Case No. 09-16809
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Plaintiff-Appellant,* *vs.* ROBERT A. DELSMAN, *Defendant-Appellee.*	**Appeal from the U.S. District Court for the Northern District of California** (No. 4:09-cv-01468-SBA)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Plaintiff-Appellant Sedgwick Claims Management Services, Inc. ("Sedgwick"), by its attorneys Locke Lord Bissell & Liddell LLP and Harvey Siskind LLP, submit this reply brief in support of its appeal from an order of the United States District Court for the Northern District of California (Hon. Saundra Brown Armstrong, U.S.D.J.), which dismissed Plaintiff-Appellant's claims pursuant to Fed. R. Civ. P. 12(b)(6) and California Code of Civil Procedure § 425.16.

ARGUMENT

As demonstrated in Sedgwick's opening brief, the District Court's dismissal of Sedgwick's action under California Code of Civil Procedure § 425.16, California's Anti-SLAPP Statute, was erroneous as a matter of law. The District Court improperly determined that the statements which form the basis of Sedgwick's defamation and trade libel claims were protected speech and dismissed these claims pursuant to the Anti-SLAPP Statute.[1] Instead of considering each statement that Delsman made on its own merits, Judge Armstrong considered as one all of Delsman's statements, using one statement to inform another, even though they appear to have been made at separate times, in separate places to separate people. This was improper because certain statements Delsman made

[1] Delsman notes that Sedgwick has appealed on a very narrow issue. That is true. Nonetheless, the narrow issue that Sedgwick has appealed on is dispositive because if the court undertook a faulty Anti-SLAPP analysis, its dismissal of Sedgwick's action on that basis must be overturned.

were qualitatively distinct from others and did not fit within the analysis the District Court performed to determine that Delsman was exercising free speech. Specifically, when Delsman accused Sedgwick of being a Ponzi scheme he made provably false factual assertions about Sedgwick.

Because on their face Delsman's Ponzi scheme accusations were provably false, to determine they were free speech required a different analysis than the one the District Court undertook with respect to Delsman's non-factual statements of opinion. These defamatory statements were not free speech and do not support an Anti-SLAPP dismissal. None of the arguments Delsman raises in opposition to Sedgwick's appeal dispute Sedgwick on this point. Instead, he incorrectly argues that Sedgwick did not preserve this issue for appeal.

I. The District Court Erred In Finding That Labeling Sedgwick A Ponzi Scheme Was Free Speech

Delsman asserts that the District Court's decision was correct because he "has shown that his speech and conduct are within the scope of the Anti-SLAPP statute." (Opposition Brief ("Br.") p. 21). He then proceeds to argue his use of the phrase "Ponzi Scheme" was rhetorical and therefore a permitted exercise of his free speech. These arguments crystallize exactly why the District Court's ruling was incorrect. Delsman has never made any showing of any kind that his calling Sedgwick a Ponzi scheme is free speech. That he now tries to demonstrate to this Court that his use of the phrase Ponzi scheme was rhetorical by citing various

articles as evidence of its use as a rhetorical device underscores this failing. It also underscores that the District Court never did a proper analysis of Sedgwick's claims before deciding to dismiss. The District Court improperly found that Delsman's statements accusing Sedgwick of being a Ponzi scheme were ripe for an Anti-SLAPP dismissal.

A. The District Court's Anti-SLAPP Analysis Was Flawed

As stated in Sedgwick's opening brief, in order for an action to be dismissed under the Anti-SLAPP statute, two determinations must be made. "First, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike. Second, if the threshold showing has been made, the court must determine whether the plaintiff has demonstrated sufficient minimal merit to be allowed to proceed … Nothing outside of this two-step process is relevant." Weinberg v. Feisel, 110 Cal.App.4th 1122, 1130 (2003)(citations omitted). In order to meet the first, threshold requirement that the challenged cause of action is subject to an Anti-SLAPP dismissal, the moving defendant "must demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue.'" Hailstone v. Martinez, 169 Cal.App.4th 728, 735 (2008)(internal quotation omitted); see also Navellier v. Sletten, 29 Cal.4th 82, 89

(2002)(stating that "in the Anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity").

