Examining what functional relationship exists between the speech and the public conversation about some matter of public interest (i.e., the *context* of the speech). (*Id.* at 149-150.) The Court then held that as to the second part, the Anti-SLAPP statute requires that there be "some degree of closeness between the challenged speech and the asserted public interest." (*Id.* at 150, citing *Weinberg*, *supra*, 110 Cal.App.4th at 1132.)

In articulating what constitutes a matter of public interest in the Anti-SLAPP context, courts look to certain specific considerations, such as whether the subject of the speech or activity "was a person or entity in the public eye" or "could affect large numbers of people beyond the direct

participants"; and whether the activity "occur[red] in the context of an ongoing controversy, dispute or discussion", or "affect[ed] a community ... in a manner similar to that of a governmental entity." (*Id*. at 145.)

This Court advised that it "[is] not concerned with the social utility of the speech at issue, or the degree to which it propelled the conversation in any particular direction; rather, we examine whether a defendant — through public or private speech or conduct — participated in, or furthered, the discourse that makes an issue one of public interest." (*Id*. at 151.) This Court further reaffirmed that "Defendants cannot merely offer a 'synecdoche theory' of public interest, defining their narrow dispute by its slight reference to the broader public issue." (*Id*., citing *Commonwealth Energy Corp. v. Investor Data Exchange, Inc*. (2003) 110 Cal.App.4th 26, 34 (*Commonwealth*).)

In *FilmOn*, DoubleVerify argued that its reports "'concerned' or 'addressed' topics of widespread public interest: the presence of adult content on the internet, generally, and the presence of copyright-infringing content on FilmOn's websites, specifically." (*Id*. at 150.) However, "[E]ven if adult content on the Internet and FilmOn's particular streaming model are in fact issues of public interest, [this Court] agree[d] with the court in *Wilbanks* that 'it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate.'" (*Id.* at 150, citing *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.)

The second prong of the test moves the focus from identifying relevant matters of public interest to addressing the specific nature of the defendants' speech and its relationship to the matters of public interest. (*Id*. at 152.) It is the job of the Court to examine whether a defendant – through public or private speech or conduct – participated in, or furthered, the discourse that makes an issue one of public interest. (*Id*. at 151, citing *All*

One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc. (2010) 183 Cal.App.4th 1186, 1203-1204 and *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 375.)

DoubleVerify argued that "FilmOn is notorious for its long history of violating copyright laws" and that FilmOn's CEO routinely entered the public spotlight to discuss himself and FilmOn's business. (*Id*. at 152.) The Court acknowledged that DoubleVerify "identified the public issues or issues of public interest to which its reports and their 'tags' relate" and that "the various actions of a prominent CEO, or the issue of children's exposure to sexually explicit media content—in the abstract—seem to qualify as issues of public interest under [Code of Civil Procedure section 425.16](e)(4)." (*Id*.)

However, this Court determined that identifying FilmOn as falling into certain categories (i.e., adult content and copyright infringement) tells us nothing about how that identification relates to the issues of adult content and copyright. (*Id*. at 153.) That question can only be answered by looking at the broader context in which DoubleVerify issued its reports, discerning through that context whether the company's conduct qualifies for statutory protection by furthering the public conversation on an issue of public interest. (*Id*.) To that end, a court should examine "the identity of the speaker, the intended audience, and the purpose of the statement." (*Id*. at 147.)

This Court concluded that DoubleVerify did not issue its report in furtherance of free speech in connection with a public issue – instead, the report was a commercially prepared, confidentially shared document that was only distributed to DoubleVerify's clients solely for business purposes. (*Id*. at 153.)

While the *FilmOn* case was useful for devising the two steps needed for determining whether a defendant's activities were in furtherance of free

speech in connection with a public issue, the Court did not need to reckon with how to handle the first step (i.e., identifying the relevant public issue(s) via the content) since DoubleVerify's reports clearly identified the public issues -- adult content on the Internet and copyright infringement. Most cases will require more analysis at this step.

