



ELECTRONIC FRONTIER FOUNDATION

Defending Your Rights in the Digital World

December 19, 2014

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: *Amicus Letter of the Electronic Frontier Foundation in Support of Petition for Review of Wineland-Thomson Adventures, Inc. d/b/a Thomson Safaris v. Doe 1, Court of Appeal First Appellate District Case No. A140537, Supreme Court of the State of California Case No. S.222624*

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, the Electronic Frontier Foundation (EFF) submits this *amicus* letter urging this Court to grant review of the above-entitled case. EFF supports the arguments made by Defendant/Appellant/Petitioner Doe 1 in the Petition for Review and Reply.

We have a unique perspective on the Court of Appeal's decision in this case. EFF is a San Francisco-based, non-profit, member-supported civil liberties organization working to protect rights in the digital world. We actively encourage and challenge industry, government, and the courts to support free expression, privacy, and openness in the information society. Founded in 1990, EFF has over 23,000 dues-paying members from across the United States. We frequently litigate or participate as *amicus curiae* in First Amendment cases involving online and anonymous speakers and are recognized as a leader in First Amendment and technology law. EFF also operates a referral service because we do not have the capacity to represent every potential client who comes to us. We regularly refer cases to outside counsel who often take the cases *pro bono* in order to vindicate important rights of those who cannot afford to pay legal fees. We also have participated in campaigns that urge service providers to allow individuals to use the identities of their choice online.¹

EFF has an interest in ensuring that First Amendment principles and the California anti-SLAPP statutes are fairly applied to protect the free speech rights of online speakers, including anonymous speakers. Although the Court of Appeal decision is unpublished, it

¹ See, e.g., *My Name Is Me*, <http://mynameisme.org/> (last visited Dec. 19, 2014).

is a stark example of the inconsistent approaches taken by the California appellate courts in anti-SLAPP cases, making this case ripe for review.

Specifically, we agree with the Defendant/Appellant/Petitioner on the two issues presented for review. First, contrary to the Court of Appeal's decision, a plaintiff should not be able to overcome an anti-SLAPP motion by submitting evidence to cure a legally insufficient complaint. Rather, to meet the second prong of the anti-SLAPP analysis, a plaintiff should have to both present a legally sufficient complaint and substantiate that complaint with evidence such as declarations. Second, a defendant's anonymity should not be an excuse for a court not to consider whether the plaintiff has substantiated the fault element of his defamation claim.

We fear that should the trend represented by the Court of Appeal decision continue, defendants will more frequently lose anti-SLAPP motions and defendants who are anonymous online speakers will more frequently be unmasked – chilling speech not only in the United States, but also in foreign countries like Tanzania, where the Defendant/Appellant/Petitioner in this case is located. As Frank La Rue, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, wrote:

“The right to privacy is essential for individuals to express themselves freely. Indeed, throughout history, people's willingness to engage in debate on controversial subjects in the public sphere has always been linked to possibilities for doing so anonymously.”²

This Court should grant review and decide this case to ensure that freedom of speech online can flourish.

I. A Plaintiff Should Have to Present a Legally Sufficient Complaint and Substantiate the Complaint With Supporting Evidence to Meet the “State and Substantiate” Second Prong of the Anti-SLAPP Analysis

The first issue presented in the petition for review reflects a split in authority among the Courts of Appeal making it a ripe legal issue for this Court to review and resolve. The question is whether the “state and substantiate” second prong of the anti-SLAPP analysis is in fact two distinct requirements, or whether it is one “substantiate”

² *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, United Nations General Assembly, U.N. Doc. A/HRC/17/27 (May 16, 2011) (by Frank La Rue), available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

prong.³ In other words, if a defendant files an anti-SLAPP motion that meets the first prong burden of showing that the plaintiff's claim implicates the defendant's rights of free speech on a "public issue," should the plaintiff have to both present a legally sufficient complaint and substantiate that complaint with supporting evidence to overcome the motion – and, in the interest of upholding First Amendment values, automatically lose the anti-SLAPP motion if the complaint is legally insufficient? Or may the plaintiff cure a legally insufficient complaint by submitting evidence (e.g., declarations) that would support an amended complaint?⁴