Here, the District Court found that Delsman's statements were free speech made in the public interest, because their "purpose is to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services." [ER-13]. And, that Delsman "is asserting his constitutional right to criticize Sedgwick." [ER-14]. The District Court did not require any demonstration "that the act or acts of which the plaintiff complains were taken in furtherance of [defendant's] right of petition." See Hailstone, 169 Cal.App.4th at 735. It appears instead that the District Court simply determined based on Sedgwick's memorandum of law in opposition to Delsman's "Motion For Summary Judgement [sic]; Improper Venue; Failure To Join An Indispensable Third Party Under Rule 19" that Delsman was exercising free speech.

It is ultimately unclear what provided the factual basis for the court's finding, since Delsman did not provide any evidence, or even any legal argument, to demonstrate that labeling Sedgwick a Ponzi scheme is free speech. A review of the filings Delsman made in support of his motion bear this out. His "Motion For Summary Judgement [sic]; Improper Venue; Failure To Join An Indispensable Third Party Under Rule 19" is silent with respect to this issue. Though he sought

summary judgment relief, Delsman did not file any documentation or evidence in support of his motion. Because of this, Delsman has done nothing to demonstrate that he was exercising his right to free speech by calling Sedgwick a Ponzi scheme. If the District Court had required Delsman to make the requisite showing before ruling, it is likely that it never would have determined that falsely accusing Sedgwick of a crime is free speech because Delsman would not have been able to show that this was free speech.

The District Court did not just err by failing to require Delsman to demonstrate that he was exercising free speech, it erred in how it ultimately analyzed Delsman's statements. In making her findings, Judge Armstrong treated all of Delsman's statements that formed the basis for Sedgwick's claims for defamation and trade libel, which involved a series of statements Delsman made over the course of several weeks, as if they were one statement. She failed to analyze each of the component statements in Delsman's series of statements separately, as she was required to do. See, e.g., Manufactured Home Communities, Inc. v. County of San Diego, 544 F. 3d 959 (9th Cir. 2008)(performing a statement by statement analysis of allegedly defamatory statements in denying SLAPP dismissal); see also Mann v. Quality Old Time Service, Inc., 120 Cal.App.4th 90 (2004) (performing a separate SLAPP analysis for each different assertion of defamatory conduct and holding that once a plaintiff shows a likelihood of success

on any of its causes of action the suit is not subject to an Anti-SLAPP dismissal). In failing to do the required analysis, the District Court ignored the qualitative differences between the different statements that Delsman made, to different people at different times, which requires a much different analysis than simply lumping all of the statements together. For this reason, the District Court never found, as it was required to, that all of Delsman's activities were free speech so as to support an Anti-SLAPP dismissal of all of Sedgwick's claims.

In fact, the differences between Delsman's component statements raise grave questions for an Anti-SLAPP analysis and clearly put certain of them outside of the purposes which the District Court found warranted their treatment as free speech. Specifically, in accusing Sedgwick of being a Ponzi scheme Delsman made provably false statements of fact. This type of statement is very different than the other statements of opinion that he made about Sedgwick. The difference is, in fact, dispositive in determining whether a an Anti-SLAPP motion on a defamation claim should be granted. See, e.g., Nygard, Inc. v. Uusi-Kerttula, 159 Cal.App.4th 1027, 1052 (2008) (analyzing the difference between non-actionable statements of opinion and verifiable statements of fact on Anti-SLAPP dismissal for defamation claims).

The District Court never reached this issue, and instead held in effect that because Delsman made certain of his statements in certain contexts "to enlighten

potential consumers of Sedgwick's allegedly questionable claims practices," every statement he made relating to Sedgwick, no matter the context or contents of that statement, was free speech. The District Court's reasoning does not bear scrutiny, especially since that postcards which label Sedgwick a Ponzi scheme do not say anything about Sedgwick's claims management services (the criticism of which, according to Judge Armstrong, is supposedly free speech).