B. The First Step Of The *FilmOn* Analysis Calls For An Objective, Neutral Test Rather Than Deference To Either Party.

1. California's Anti-SLAPP Statute, And The Decisions Interpreting It, Support A Neutral Test.

Cases concerning Anti-SLAPP issues make it clear that it is relevant *whether* an issue is a matter of public interest, not *what* is the matter of public interest. "[A] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest." (*Weinberg*, *supra*, 110 Cal.App.4th at 1132; *Thomas v. Quintero* (2005) 126 Cal.App.4th 635, 658 (*Thomas*).) "[T]he fact that a broad and amorphous public interest can be connected to a specific dispute is not sufficient to meet the statutory requirements of the anti-SLAPP statute." (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570 (*WFG*) [internal quotation marks omitted].)

"At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625 (*Rand*) [speech concerning the issue of who should represent a city in negotiations with the National Football League to build a stadium there is not a matter of public interest, even though the building of the stadium in the city would be].) Such a "synecdoche theory" has been roundly rejected. (*Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, 1106 (*DDTC*) [allegations

of unethical practice by addiction clinic not a matter of public interest based on general interest in addiction treatment]; *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 900-903 (*Wilson*) [California Supreme Court rejected argument that the discussion of a journalist's termination arising out of an accusation of plagiarism of an article about Sheriff Lee Baca's retirement implicated larger issue of journalistic ethics].)

As the Court of Appeal, Second Appellate District, noted in early 2020, "*FilmOn* did not announce any change in the approach that courts should take to identifying issues of public interest. On the contrary, the court said that the Courts of Appeal have 'ably distilled the characteristics of a 'public issue or an issue of public interest' for purposes of section 425.16, subdivision (e)(4)." (*Serova v. Sony Music Entertainment* (2020) 44 Cal.App.5th 103, 118 (*Serova*) [remarking on how "[I]n particular, this Court [in *FilmOn*] cited with approval the definition of an issue of public interest in [*Rivero*] and [*Weinberg*]"].)

In *Rivero*, the Court of Appeal, First Appellate District identified three common elements in statements that concerned an issue of public interest: (1) a person or entity "in the public eye"; (2) conduct that "could directly affect a large number of people beyond the direct participants"; or (3) a "topic of widespread, public interest." (*Rivero, supra,* 105 Cal.App.4th at p. 924.)

In *Weinberg*, the Court of Appeal, Third District expanded on *Rivero* and explained that public interest "does not equate with mere curiosity" and that a matter of public interest should be of concern to a substantial number of people rather than just to a "relatively small, specific audience." (*Weinberg*, *supra*, 110 Cal.App.4th at p. 1132.)

Similarly, a defendant's attempt to generate publicity for their dispute, and the *ex post facto* media attention a matter receives, do not create an issue of public interest, or otherwise convert the purely private dispute into one of public interest. (See *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291,

1294-1298 [defendant's effort to publicize dispute by sharing video of incident with reporters and creating online petition did not transform dispute into issue of public interest]; *Wilson*, *supra*, 7 Cal.5th at 902; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 354 (*Carver*), citing *Hutchinson v. Proxmire* 443 (1979) 443 U.S. 111, 112-113 [a party cannot "create its own defense" under the Anti-SLAPP statute by taking actions that create a controversy]; *Rivero*, *supra*, 105 Cal.App.4th at 926 [explaining that if the mere publication of information was sufficient to turn a private issue into a public issue, "the public-issue limitation would be substantially eroded, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect."].)

This Court and the Courts of Appeal have not, in their array of decisions, decided the issue of deference in favor of the moving party. To the contrary, the Courts have tread carefully on the issues of weight of evidence and deference. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3, quoting *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 ["We neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'"]; see also *Wilson*, *supra*, 7 Cal.5th at 887 ["we have never insisted that the complaint's allegations be given similar credence in the face of contrary evidence at the first step. Such conclusive deference would be difficult to reconcile with the statutory admonition that courts must look beyond the pleadings to consider any party evidentiary submissions as well."] Tellingly, no courts have affirmatively ruled that any sort of deference was owed to the moving party at the first prong of the Anti-SLAPP analysis, which requires the defendant to make "a threshold showing that the challenged cause of

action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

The reasoning used in other cases to determine if Anti-SLAPP protections apply, to wit, respecting the distinction between the activities that form the basis of a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim should be used to determine if Anti-SLAPP protections apply. The "focus [on] determining what 'the defendant's activity [is] that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning.'" (*Park*, *supra*, 2 Cal.5th at 1063, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; see also *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399.) In short, the Court should consider the actions by the defendant that supplied the basis for the liability. (*Park*, *supra*, 2 Cal.5th at 1063.)

