

Superior Court of California, County of Los Angeles  
 Case No. BC369626, Academia Semillas del Pueblo v. McIntyre  
 Department 57

JAN 10 2008

Order on defendants' special motion to strike

LOS ANGELES  
 SUPERIOR COURT

Defendants have moved to strike plaintiff's first amended complaint (FAC) pursuant to Code of Civil Procedure section 425.16. (All further statutory references are to the Code of Civil Procedure unless otherwise indicated.) Defendants argue the complaint arises from acts in furtherance of the right of free speech in connection with a public issue in the form of a radio broadcast by Douglas McIntyre regarding the quality and nature of education provided to children at a charter school. Defendants further argue that plaintiffs cannot show a likelihood of prevailing on the merits in this matter.

In opposition, plaintiffs argue that Mr. McIntyre's statements are provably false factual assertions about Academia Semillas which were defamatory per se in that they identified plaintiffs by name and directly imputed professional incompetence and immorality to them, subjecting them to hatred, ridicule, contempt, shame, and threats of violence. (*Sellick v. Globe Int'l* (1985) 166 Cal.App.3d 1123.) This is argued to show a substantial likelihood of prevailing on the merits.

In reply, defendants argue that plaintiffs have failed to demonstrate a probability of prevailing, claiming that the challenged statements were of opinion and commentary.

#### Evidentiary Objections

##### Plaintiff's objections

##### McIntyre Decl.

1	p. 2:6-10	Overruled.
2	p. 2:16-17	Overruled.
3	p. 2:17-24	Overruled.
4	p. 2:24-3:8	Overruled.
5	p. 3:9	Overruled.
6	p. 3:10-15	Overruled.
7	p. 3:16-17	Overruled.
8	p. 3:18-19	Overruled.
9	p. 3:20-27	Overruled.
10	p. 4:3-4	Overruled. Printed pages of the Internet site are attached as Exh. A to the declaration.
11	p. 4:4-16	Overruled.
12	p. 4:16-17	Overruled. A glance at <a href="http://www.dignidad.org">www.dignidad.org</a> on 11/1/02 confirms this statement.
13	p. 4:18-20	Overruled.
14	p. 5:1-7	Overruled. A copy of the website being referred to is attached as Exh. C.
15	p. 5:21-6:1	Overruled. A copy of the report is attached as Exh. D.
16	Exh. D	Overruled. The document is easily authenticated by resort to the Cal. Dept. of Education's website.
17	p. 6:5-11	Overruled. A copy of the Charter is attached as Exh. B.

18	p. 6:17-28	Overruled.
19	p. 7:1-5	Overruled.
20	p. 7:6-25	Sustained. Irrelevant.
21	p. 7:26-27	Overruled.
22	p. 7:28-8:17	Overruled. A transcript of the broadcast is attached as Exh. E.
23	p. 8:18-26	Overruled.
24	p. 8:22-26, p. 9:3, 10-14	Overruled.
25	p. 9:18-23	Overruled.
26	p. 9:23-28	Overruled.
27	p. 10:1-9	Overruled.
28	p. 10:21-26, Exh. 10	Overruled.
29	p. 10:27-11:11	Overruled.
30	p. 11:11-14	Overruled.
31	p. 11:15-23	Overruled.
32	p. 11:24-12:15	Overruled.
33	p. 12:27-13:4	Overruled.
34	p. 13:12-19	Overruled.
35	p. 13:20-14:5	Sustained. Irrelevant.
36	p. 14:6-14	Overruled.
37	p. 14:15-28	Sustained. Irrelevant.
38	p. 15:1-5	Overruled.

Defendants' objections

First, all general objections to the entirety of the declarations at issue, save that of Mr. Quintero, are overruled.

*Aguilar Decl.*

1	p. 2:7-9	Overruled.
2	p. 2:27-3:8	Sustained.
3	p. 3:15-21	Overruled.
4	p. 3:22-27	Overruled.
5	p. 4:2-9	Overruled.
6	p. 4:10-16	Overruled.
7	p. 4:18-21	Overruled.
8	p. 4:22-5:8	Overruled.
9	p. 5:17-19	Overruled.
10	p. 5:20-23	Overruled.
11	p. 5:23-24	Overruled.
12	p. 6:2-5	Overruled.
13	¶17, Exh. A	Overruled.
14	p. 6:9-10	Overruled.
15	p. 6:10-12	Sustained. Irrelevant.
16	p. 6:12-13	Sustained. Speculation.
17	p. 6:14-16	Overruled.
18	p. 6:20-21	Overruled.
19	p. 6:22-24	Overruled.