This failure is particularly egregious because Delsman's statements were defamatory per se. Not only was calling Sedgwick a Ponzi scheme a provably false factual assertion, but it was a false accusation of a crime and, as such, is defamatory per se. See Crowe v. County of San Diego, 593 F.3d 841, 877 (9th Cir. 2010). ; WEST'S ANN. CAL. CIV. CODE §§ 45, 45a, and 46 (2007). California courts have specifically held that such statements – false accusations of a crime – will not support an Anti-SLAPP dismissal. See Weinberg, 110 Cal.App.4th at 1136 ("Simply stated, causes of action arising out of false allegations of criminal conduct … are not subject to the anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law…"); see also Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 168-169 (1979). As such, the obligation to demonstrate that these statements were not defamatory, but within his right to free speech, lay

only with Delsman. By not applying the proper analysis, Judge Armstrong placed that obligation – to demonstrate that it was not a criminal enterprise and that false accusations to that end were not free speech – on Sedgwick. This turns the requirements for an Anti-SLAPP dismissal on its head. And, in the present situation, where Delsman had moved for summary judgment (with the burden of making a factual showing), inverted the evidentiary burden as well which prejudiced Sedgwick.

That these statements were defamatory per se also implicates the second prong of the Anti-SLAPP analysis, and goes to the question of whether Sedgwick has shown enough merit so that its claims may go forward. The "dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." Franklin v. Dynamic Details, Inc., 116 Cal.App.4th 375, 385 (2004). By complaining of statements that were defamatory per se, Sedgwick clearly alleged claims that a reasonable finder of fact could determine were defamatory, which is all that is required.

B. Delsman Improperly Asks This Court To Make Findings Of Fact

Delsman is aware that this analysis did not take place, and that he did not make the requisite showing, but nevertheless belatedly tries to make the required demonstration to this Court. He argues that his defamatory statements are free speech because they are allegedly rhetorical opinions. Delsman also argues that

this Court should not grant Sedgwick's appeal because Sedgwick has not shown that it could prevail on the merits of its defamation claims because Sedgwick has not demonstrated that Delsman's statements calling Sedgwick a Ponzi scheme were not rhetorical. (Br. pp. 21-27). This argument completely misunderstands the requirements for an Anti-SLAPP dismissal. It also proves that the District Court's analysis was incorrect because it did not require that Delsman satisfy his burden to show that he was exercising free speech when he called Sedgwick a Ponzi scheme. It is also an admission that Delsman's claim that Sedgwick is a Ponzi scheme is false.

As an initial failing, Delsman's argument on this point inverts the requirements for an Anti-SLAPP dismissal. As noted above, the absolute threshold requirement of an Anti-SLAPP dismissal is that the moving defendant "must demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue." Hailstone, 169 Cal.App.4th at 735. It is not presumed that a defendant moving for this type of dismissal is exercising his free speech. See id. Nonetheless, Delsman seeks to place the burden on Sedgwick asserting that it must demonstrate that Delsman was not exercising free speech; Delsman does this under the guise of arguing that Sedgwick cannot demonstrate that it can prevail on the merits of its claim because

Delsman's Ponzi scheme accusations were supposedly rhetorical opinions. But, Sedgwick made a prima facie showing of defamation in its complaint, and this showing included Delsman's false factual allegation of Sedgwick being a Ponzi scheme. See, e.g., Franklin, 116 Cal.App.4th at 385 ("[T]he dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.")(citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990); Standing Committee on Discipline of U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F. 3d 1430, 1438-1439 (9th Cir. 1995)). For this reason, before the question of whether Sedgwick could prevail on its claims even arose, for Delsman to prevail on an Anti-SLAPP dismissal of these claims, Delsman (not Sedgwick) needed to demonstrate that those statements were free speech by for example – as he now seems inclined – showing that they were rhetorical opinions. But Delsman has not done this to date. And, the District Court never considered this issue, which is exactly the flaw in its analysis from which Sedgwick appeals.