In *Park*, the plaintiff, a professor of Korean national origin, alleged he was denied tenure while other faculty of Caucasian origin received tenure. (*Park*, *supra*, 2 Cal. 5th at 1068.) While the complaint also alleged that derogatory comments were made about him and that he was denied relief in an internal grievance procedure, the crux of his case turned "only on the denial of tenure itself and whether the motive for that action was impermissible." (*Id.*) Tertiary evidence the defendant submitted, such as university comments that the plaintiff had omitted from his complaint, were ultimately not relevant. (*Id.*)

In *Rand*, plaintiff and his company were hired by the City of Carson to act as the City's agent to negotiate with the National Football League. (*Rand*, *supra*, 6 Cal.5th at 614.) The City Attorney made representations to plaintiffs about the status of their agreement while, at the same time, the Mayor and a third party engaged in a series of email discussions regarding the issue of building a stadium in Carson and how to "get around" the

agreement between plaintiffs and the City. (*Id*. at 617.) After plaintiffs submitted a bid to extend their agreement, the Mayor and a councilperson allegedly discussed and conspired how to breach the agreement and not extend it. (*Id*.) Thereafter, the council voted to deny the extension. (*Id*.) This Court held that most of the conduct providing the basis of plaintiffs' claims only bore the slightest bearing on the public issue – of whether or not, or how, an NFL stadium should be built – and did not concern any comparable matter of public interest. (*Id*. at 616.) In so ruling, this Court distinguished *Rand* from *Tuschner Development Enterprises, Inc. v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219 (*Tuschner*). In *Tuschner*, the communications at issue pertained to the actual development of real estate on certain bayfront property – an issue of public interest – and formed the basis of the developer's claims (e.g., a letter from the rival developer to a defendant discussing the construction of "H St. Marina View Parkway", the demolition of the existing structures on Port property', and the development of residential housing on the adjacent fee owned property and commercial development on Port property. (*Tuschner*, *supra*, 106 Cal.App.4th at 1229.) By contrast, most of the discussions at issue in *Rand* were related to *who would represent the City* rather than the merits of whether, how, and in what form the NFL stadium should be built. (*Rand*, *supra*, 6 Cal.5th at 624.) This Court correctly noted that "[W]hat a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand*, *supra*, 6 Cal.5th at 625, citing *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 80, 85, *Consumer Justice Center v. Trimedica International Inc.* (2003) 107 Cal.App.4th 595, 601, *Commonwealth*, *supra*, 110 Cal.App.4th at 34.)

In *Wilson*, a journalist sued his former employer (i.e., CNN) alleging six causes of action for discrimination and retaliation and one cause of action for defamation. (*Wilson*, *supra*, 7 Cal.5th at 882.) Wilson alleged various wrongs committed against him by CNN. (*Id.*) Wilson was ultimately fired after it appeared that he might have plagiarized an article about the retirement of Los Angeles County Sheriff Lee Baca. (*Id.*) This Court reiterated the rules from *Park* and *Rand* and explained that the moving party had the burden of showing that its challenged conduct (i.e., taking actions related to Wilson's role at CNN) bore such a relationship to the exercise of editorial control – which itself was a potential public issue – so as to warrant Anti-SLAPP protection. (*Id.* at 888-889, 896.)[7] This Court went on to explain how, even though Sheriff Baca's retirement was a matter of public interest,[8] his claim did not rest on CNN's statements about the retirement – they rested on CNN's statements about the reason Wilson was fired. (*Id.* at 901.)

These cases, taken together with the foundational structure of the Anti-SLAPP analysis, call for an objective test.

2. Implementing An Objective Test.

Plaintiff proposes that the Anti-SLAPP defendant have the opportunity in their motion to propose to the court what public issue or issues are implicated, based on the content of the specific speech, or conduct which form the core basis of the plaintiff's cause of action. The moving party will have to tie that public issue to the conduct at issue and the content of the

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[7] This Court retierated that a defendant's motives are not "categorically off-limits in determining whether an act qualifies as a protected activity under the anti-SLAPP statute," and that a plaintiff's allegations are not solely dispositive to the question. (*Wilson*, *supra*, 7 Cal.5th at 889.)