20	p. 6:24-7:8	Overruled. The writing referred to is Exh. A to the declaration of Peter Misseijer, which has been placed inside Exh. E to the Ferguson Declaration, along with a number of other declarations.
21	p. 7:9-11	Overruled. The writing referred to is Exh. A to the declaration of Peter Misseijer, which has been placed inside Exh. E to the Ferguson Declaration, along with a number of other declarations.
22	p. 7:13-17	Overruled.
23	p. 7:22-27	Sustained. Irrelevant.
24	p. 8:1-4	Overruled.
25	p. 8:5-13	Overruled.
26	p. 8:14-24	Overruled.
27	p. 8:25-9:3	Overruled.
28	p. 9:4-9	Overruled.
29	p. 9:10-14	Overruled.
30	p. 9:15-18	Overruled.
31	p. 9:18-21	Sustained. Irrelevant.
32	p. 9:25-10:2	Overruled.
33	¶36, Exh. B	Overruled. It is noted that the attachments are excerpts.
34	¶37, Exh. C	Overruled.
35	p. 10:7-10	Sustained. Speculation.
36	p. 10:11-18	Overruled.
37	¶38, Exh. D	Overruled.
38	p. 10:19-21	Sustained as Hearsay. No letter is attached.
39	p. 10:22-11:1	Overruled.
40	p. 11:2-6	Overruled.
41	p. 11:7-13	Overruled.
42	¶42, Exh. E	Sustained. Exh. E begins with the declaration of Terry Drea, and includes no obvious source of the statement alleged in ¶42.
43	p. 11:16-22	Sustained. Foundation.
44	p. 11:23-24	Sustained. Irrelevant.
45	p. 11:25-12:2	Sustained. Speculation.
46	p. 12:3-7	Sustained. Speculation.
47	p. 12:8-15	Sustained. Speculation.
48	p. 12:16-18	Overruled.
49	p. 12:20-13:2	Sustained. Speculation.
50	p. 13:3-5	Overruled.

*Bramzon Decl.*

1	p. 2:6-11	Sustained. Hearsay.
2	p. 2:12-14	Sustained. Hearsay.
3	p. 2:19-21	Sustained. Speculative.
4	p. 2:27-3:1	Overruled.
5	¶9, Exh. C	Overruled.
6	¶10, Exh. D	Overruled.
7	¶11, Exh. E	Sustained. Irrelevant.

*Ferguson Decl.*

1	p. 2:7-8	Overruled.
2	p. 2:11-14	Overruled.
3	p. 2:16-17	Overruled.
4	p. 3:20-22	Overruled.
5	p. 4:15-18	Overruled.
6	p. 4:19-23	Sustained as to the first sentence of ¶14.
7	p. 4:24-25	Overruled.
8	p. 5:8-10	Overruled.
9	p. 5:14-17	Overruled.
10	p. 6:9-11	Sustained. Irrelevant.
11	p. 6:12-14	Overruled.
12	¶19, Exh. B	Overruled.
13	p. 6:21-24	Sustained. Argument.
14	p. 6:25-7:4	Overruled.
15	p. 7:5-7	Sustained. Irrelevant.
16	¶23, Exh. D	Overruled.
17	p. 7:16-18	Overruled.
18	p. 7:18-20	Overruled.
19	p. 7:22-24	Overruled.
20	p. 8:8-10	Overruled.
21	p. 8:21-9:2	Sustained. Irrelevant.
22	p. 9:8-10	Sustained. No Quintero Declaration filed.
23	p. 9:12-14	Overruled.
24	p. 9:18-10:2	Overruled.
25	p. 10:5-8	Overruled.
26	p. 10:11-13	Sustained. Argument.
27	p. 10:14-20	Sustained as to the last sentence. Foundation.
28	¶36, fn. 5	Overruled.
29	p. 10:21-26	Overruled.
30	p. 11:10-16	Overruled.
31	p. 11:18-19	Overruled.
32	p. 11:20-26	Overruled.
33	p. 11:27-12:8	Overruled.
34	p. 12:10-13	Sustained. Argument.
35	p. 12:14-24	Overruled.

*Drea Decl.*

1	Entire Declaration	Overruled.
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*Garcia Decl.*

1	p. 2:13-16	Overruled.
2	p. 2:17-20	Overruled.
3	p. 2:21-24	Overruled.
4	p. 2:25-28	Sustained. Argument.

*McLaren Decl.*

1	p. 2:12-14	Overruled.
2	p. 2:15-20	Overruled.

3	p. 3:5-9	Overruled.
4	p. 3:10-17	Sustained. Argument.