In attempting to place this affirmative burden on Sedgwick, Delsman seeks to rewrite the Anti-SLAPP statute. Under Delsman's conception of the Anti-SLAPP statute, it is up to the plaintiff to demonstrate why dismissal should not be granted; or, stated differently, an Anti-SLAPP dismissal is presumed unless a plaintiff can prove that it should not be granted. Delsman has transformed the

Anti-SLAPP statute from a safe harbor a defendant may be entitled to, if he can demonstrate that he belongs there, into a prerequisite that a plaintiff must satisfy to proceed. California courts have already held that this is not how courts should apply the statute. See Weinberg, 110 Cal.App.4th at 1130 ("First, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike.")(emphasis added).

Moreover, this argument asks the Circuit Court to make a finding of fact which the District Court did not, namely that Delsman's statement at issue here is a rhetorical opinion. Delsman cites to 11 articles in the hope of persuading the Court that Delsman's false factual statement is a rhetorical opinion.[2] Though he does not explicitly say so, Delsman is seeking a finding of fact on this question. This Court is not the place for a finding of fact that Delsman's statements were rhetorical opinions. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.... [I]t should not simply have made

[2] Interestingly, the bulk of these articles refer to government agencies or programs as Ponzi schemes. An agency or entity operating under the government's imprimatur is very different than a private company. Calling a government agency a "Ponzi Scheme" would not seem to carry the same weight as calling a private company the same thing. Also, Delsman does not provide any information as to whether the statements in the articles cited led to any claims of defamation.

factual findings on its own."); see also Morgan v. Gonzales, 495 F. 3d 1084, 1090 (9th Cir. 2007)(citing Tippitt v. Reliance Standard Life Ins. Co., 457 F. 3d 1227, 1237 (11th Cir. 2006) ("[I]t is not the role of appellate courts to make findings of fact.")). And, even if the Court were inclined to make such a finding, it is a finding the Court could not make on the information before it. There are myriad issues that accompany this question. For example, Delsman argues that calling Sedgwick a Ponzi scheme was rhetorical because "he views this scheme as roughly comparable to the way a Ponzi operator receives the investments of many but avoids having to make complete payouts by the ruse of making small payments to keep its scheme going." (Br. p. 26). This requires a weighing of Delsman's beliefs and discovery as to what exactly those beliefs were.[3]

Finally, that Delsman must try to make this showing here for the first time demonstrates just how the District Court failed to make the findings that were required for it to dismiss Sedgwick's claims under the Anti-SLAPP statute. The District Court never determined that the post cards accusing Sedgwick of being a Ponzi scheme were free speech, which is why Delsman makes this argument without a single cite to any document that is in the record or to the District Court's decision.

[3] It also undercuts Delsman's argument because he essentially says that he accused Sedgwick of being a Ponzi scheme because he thinks Sedgwick is a Ponzi scheme.

II. The Issues Sedgwick Has Raised Were Properly Preserved For Appeal

Delsman's final argument is that Sedgwick is not entitled to make the arguments that it has chosen to make on appeal because it did not preserve those arguments below. (Br. pp. 10-13). This argument is incorrect. It oversimplifies and misstates the law and ignores the procedural circumstances surrounding the District Court's decision. In fact, the arguments that Sedgwick has made on appeal were preserved on the record below and are properly before this Court.

Though he never states exactly what argument Sedgwick supposedly failed to preserve, Delsman appears to object to Sedgwick's argument that, in granting an Anti-SLAPP dismissal, Judge Armstrong did not properly consider the statements Delsman made which asserted provably false factual statements. An issue is not waived or forfeited, however, if the issue has been "raised sufficiently for the trial court to rule on it." Cornhusker v. Kachman, 553 F. 3d 1187 (9th Cir. 2009) (quoting In re E.R. Fegert, Inc., 887 F. 2d 955, 957 (9th Cir. 1989)). The court need not rule on the specific argument as long as the facts were presented to the court and the court could have ruled. In re E.R. Fegert, 887 F. 2d at 957; U.S. v. Baxley, 982 F. 2d 1265, 1268, n. 5 (9th Cir. 1992).