[8] Defendants argue that the courts deferred to the Anti-SLAPP defendant's framing of the public issue (P.O.B., p. 36.) On the contrary, the court rightly gave a critical eye to the evidence and pleadings available to it.

speech based on the pleadings and the evidence. This would not be a deferential approach in the manner Defendants propose. It is only "deferential" in that the court, using its independent review of the evidence and pleadings before it, must determine whether the moving party is persuasive in their framing of the public issue. In other words, to the extent that this Court considers any sort of deference, such deference should only be afforded insofar as the stated argument is what it purports to be at face value (i.e., not pretextual).

In order to effectuate the first prong of the Anti-SLAPP analysis and the first step of the *FilmOn* test, the moving party's argument still should be subject to judicial scrutiny. There is an inherent reliance on the judge's learned experience and discernment as to what matters are sufficiently broad in public importance to warrant Anti-SLAPP protection. Those protections in that analytical process still need to be vindicated under the new rule. That means there is only deference insofar as the cause of action arises out of what the moving party says it arises out of and nothing pretextual. Otherwise, the moving party can still be met with judicial scrutiny without reliance on an opposition to provide evidence to place something in evidentiary equipoise.

Courts should consider the pleadings and evidence presented to it to determine what public issue is implicated by the conduct or speech <u>that forms the basis of liability</u>. Sometimes courts will have a relatively easy job spotting the presence of an implicated public issue (e.g., *FilmOn* where the content of the speech plainly invoked adult content & copyright) or the total lack of a public issue (e.g., *Jeppson v. Ley* (2020) 44 Cal.App.5th 845, 856 [no public issue implicated in private dispute arising out of defendant's post on neighborhood website reached by 951 neighbors regarding a prior restraining order]). Other times, courts will need to take consider all of the pleadings and evidence to determine if there is a public issue involved.

Defendants' concern that anything other than a deferential approach will lead to inevitable errors by courts is unsupported.

3. Contrary To What Defendants Assert, The Speaker Is Not In The "Best Position" To Identify The Public Issue And The Second (i.e., "Context") Step Of *FilmOn* Does Not "Screen" For Deference.

Defendants propose that this Court should impose a standard that is deferential to the moving party's framing of the public issue because "no one is in a better position to define what a speaker was talking about than the speaker himself." (P.O.B., p. 34.) Defendants claim that the second step of the *FilmOn* test would "shut down any attempts to fabricate a public issue." (P.O.B., p. 34, fn. 4.) However, this approach is misguided.

The most obvious flaw with Defendants' reasoning is that a moving party is *always* going to try to tie their speech to a public issue and "[A]t a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance." (*Rand*, *supra*, 6 Cal.5th at 625.) Deferring to a speaker's justification during litigation opens the door to all manner of retroactive justifications. It also places undue weight on subjective intent over observable facts; one can imagine plenty of circumstances where a reasonably competent defense attorney could tie-in a given fact pattern to a public issue.

Moreover, Defendants' approach conflates the two steps of the *FilmOn* test and the purpose of each step. Both sides agree that the context step is used to determine whether the speech or conduct actually furthers public discussion on the public issue. However, the context analysis does not *identify* the relevant public issue – it tests the nexus between the issue and the speech. If the context analysis served to identify the public issue, then the Court would not have implemented the two-part test in the first

place. This Court was correct in determining that the public issue must first be identified using the content of the speech.

If, for example, a defendant journalist was sued over their unfavorable coverage and analysis of a private person's statement that "[T]he 2020 Presidential Election was stolen" as part of an article discussing social and political tensions arising out of the election, the journalist would meet this burden by directing the court to the statements in the article and explaining, how their statements relate to the conversation on the issue of social and political tensions arising out of the election; in bringing an Anti-SLAPP motion, this hypothetical journalist would meet any objective test. No deference is required.

Defendants' cited hypothetical example of a family protesting at a police station after losing a loved one to violence is inapposite – especially compared to the present case.[9] Consider the real-life protests that erupted during the Summer of 2020 following the death of George Floyd. Three common slogans appeared on signs and were chanted by protestors: "Justice for Floyd," "Black Lives Matter," and "Defund the Police." Each statement