*Misseijer Decl.*

1	p. 2:8-14	Sustained. Foundation.
2	p. 2:15-18	Overruled.
3	p. 2:19-25	Overruled.
4	¶4, Exh. A	Overruled.
5	p. 3:1-14	Overruled.
6	p. 3:16-21	Overruled.

*Ramm Decl.*

1	p. 2:5-6	Overruled.
2	Exh. A	Overruled.
3	Exh. B	Overruled.
4	Exh. C	Overruled.
5	Exh. D	Overruled.

*Quintero Decl.; Supplemental Ramm. Decl.*

Defendants object to both the declarations of Mr. Ernesto Quintero and the Supplemental declaration of Benjamin Ramm, for untimely service and filing on October 25, 2007. These declarations are not before the Court. The only record of any Court filing on October 25, 2007 is the plaintiffs' notice of errata. These objections to the declarations of Mr. Ernesto Quintero and the Supplemental declaration of Benjamin Ramm are moot.

Analysis

*Legal Standard*

In ruling on a special motion to strike pursuant to section 425.16, the court engages in a two-step process. "First, the court decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity (i.e., that the act or acts of which plaintiff complains were taken "in furtherance of defendant's right of petition of free speech. . . . If such a showing has been made, the court then determines whether plaintiff has demonstrated a "probability" of prevailing on the claim." (Weil & Brown, Cal. Practice Guide, Civil Procedure Before Trial (The Rutter Group, 2007) § 7:256; see also *Equilon Enterprises, L.L.C. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.)

To invoke the protection of section 425.16, a defendant need only demonstrate that a suit "arises from" defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, stating that the defendant's act must "have been an act in furtherance of the right to petition or free speech.") In opposing an anti-SLAPP motion, plaintiff must present admissible evidence and cannot rely on the allegations of the complaint. (*Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, 613-614.)

*Suit "Arises From" Defendants' Exercise of Free Speech*

The critical point in the anti-SLAPP context is whether the plaintiff's cause of action itself was based on an action in such furtherance of the right of free speech. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69.) For purposes of Code of Civil Proce-

section 425.16, an “act in furtherance” includes “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.” (§ 425.16, subd. (e)(3).)

Here, there is no argument that the statements alleged in the complaint (FAC ¶¶ 14-16) were made during a radio broadcast by Mr. McIntyre, or that they concerned the operations of a publicly funded charter school. An on-air radio broadcast is a “public forum.” (See *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 807 [“public forum” is construed broadly to include settings and contexts beyond those protected by the First Amendment].)

The definition of “public interest” within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) Here, the issue of public funding for charter schools is clearly an ongoing matter of public significance.

Because of the forum and the subject of discussion, this matter falls within section 425.16, subdivision (b)(1). (See *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1062-1064.)

#### *Probability of Prevailing*

The issue presented is whether plaintiff can establish a prima facie showing of facts which would, if proved at trial, support a judgment in the plaintiff’s favor. To satisfy the burden, plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The court also considers opposing evidence, but only to determine if it defeats the plaintiff’s showing as a matter of law. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 867.)

The “probability of prevailing” is tested by the same standard governing a motion for summary judgment, nonsuit, or directed verdict. In other words, in opposing a SLAPP motion, it is plaintiff’s burden to make a prima facie showing of facts that would support a judgment in plaintiff’s favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)

#### *Defamation Claim*

Defamation is effected by either libel or slander. (Civ. Code, § 44.) “Slander” includes “a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which . . . [t]ends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to less its profits . . . [or] [w]hich, by natural consequence, causes actual damage.” (Civ. Code, § 46.) The tort involves an intentional publication that is false, defamatory, unprivileged, and that has a natural tendency to injure or that causes special damage. (Civ. Code, §§ 45, 46; Rest.2d, Torts §§ 558, 559; see *Smith v.*

*Maldonado* (1999) 72 Cal.App.4th 637, 645; *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 809.)

Here, the parties contest only whether false statements of fact, rather than opinion, are being alleged.

An essential element . . . is that the publication in question must contain a false statement of fact. . . . This requirement . . . is constitutionally based.” (*Gregory v. McDonnell Douglas Corp.* (1976) 17 Cal.3d 596, 600-601.) “However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340, fn. omitted.) A statement of opinion, however, may still be actionable “if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 451-452; *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1; Rest.2d Torts, § 566, p. 170.) “The dispositive question for the court is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion. . . .” (*Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724.)

(*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 837.)