Like Defendant/Appellant/Petitioner Doe 1, EFF believes that a plaintiff, alleging a claim that implicates the First Amendment such as defamation, should not be shielded from an anti-SLAPP motion by being permitted to file declarations that act like an amended complaint in order to cure an original complaint that lacks the constitutionally required specificity.⁵ Granting this kind of flexibility, like the Court of Appeal did for Thomson Safaris in this case, might appear to be a fair consequence of giving the plaintiff a second chance to vindicate his rights. However, we believe that effectively eliminating the requirement that the plaintiff submit a legally sufficient, appropriately specific defamation claim is not only contrary to the First Amendment, but also frustrates the free speech values embodied in the anti-SLAPP statutes.

A. Allowing a Plaintiff to Cure a Legally Insufficient Complaint With Declarations Places the Defendant in a Fundamentally Unfair Position

Reducing the "state and substantiate" second prong of the anti-SLAPP analysis to simply a "substantiate" requirement places the defendant in a fundamentally unfair position by making it more difficult to present an effective and efficient defense, and for some defendants to even find a lawyer in the first place. If this Court permits to stand the precedent set by some Courts of Appeal that a plaintiff can overcome an anti-SLAPP motion by submitting declarations that effectively serve as an amended complaint, plaintiffs will continue to file vague and legally insufficient complaints, making challenging the complaint and fighting the lawsuit more difficult and costly for the

³ See California's anti-SLAPP law, Cal Code Civ Proc § 425.16(b)(1); *Taus v. Loftus*, 40 Cal.4th 683 (2007); *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811 (2002).

⁴ See *Vogel v. Felice*, 127 Cal.App.4th 1006 (2005); *Gilbert v. Sykes*, 147 Cal.App.4th 13 (2007); *Salma v. Capon*, 161 Cal.App.4th 1275 (2008). *But see Nguyen-Lam v. Cao*, 171 Cal.App.4th 858 (2009).

⁵ See *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976).

defendant – the very party the legislature intended to protect in passing the anti-SLAPP statutes.

A legally insufficient complaint that can later be cured by declarations filed in response to an anti-SLAPP motion places the defendant in a “bait and switch” situation. He may initially put forth a strong argument that the complaint fails to state a claim, but he ultimately loses the anti-SLAPP motion because the plaintiff can come in after the motion is filed with declarations that cure the complaint’s legal insufficiency. Being in such an untenable position and now facing the prospect of a trial, the defendant may give up on the case and ultimately agree to silence his criticism of the plaintiff. At this point the court has thwarted the intent of the anti-SLAPP statutes and aided the plaintiff in his goal.

Moreover, for many SLAPP defendants, including those who seek legal advice from EFF and wish to remain anonymous, finding representation can be a challenge. Such defendants often have little money and few resources to find and pay for counsel. EFF takes a select number of cases *pro bono* and we work hard to find outside *pro bono* counsel for individuals whom we cannot represent. If an individual has been sued, the complaint is the only document a lawyer has to assess the strength of the defendant’s position and whether the case is worth taking on for free. A vague complaint makes it more difficult for us and other lawyers to determine the odds of the defendant prevailing on an anti-SLAPP motion.

B. Allowing a Plaintiff to Cure a Legally Insufficient Complaint With Declarations Places the Free Speech Rights of Anonymous Online Speakers in Jeopardy

Permitting plaintiffs to cure a legally insufficient complaint with declarations that – in effect – serve as an amended complaint places the free speech rights of anonymous online speakers in jeopardy. Vague “placeholder” complaints are often intentionally filed in cases where the defendant’s identity is unknown, doubly implicating the defendant’s First Amendment rights – the rights of speakers associated with defamation claims and the right to speak anonymously. With little effort at the front end, a plaintiff can meet the “state and substantiate” second prong of the anti-SLAPP analysis because the requirement to state a legally sufficient claim is eliminated. A plaintiff can then move on to what he really wants to do – unmask the anonymous speaker.