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[9] Not only do Defendants fail to explain what the hypothetical family protestors would be sued for in the first place, the overall comparison between a family protesting the loss of a loved one to police violence and the actions of the Defendants in this case simply do not track. Police killing civilians, both on an individualized basis and as a broader social concern, are issues of public interest and a public issue, respectively. Aggrieved family and friends protesting about justice for their lost loved one and for changes to the system are furthering those issues. By contrast, the Defendants in the present case trespassed on private property to harass a CEO into having his company give a couple their house back – and later haranged him at his home. Neither of these involved public issues or furthered discussion of public issues; indeed, the Caamals dispute with Wedgewood *only received press coverage after they engaged in the conduct that was at issue in this litigation*.

objectively calls to mind various related matters of public interest or public issues: the widely viewed murder of George Floyd by police officers; the systemic indifference of police violence against the African-American community; and reducing the resources and size of police forces as a means of addressing police violence and militarization of civilian law enforcement. If such protests became the subject of an Anti-SLAPP Motion - say that a city tried to use a civil "gang injunction" to crack down on a protesters that regularly gathered outside City Hall, where people carried BLM signs and chanted slogans demanding justice, and the protestors filed an Anti-SLAPP Motion – the court performing the first step of the *FilmOn* analysis would only need to look at the statements themselves, together with any supplementary evidence provided by the parties, to identify the public issue. No deference is required.

Defendants argue that not granting deference to a moving party is crucial to avoid the potential slippery slope of courts classifying otherwise socially relevant acts as being private disputes. However, this ignores that granting deference to a defendant's framing of an issue could have serious unintended and undesirable outcomes. Suppose that a woman had an abusive ex-boyfriend with whom she has a child. She tells the ex-boyfriend that she will not let him see the child, and he later shows up at her home with some friends and harasses her, yelling "You can't treat the father of your child like that!" If the woman sought a restraining order, then the ex-boyfriend could – under a deferential standard – establish that his act of showing up at the woman's home implicated the issue of the broader social bias against fathers in custody disputes. Under a neutral, objective standard, the court would not be obliged to credit the ex-boyfriend's argument and could more readily conclude that no public issue or issue of public interest was implicated.

Suppose for another example, that a private person was the victim of sexual assault by another private person and she shared that experience with

a small handful of people. The rapist finds out and, in retaliation, engages in a cyberbullying campaign against the victim: he makes derogatory comments about her; he makes threatening-sounding statements (without actually making a "true threat"); and he tells her to "shut up." The purpose of the cyberbullying campaign is to make her back down from sharing her story again; the cyberbullying campaign is subsequently picked up by news outlets. The victim then sues the rapist for defamation and intentional infliction of emotional distress.

Under a deferential standard, the rapist could bring an Anti-SLAPP motion and argue that 1) their dispute is a matter of public interest because the news picked up on the cyberbullying campaign and 2) his cyberbullying implicates issues related to the propriety of #MeToo and other "believe the victim" movements versus false accusations, "innocent until proven guilty" and other "men's rights" issues – even if his challenged statements and actions did not address those movements or those issues. By contrast, a court applying a neutral standard analyzing both the pleadings and the totality of the evidence would recognize that the facts forming the basis of the causes of action – making derogatory comments, threatening statements, and telling her to "shut up" – did not implicate any issues of public interest. The judge would recognize that it would take a broad level of generalization to connect the challenged conduct and speech to the broader public issues, and that the dispute between the two parties only became a matter of public concern after the defendant's wrongful conduct.

The above-referenced hypotheticals are extreme, but they nonetheless illustrate how a deferential standard could be used to allow the Anti-SLAPP statute to be wielded in unintended ways if a deference standard is applied.

4. Deference Does Not Promote Judicial Efficiency.

Defendants contend that "[D]eference advances the legislative purpose of the statute, reduces the risk of courts relying on normative

evaluations about the defendant's speech, and provides simplicity to a statutory inquiry already packed with multifactor tests." (P.O.B., p. 38.) However, adopting Defendants' proposed deferential standard will not avoid that outcome. The sort of deference Defendants propose creates a rebuttable presumption in the first prong of Anti-SLAPP and would create a nesting doll of tests, with burden shifting within burden shifting, that judicially complicates a relatively straightforward analysis. A test by any other name is still a test.

Moreover, there is still a judicial gatekeeping role. Judges need not accept a moving party's efforts to impute or project matters of public significance in a clearly private matter. To create a presumption of validity at the first step makes it difficult for the judge to weed out unmeritorious motions, especially when the moving party's own pecuniary interest is so manifestly apparent. The goal should not be to make it easier to gild an ordinary lawsuit with the thin veneer of Anti-SLAPP protection. While it is true that the goal of the Anti-SLAPP statute is to efficiently dispose of certain types of cases at the pleading stage, that does not mean that the Court should alter part of the very nature of that statute.