The statements at issue include criticism of the “School’s funding, curriculum, demographics, administrators (specifically Mr. Aguilar), and educational statistics[,]” including the following specific quotations:

- (a) “Is this a reconquista grade school?”
- (b) “This is a madrasa and you can’t take over the high schools until you take over the grade schools.”
- (c) “This school has a founder and principal who is saying ‘If you assimilate into mainstream America you are committing suicide because that is a white supremacy culture that will destroy you.’ These are his words, not mine. It’s a separatist philosophy.”
- (d) “This school is ranked the lowest of the low in the LAUSD and in the state of California. It has an abysmal academic performance record and its creator and founder rejects *Brown vs. Board of Education*.”
- (e) “Because the school has a separatist philosophy and a separatist agenda, because this is a self-segregating school by design, it’s a separatist school. It’s a school that rejects Martin Luther King’s vision, it’s a school that rejects *Brown vs. Board of Education*. It’s very dangerous.”
- (f) “It’s a radical concept, it’s a racist concept, and it’s reflected in the ethnic composition of the school: 0.00% whites, 0.00% blacks, 0.00% Asians.”
- (g) “Aztecs butchered and ate Spanish invaders. I wonder if they’re teaching that at ASDP.”
- (h) “His [Aguilar] job is to keep his school, his madrasa school, open so they can train the next generation of Aztec revolutionaries. Again, I want to make sure that we emphasize this: this school should close.”

- (i) "Decisions about investing should be taken seriously and one of the best investments you can make is in education, unless of course you're at the ASDP."
- (j) "These people [Mr. Aguilar and the School's teachers and staff] are racists, they're hate mongers, and just like the Ku Klux Klan and the Nazi Party, they're terrorists."

(FAC ¶¶ 15(a)-(i), 16.)

Plaintiffs oppose this motion by arguing that reference to Academia Semillas as a "madrassa," as racist or separatist, that was 0% White, Asian, and Black, inter alia, were false statements. However, plaintiffs cite the literal meaning of the word, "madrassa," as a religious school that teaches the Koran, completely ignoring the First Amendment doctrine providing protection to statements that cannot reasonably be interpreted as stating actual facts.

Though there is no additional separate constitutional privilege for "opinion," statements on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved, inter alia, to provide "breathing space" for true speech on matters of public concern. (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 778-779.) Similarly, the First Amendment protects statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 50-54.) This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. (*Ibid.*) The dispositive question is whether a reasonable factfinder could conclude that the statements at issue assert, or imply an assertion, that is provably false.

Upon a perusal of the transcripts Mr. McIntyre's morning show of May 31, June 1, June 2, and June 9, 2006, as provided by defendants here (Exhs. E, F, I, J), it is clear that no reasonable listener would have concluded that Mr. McIntyre was seriously and *literally* maintaining that Academia Semillas del Pueblo was a reconquista<sup>1</sup> grade school, a madrassa,<sup>2</sup> was aiming to train the next generation of Aztec revolutionaries, or to mount an attempt to secede from the United States. (FAC ¶ 15(a), (b), (e), and (h).) Similarly, statements characterizing the school and/or the founders as racists and/or terrorists could not have led a reasonable listener to conclude that Mr. McIntyre was asserting that the school was literally training "terrorists," or was actually a "rascist" organization. (FAC ¶¶ 15(f), 16.) In both cases, the words, when considered in the context of the series of broadcasts from May 31 through June 9, 2006 – were merely an expression of subjective opinion by one who believed that the underlying mission of the school was not deserving of public or private funding. (McIntyre Decl. ¶ 14; FAC ¶ 15(i).) There is no evidence

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1. Presumably refers to a series of campaigns by Christian states to "re-conquer" territory from the Muslims, who had occupied most of the Iberian Peninsula in the early 8th century.

2. Defined by plaintiffs as a religious institution that teaches students the Koran, to hate the United States, to commit terrorist acts, and to wage Jihad. (Opposition, p. 7:13-21.)

introduced demonstrating that any reasonable listener would have believed that the school was actually training paramilitaries that sought to “re-conquer” any area based on racist ideology, or to violently terrorize others. (See, e.g. *Old Dominion Branch No. 496 v. Austin* (1974) 418 U.S. 264, 284 [use of the term “traitor” does not assert treason].)

Several factual statements are made, however, including that the founder and principal of the school had stated that assimilation into mainstream America would lead to self-destruction; that the school is ranked low in the LAUSD and in the state of California; that its creator and founder rejects *Brown vs. Board of Education*; that the ethnic composition of the school consists of 0.00% whites, 0.00% blacks, 0.00% Asians. Plaintiffs raise but two arguments charging that any of these statements are false: including: (1) that a *single* black student was enrolled; and (2) that the school was audited positively by Peter Misseijer, an LAUSD “Coordinator.” The second of these objections is without merit. That a different report than the one Mr. McIntyre obviously and notoriously relied on may have contained a positive review is irrelevant to how LAUSD ranked its performance – and does not show falsity. That the report Mr. McIntyre referenced showed that a *single* Black student was enrolled – such that his report that the school had no Whites, Blacks, or Asians is negligible. (McIntyre Decl., Exhs. D-F.) That a lone Black student was enrolled (and no Whites or Asians) does not show that Mr. McIntyre’s statement diverged from the true facts in any demonstrable degree, nor does it produce a more damaging effect on the mind of an average listener. (See *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1019-1020.)