A plaintiff who files a lawsuit that implicates First Amendment rights often has the primary goal of silencing critics – this is the quintessential SLAPP.⁶ An easily dismissed anti-SLAPP motion enables a plaintiff to move on with the case and begin discovery of an anonymous defendant’s identity, either by issuing a subpoena to the defendant directly or to an online service provider. Once the defendant’s identity is known, the plaintiff has little incentive to continue the case. The plaintiff can then voluntarily dismiss the case and proceed to seek other means outside the courtroom to silence or retaliate against the defendant-critic. In foreign countries especially, anonymity is often the only thing allowing an individual to speak freely and protect himself against serious retaliation.⁷

II. A Defendant’s Anonymity Should Not be a Complete Barrier to a Court Considering Whether the Plaintiff Has Substantiated the Fault Element of a Defamation Claim Subject to an Anti-SLAPP Motion

The second issue presented in the petition for review is whether a defendant’s anonymity may be a complete barrier to a court considering an anti-SLAPP motion filed against a defamation claim. To substantiate a defamation claim, a plaintiff must submit supporting evidence for each element of the claim. For the fault element the plaintiff must show that the defendant made his statements about the plaintiff with negligence or actual malice.⁸ We agree with the Defendant/Appellant/Petitioner that a plaintiff should be required to submit, along with his opposition to the anti-SLAPP motion, a motion for discovery if he does not have enough information about the defendant to substantiate the fault element of his defamation claim.⁹ In this case, Thomson Safaris failed to submit such a discovery motion.

⁶ See *What is a Strategic Lawsuit Against Public Participation (SLAPP)?*, California Anti-SLAPP Project (Dec. 19, 2014), <http://www.casp.net/sued-for-freedom-of-speech-california/what-is-a-first-amendment-slapp/> (“While most SLAPPs are legally meritless, they can effectively achieve their principal purpose: to chill public debate on specific issues.”).

⁷ See, e.g., Craig Kanalley and Jake Bialer, *Anonymous Internet Users Team Up To Provide Communication Tools For Egyptian People*, Huffington Post (Jan. 29, 2011), http://www.huffingtonpost.com/2011/01/29/anonymous-internet-egypt_n_815889.html.

⁸ See *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974).

⁹ A court may allow discovery to substantiate the fault element of a defamation claim without requiring discovery of the identity of the defendant. Although discovery of the identity of an anonymous speaker is an important First Amendment issue with different standards applied by courts across the country, it is not at issue in this case. Compare, e.g., *John Doe No. 1 v. Cahill*, 884 A.2d 451 (Del. 2005) (summary judgment standard)

The Court of Appeal in this case viewed the defendant's anonymity as a complete barrier to considering the fault element, denying the anti-SLAPP motion precisely because Doe 1 is anonymous rather than considering whether discovery should have been taken on that issue. According to the Court of Appeal's reasoning, anonymous defamation defendants should always lose anti-SLAPP motions when the plaintiff has substantiated all other elements of a defamation claim except fault. The Court of Appeal essentially punished the defendant for guarding his identity when it is the defendant's anonymity that has so far enabled him to exercise his universal free speech rights.¹⁰ This is a result contrary to the rights and interests of anonymous online speakers that this Court should review and reject.

In conclusion, this Court should grant review of this case and resolve the issues presented to ensure that First Amendment principles and the California anti-SLAPP statutes are appropriately applied to protect online and anonymous speakers from unfair retaliation.

Respectfully submitted,



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Electronic Frontier Foundation

cc: All Counsel

with Dendrite Int'l, Inc. v. Doe No. 3, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) (summary judgment standard plus additional balancing of interests).

¹⁰ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), Article 19, available at <http://www.un.org/en/documents/udhr/index.shtml#a2> ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

PROOF OF SERVICE BY MAIL

Re: *WINELAND-THOMSON ADVENTURES v. DOE 1*
Supreme Court of the State of California Case No. S222624

I, Stephanie Shattuck, declare that I am over the age of 18 and not a party to the within action. My business address is 815 Eddy Street, San Francisco, CA 94109. I served a true copy of the attached Amicus Letter Brief of the Electronic Frontier Foundation in Support of Defendant-Appellant on the following by placing a copy in a sealed envelope addressed to the parties listed below, which envelope was then sealed by me and deposited in the United States Mail, postage prepaid, at San Francisco, California on December 19, 2014.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 19, 2014 at San Francisco, California.



Stephanie Shattuck