C. Under An Objective Framework, The Court Should Find That Defendants' Conduct Did Not Merit Anti-SLAPP Protection.

Plaintiff asked for the Trial Court's assistance in keeping the Defendants and their cohorts at a meaningful distance away from him and his wife, his business, and his home. This request was supported by the following allegations:

> First, on December 17, 2015, I learned from my colleagues that the previous occupants along with several ACCE activists, including Mr. Kuhns, came to my office supposedly to protest

> the pending eviction. It is my understanding that during the ruckus one of the activists physically shoved Wedgewood's general counsel. The police were called and the previous occupants and ACCE activists retreated.
>
> Second, on March 23, 2016, the previous occupants and other ACCE activists, including Mr. Kuhns, came back to my office in force. I understand that Pablo Caamal stated: "you're not getting me out of this property alive." The police were called again, and they removed the Caamals and other ACCE activists. As they were leaving, I understand that one of the activists yelled to the Wedgewood employees "you're going to get what's coming!" We also reported the threats to the Sheriffs Department.
>
> Third, on March 30, 2016, the previous occupants and other ACCE activists, including Mr. Kuhns, showed up at my personal residence at around 9:00 at night. My wife and I were at home when we heard the shouts and chanting. We looked out of our window to see what looked to us like a mob of over 30 people. We called the police and Wedgewood's general counsel. Approximately 10 police officers showed up to protect us and our property. Wedgewood's general counsel showed up as well. During this time, I had my wife, Nancy, sneak out of the back door with neighbors to hide at their house.
>
> Sometime before midnight, as a result of discussions with the police and Wedgewood's lawyer, the mob disbanded, my wife and I were left shaken by the escalating campaign of harassment that has followed me from work to my home. In view of the mob actions combined with the direct verbal threats, we are in fear for our safety. We have arranged for private security to stand guard outside both our place of business and our house.
>
> (1 JA 28.)

The Court of Appeal's Majority Opinion examined the declarations submitted as evidence regarding the underlying dispute with Wedgewood:

> In Ms. Caamal's declaration, she described the motivation for the demonstrations at Wedgewood's office building. As to the

first demonstration, she stated that she and her husband "and a group of concerned citizens *seeking to assist us*, went to Wedgewood's office building in Redondo Beach and requested a meeting with [plaintiff] *to attempt to prevent the impending eviction and negotiate a re-purchase of m*[*y*] *home*." (Italics added.) As to the second demonstration, she stated that "as Wedgewood was attempting to lock me and my husband from our home and continuing to ignor[e] letters from both myself and my attorney, my husband and I, as well as another group of citizens *supporting our effort to repurchase our home*, returned to Wedgewood's office and again requested a meeting with [plaintiff]." (Italics added.) She said nothing about Wedgewood's residential real estate business practices displacing residents and gentrifying working-class neighborhoods or about large scale fix-and-flip real estate practices being a root cause of the great recession.

Consistent with his wife's stated purpose for the first demonstration, Mr. Caamal stated in his declaration, "I "accompanied my wife to Wedgewood's office building ... to obtain an answer as to why Wedgewood was refusing to negotiation [*sic*] with my wife *in her attempt to repurchase our home*." (Italics added.) Kuhns likewise stated in his declaration, "I and others involved with ACCE accompanied Mr. and Ms. Caamal to Wedgewood's office building ... *to obtain an answer as to why Wedgewood was refusing to negotiation* [*sic*] *with the Camaals* [*sic*] in *their attempt to repurchase their home."* (Italics added.) Neither Mr. Caamal nor Kuhns said anything in his respective declaration about the purpose of the demonstrations relating to issues of displacement of residents due to residential real estate business practices, gentrification, or large scale fix-and-flip real estate practices leading to the great recession.

Even a third-party participant, Saucedo, the National Lawyers Guild legal observer, described in his declaration the purpose for the demonstration at plaintiff's residence as a private matter limited to the Caamals' dispute with Wedgwood. He stated that ACCE organized the demonstration at plaintiff's residence "to protest unfair and deceptive practices used by Wedgewood ... and its agents *in acquiring the real property of Pablo and Mercedes Caamal, and evicting them from their home*." (Italics added.) That motivation was purely personal to the

> Caamals and did not address any societal issues of residential displacement, gentrification, or the root causes of the great recession.
> (Opn., at pp. 8-9.)