Plaintiffs have failed to show that they are likely to prevail at trial on the defamation cause of action. The motion is therefore granted as to the defamation cause of action. “Indeed, the 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.” (*Varian Med. Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193.)

#### *Claim for Violation of the Unruh Act*

The Unruh Civil Rights Act guarantees a number of “personal rights,” including that “[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of [Civil Code] Section 51<sup>3</sup> . . . because another person perceives them to have one or more of those characteristics.” (Civ. Code, § 51.7.)

By their third cause of action, plaintiffs claim that the publication of the statements forming the basis for the defamation action incited others to make threats of violence to plaintiffs based on their racially hateful broadcasts. (FAC ¶¶ 43-50.) Here, while the allegations of the actual threats made do appear actionable, plaintiffs make no claim to show that Mr. McIntyre’s commentary, during any of the broadcasts on May 31, June 1, June 2, or June 9, 2006, was anything but protected speech, or that it was directed at, and likely to cause, imminent lawless action.

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3. Civil Code section 51, subdivisions (b) and (e), list “sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation.”

The radio broadcast at issue here, as discussed, *supra*, is protected speech. One recognized exception is speech directed to inciting imminent lawless action, which is likely to incite or produce this action. (*Brandenburg v. Ohio* (1969) 395 U.S. 444.) But to justify a claim under this exception the court must be satisfied that the speech (a) was directed or intended toward the goal of producing imminent lawless conduct, and (b) was likely to produce the imminent conduct. (*McCullum v. CBS* (1988) 202 Cal.App.3d 989, 1000.)

Here, plaintiff has submitted no evidence to make a *prima facie* showing that Mr. McIntyre's speech here was directed or intended toward the goal of producing imminent lawless conduct, or was likely to produce imminent lawless conduct. There is nothing in any of the statements forming the basis of this suit which could be characterized as a command to any imminent violence or other lawless action.

Plaintiffs have failed to show that they are likely to prevail at trial on the third cause of action.

#### *Remaining Issues*

Defendants also raise two issues as to whether Academia, a charter school, has standing to pursue this suit, and whether the ABC parties are proper defendants. Inasmuch as plaintiffs have failed to meet their burden, a discussion of these issues is not necessary.

#### *Leave To Amend*

When a court grants a special motion to strike as to a cause of action, the court may not grant leave to amend the cause of action, as such an order would frustrate the Legislature's "quick and inexpensive method of unmasking and dismissing such suits." (*Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th 1068, 1073.) Therefore, the court orders the first and third causes of action stricken without leave to amend.

#### *Attorneys' Fees*

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion . . ." (§ 425.16, subd. (c).)

Defendants were successful in striking both of plaintiffs' remaining causes of action. However, on the same day that this motion was filed, plaintiffs dismissed the remaining three causes of action based on the costs of litigation. (Aguilar Decl. ¶¶ 8-9.) Based on the dismissal, plaintiffs argue that should defendants prevail on this motion, they should not be deemed the prevailing party for purposes of attorneys' fees. (*Coltraine v. Shewalter* (1998) 66 Cal.App.4th 94, 104-107; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374.)

Both cases are inapposite. The holding in *S. B. Beach Properties* was that defendants who fail to file an anti-SLAPP motion before the voluntary dismissal of all causes of actions against them cannot recover fees or costs under section 425.16, subdivision (c).

(*S. B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379.) *Coltraine v. Shewalter* concerned the definition of “prevailing party” in the context of Civil Code section 1717 and/or in section 1032 when a plaintiff voluntarily dismisses certain claims. The cases however, do not discuss what should occur, in the context of a voluntary dismissal filed after a motion under section 425.16 is filed. (Kissinger Decl. ¶¶ 4, 6, Exh. A.)

Defendants have not provided any documentation as to the hours expended in preparation of this motion. The fee provision of the Anti-SLAPP statute was intended only to cover fees and costs expended in the motion, rather than in the entire case. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1383.)

Defendants may submit a memorandum of costs and a declaration as to attorneys’ fees.

Dated: January 10, 2008

Ralph W. Dau  
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Ralph W. Dau, Judge