Here, Sedgwick sufficiently raised with the trial court the issue that it is now appealing. In its amended complaint, Sedgwick clearly indicated that the February 9th post card labeling Sedgwick a Ponzi scheme was one of the statements on

which Sedgwick based its defamation and trade libel claims. [ER-65-66, ¶34]. In its opposition to Delsman's summary judgment motion, Sedgwick argued that Delsman had not made any showing that his actions, including the post card calling Sedgwick a Ponzi scheme, were free speech. [See Opposition to Defendant's Motion For Summary Judgment, Improper Venue, Failure To Join An Indispensible Third Party Under Rule 19, filed June 23, 2009, District Court Docket No. 25, pp. 2-6]. The District Court even referenced this post card in its decision, although it never analyzed it as the law requires. [ER-3]. As such, whether the statements on the February 9 post card were defamatory and whether they had been shown to be free speech was clearly raised before the trial court and is a question preserved for appeal. See Cornhusker, 553 F. 3d at 1192; In re E.R. Fegert, 887 F. 2d at 957.

Delsman's argument regarding preservation of Sedgwick's right to appeal is particularly troubling because it ignores exactly what occurred in the trial court and how the trial court reached its decision. Specifically, the appealed-from decision is on a motion Delsman made, which he called a "Motion For Summary Judgement [sic]; Improper Venue; Failure To Join An Indispensable Third Party Under Rule 19." [ER–40-51]. In that motion he requested that the court enter "summary judgment in favor of Rob Delsman." [ER-51]. As such, he had an evidentiary burden to demonstrate that there be no material issues of fact in order to prevail on

summary judgment. See Playboy Enterprises v. Netscape Communications, 354 F. 3d 1020, 1023-4 (9th Cir. 2004); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). He provided no evidence in support of his motion. In the course of this motion, Delsman made two passing references to the Anti-SLAPP statute. He did not request dismissal under this statute, nor did he make any showing that his activities were free speech in the public interest. In replying to this motion, Sedgwick argued that there was no Anti-SLAPP issue because Delsman did not satisfy either prong of the Anti-SLAPP analysis. He did not demonstrate that he was exercising free speech in the public interest and Sedgwick had a likelihood of prevailing on the merits. [See Opposition to Defendant's Motion For Summary Judgment, Improper Venue, Failure To Join An Indispensible Third Party Under Rule 19, filed June 23, 2009, District Court Docket No. 25, pp. 2-6].

Without hearing oral argument, and with no notice to the parties, Judge Armstrong converted Delsman's motion for summary judgment into a motion to dismiss under Federal Rule of Civil Procedure 12 and an Anti-SLAPP motion to strike. Upon converting this motion, Judge Armstrong determined on her own, without any evidentiary basis or showing by defendant, that Delsman was exercising his free speech. In Delsman's silence on whether or not he was exercising his free speech, Judge Armstrong took up as Delsman's advocate, clarified his motion for him, and made arguments in his favor. She also granted his

motion. The trial court did this without warning to the parties, without oral argument where Sedgwick could have responded to issues the court might have raised, and without any supplemental briefing on the issues being considered by the court. [ER-13]. Ultimately, Delsman barely hinted at an Anti-SLAPP dismissal and the District Court took that hint, fleshed it out and created the basis for it to become a successful motion, all without Sedgwick having a chance to respond. Sedgwick was not ever given any opportunity to be heard on what was essentially a novel application of the Anti-SLAPP statute, based upon a flawed Anti-SLAPP analysis voiced by the court for the first time in its decision. With respect to Delsman's argument that Sedgwick has not preserved this issue, beyond showing above how it is incorrect, Sedgwick is left to wonder what would be sufficient under Delsman's conception of federal practice to preserve an issue? The appealed from issue only became apparent once the District Court issued its flawed decision based on a motion that was never clearly articulated.

CONCLUSION

For the reasons stated in Sedgwick's Opening Brief and those stated in this Reply Brief, Sedgwick requests that this Court overturn the decision of the District Court dismissing Sedgwick's claims.

Dated: March 1, 2010

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I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28(e)(2)(C) because it contains 3,889 words.

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Dated: March 1, 2010

Respectfully submitted,

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9th Circuit Case Number(s) 09-16809

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