The Court of Appeal's Unpublished Majority Opinion, guided by *FilmOn*, examined both the content of the speech and the context of the speech to determine whether Defendants' conduct merited Anti-SLAPP protection. (Opn., at p. 9.) It engaged in a two-part analysis: 1) What public issue or issue of public interest" the speech at issue implicates (i.e., a question answered by looking at the *content* of the speech); and 2) what functional relationship exists between the speech and the public conversation about the matter of public interest. (See *FilmOn*, *supra*, 7 Cal. 5th at 149-150.)

The Court of Appeal Majority Opinion summarized the content of Defendants' speech thusly:

> As to the content of the speech, during the first demonstration at Wedgewood, the Caamals requested a meeting at which they could discuss repurchasing their property from Wedgewood and the demonstrators left the building once Puhl agreed to such a meeting. During the second demonstration, the demonstrators sought another meeting and Mr. Caamal stated that Wedgewood would not get him out of the property alive. The only evidence of the specific content of the speeches during the demonstration at plaintiff's residence was that the demonstrators demanded plaintiff personally come out of his home.
> (Opn., at p. 9.)[10]

[10] The Court of Appeal's dissenting opinion sardonically muses that the absence of direct evidence about the content of the Defendants' speech means the majority is free to believe that they may have been "chanting about the Protestant Reformation. (Dis. Opn., at p. 8, fn. 4.) This ignores the basic role that the pleadings and evidence play in allowing parties to meet their respective burdens.

Geiser's petition did not challenge Defendants' right to protest, nor did Geiser challenge statements made by the Defendants to various news outlets. Geiser's petitions merely sought to protect himself and his wife from angry people that had twice trespassed at Geiser's office and subsequently harassed him and his wife at around 9 P.M. at their home. This is an important distinction that both this Court or any lower court remanded to review this case should bear in mind. Defendants' two incidents of trespassing at Wedgewood's lobby on December 17, 2015 and March 23, 2020, and Defendants' evening of harassment at Geiser's home, were not speech in furtherance of a public issue; subsequent news coverage did not retroactively make their wrongful conduct in speech in furtherance of a matter of public interest.[11] As this Court confirmed in *Park*, the Anti-SLAPP analysis should turn on the facts forming the basis for Geiser's petitions for restraining orders, not on tangential or extraneous matters. Moreover, under *Rivero* and *Weinberg*, Defendants conduct and speech did not concern issues of public issues: 1) Geiser was not and is not a person "in the public eye"; 2) the underlying dispute did not affect large numbers of people beyond the direct participants; 3) the underlying dispute was not a topic of widespread public interest – particularly *before* Defendants engaged in their harassing behavior; and 4) the underlying dispute was only of concern to a relatively small, specific number of people.

Geiser submits that while the acts of the Defendants are not protected by the statute, the resultant news coverage of the incidents and subsequent

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[11] None of the Defendants had a constitutionally protected right to free speech in Wedgewood's private property. (See *Hudgens v. Nat'l Labor Relations Bd*. (1976) 424 U.S. 507, 520–21 [ruling no First Amendment right to enter private shopping center to picket]; see also *Van v. Target Corp.* (2007) 155 Cal. App.4th 1375, 1382.)

statements about the incidents to the press as part of that news coverage would be protected by the statute – even under a neutral, non-deferential standard. Indeed, if Geiser had brought a defamation claim against the Defendants in April of 2016 over an interview Defendants gave to a news outlet, then those statements could have been in furtherance of a public issue.

Based on the facts and evidence actually found in the record, the Court of Appeal, rightfully concluded that the "[D]efendants' demonstrations at Wedgewood's office building and plaintiff's residence focused on coercing Wedgewood into selling back the property to Ms. Caamal at a reduced price, which was a private matter concerning a former homeowner and the corporation that purchased her former home and not a public issue or an issue of public interest." (Opn., at p. 8, citing *Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1524 and *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 65.)

The Court of Appeal further determined that "[W]e do not find in the record any basis to conclude plaintiff was a public figure or had gained widespread notoriety throughout the community for his real estate activities. Nor do we find any basis to believe the Caamals' private dispute with plaintiff was one of many similar disputes shared in common with members of the community." (Opn., at p. 10.) In reaching this conclusion, the Court of Appeal contrasted Mr. Geiser with the slumlord plaintiff in *Thomas*, who had wronged more than 100 tenants and became "the first big public case of the campaign in Oakland for a Just Cause for Eviction Ordinance" (Opn., at p.10, citing *Thomas*, supra, 126 Cal.App.4th at 654-658.) Moreover, the

Court of Appeal found the record on media coverage to be unclear and lacking. (Opn., at 10.)[12]

One issue that has been lost in the metaphorical shuffle of Defendants' brief is that the Court of Appeal's Majority Opinion included an analysis of the issues identified by Defendants. The Court of Appeal explained that "[E]ven if we accepted defendants' contention that the demonstrations concerned the issues of displacement of residents due to residential real estate business practices, gentrification, and large scale fix-and-flip real estate practices leading to the great recession, those demonstrations did not qualify for statutory protection because they did not further the public discourse on those issues." (Opn., at p. 11.) The Court of Appeal came to that conclusion in applying the second step of the *FilmOn* test and looking at the context of Defendants' activities (i.e., the audience, speaker, and purpose).

The Court of Appeal's Majority Opinion pointed out that the record indicates that the demonstration at Wedgewood's Office "occurred at a commercial building, during office hours, and were directed at plaintiff" and that the demonstration at Plaintiff's home "took place at 9:00 p.m. and there is no indication in the record that there was an audience other than plaintiff and his family, and no evidence of media presence to inform persons not at the demonstration." (Id.) The speakers were Defendants and their cohorts. (Id.) The purpose of the speech, as established by the record, was to get the Caamals their home back.

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[12] The first instance of the media picking up on the Parties' dispute came after Defendants stormed Wedgewood's office. As noted above, however, a party cannot "create its own defense" under the Anti-SLAPP statute by taking actions that create a controversy. (See *Carver*, *supra*,135 Cal.App.4th at 354.).

As with the reports from *FilmOn*, Defendants' activities, to the extent they had implicate any issues of public interest, are "too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection under the catchall provision." (*FilmOn*, *supra*, 7 Cal 5th at 140.)

The Court should also not lose focus on what was at stake in this lawsuit: a person trying to protect the safety and welfare of his family and employees after three separate incidents – two incidents of outright trespassing and harassment at one's workplace and one night of intimidation. While the very act of seeking a restraining order may be broad, remedies can be narrowly implemented to serve the goal of protecting safety and welfare while not unduly restraining a defendant's rights.

VI. CONCLUSION

Based on the foregoing, this Court should adopt an objective analysis for the first step of the *FilmOn* test. Adopting a neutral standard over a deferential standard would be in keeping with both the overall design of the Anti-SLAPP statute and existing case law. Under a neutral standard, the moving party has the opportunity in its Anti-SLAPP motion to propose what the issue of public interest is and tie that issue – based on the pleadings and evidence – to the conduct at issue and the content of the speech. There is no meaningful downside to Plaintiff's approach compared to Defendants' deference argument, whereas a deferential approach could have serious unintended consequences while hindering the judiciary's gatekeeping function.

The Anti-SLAPP statute is a powerful tool, one that is vital for safeguarding constitutionally protected speech. There are a great many cases of powerful figures trying to tamp down on public participation using the judicial system. This is not such a case. Here, Plaintiff brought his petitions

out of fear for his family's safety and a desire to ensure they are protected, while Defendants' underlying conduct was designed to reacquire their prior home. Mr. Geiser respectfully requests that this Court find that the Court of Appeal properly applied both parts of the *FilmOn* test, that Defendants' conduct did not implicate any public issue, and that the context of the Defendants' conduct demonstrates that it was not in furtherance of public discourse on any public issue. Consequently, the Court of Appeal's decision should be affirmed.

Dated: January 8, 2021 DINSMORE & SANDELMANN LLP

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C.R.C. 8.504(d)(1)

I hereby certify, pursuant to California Rules of Court, rule 8.504, subdivision (d)(1), that the foregoing brief was generated on a computer and does not exceed 14,000 words. According to the computer program used to generate the Answer, the word count for the Answer is 12,440 words.

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The undersigned hereby declares under penalty of perjury under the laws of the State of California that the following is true and correct:

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