COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC – 10485

SUFFOLK, ss.

STEVEN C. FUSTOLO,
Plaintiff-Appellee

v.

FREDDA HOLLANDER,
Defendant-Appellant

_____

On Appeal from an Order of the Superior Court

_____

BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS (ACLUM), CITIZEN MEDIA LAW PROJECT (CMLP), and LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION IN SUPPORT OF APPELLANT HOLLANDER

Paul Holtzman
BBO # 563184
Krokidas and Bluestein, LLP
600 Atlantic Avenue
Boston, MA 02210
617-482-7211

Sarah Wunsch
BBO # 548767
ACLU Fdn. of Mass.
211 Congress St.
Boston, MA 02110
617-482-3170, ext. 323

Christopher T. Bavitz
BBO # 672200
Clinical Fellow, Cyberlaw Clinic
Harvard Law School
Berkman Center for Internet & Society
23 Everett Street, 2nd Floor
Cambridge, MA 02138
617-384-9125

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Whether the Superior Court improperly denied Hollander's special motion to dismiss under the anti-SLAPP statute on the grounds that her paid employment by a community newspaper brought her conduct outside the scope of petitioning activity as defined by the statute, despite the fact that her reporting related to government proceedings in which the plaintiff had an interest and increased public pressure on the government in those proceedings.

STATEMENTS OF INTEREST

Amici are the American Civil Liberties Union of Massachusetts (ACLUM), the Citizen Media Law Project, and the Lawyer's Committee for Civil Rights Under Law of the Boston Bar Association. *Amici* are non-profit organizations that regularly engage in petitioning activities through the use of paid staff who organize, educate, and encourage the public to petition the government.

ACLUM defends the freedoms established in the Bill of Rights and the Massachusetts Declaration of Rights. To protect the right to petition under the First Amendment, ACLUM has long been involved in

representing individuals who have been sued in so-called “Strategic Lawsuits Against Public Participation” (“SLAPP”) suits because of their exercise of that right. One of those cases, Northern Provinces, Inc. v. Feldman, No. 91-2260 (Mass. Sup. 1992), was acknowledged by this Court as having been the “impetus for introduction of the anti-SLAPP legislation.” Duracraft Corp. v. Holmes Products, Corp., 427 Mass. 156, 161 (1998). ACLUM was among the organizations that sought the enactment of the Anti-SLAPP Act, codified at G.L.c. 231, § 59H. ACLUM also participated as amicus in Baker v. Parsons, 434 Mass. 543 (2001), Fabre v. Walton, 436 Mass. 517 (2002), and Benoit v. Frederickson, 454 Mass. 148 (2009), concerning the meaning of § 59H.

The Citizen Media Law Project ("CMLP") provides legal assistance, education, and resources for individuals and organizations involved in online and citizen media. CMLP is jointly affiliated with Harvard University's Berkman Center for Internet & Society, a research center founded to explore cyberspace, share in its study, and help pioneer its development, and the Center for Citizen Media, an initiative to enhance and expand grassroots media. CMLP is an unincorporated

association hosted at Harvard Law School, a non-profit educational institution. CMLP has previously appeared as an amicus on legal issues of importance to the media, including in Bank Julius Baer & Co. v. Wikileaks.org, No. 08CV824 (N.D. Cal. Feb. 26, 2008), Hatfill v. Mukasey, No.08-5049 (D.C. Cir. March 28, 2008), Maxon v. Ottawa Publishing Co., No. 2008-MR-125 (Ill. App. Ct. Mar. 24, 2009), and The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., No. 2009-0262 (N.H. June 30, 2009).

The Lawyer's Committee for Civil Rights Under Law seeks to obtain redress for victims of discrimination based on race or national origin and to protect civil, social and economic liberties. The Lawyer's Committee promotes meaningful pro bono work by members of the bar for litigation, public policy advocacy and community legal education.

Amici have a continuing interest in seeing that the Anti-SLAPP Act ("Act") is interpreted to effectively protect the exercise of the right to petition as it was intended. As advocacy organizations, each has a particular interest in ensuring that the protections of the Act are available to their paid employees, who carry out much of the

organizations' work to influence the judicial, legislative, and executive branches of government, either directly or through public education and engagement. Not unlike newspapers, *amici* publish written materials for their members and the broader public in which paid staff report on government proceedings and advocate policy positions on issues of public concern.

Amici are united in the view that interpreting the Act to deny protection to the petitioning activity of paid staff acting on behalf of an organization — whether part of the news media or an advocacy group — is at odds with the plain language and legislative purpose of the anti-SLAPP statute.

STATEMENT OF THE CASE

This case involves allegations of defamation in a lawsuit filed against Fredda Hollander by Plaintiff Steven Fustolo ("Fustolo") based on five articles she wrote in 2006 for publication in the *Regional Review* ("Review"), a free community newspaper serving the North End neighborhood. These articles generally reported on Fustolo's development activities, including meetings of community groups at which these

activities were discussed. Hollander, who was a co-founder of the North End/Waterfront Residents' Association ("NEWRA") and a member of other community groups concerned about the effects of land development projects on the community, had previously submitted uncompensated works for publication in the *Review*. In 1997, she was hired by the *Review* as a paid reporter, and it was in this capacity that she wrote the articles at issue.

Hollander filed a special motion to dismiss pursuant to Massachusetts' anti-SLAPP law, Mass. G. L. c. 231, § 59H. On October 3, 2008, the Superior Court (Hines, J.) denied the motion, and this appeal ensued.

In denying Hollander's motion, the lower court ruled that her activities fell outside the scope of the anti-SLAPP law. Specifically, the court held that because Hollander "factually described the events" that occurred at community meetings under the direction of her publisher, she "did not engage in petitioning activities on her own behalf as a citizen or seek redress from the government based on those grievances." Fustolo v. Hollander, No. 06-3595, slip op. at 5 (Mass. Super. Ct. Oct. 3, 2008) Alternatively, the court concluded that, even if

Hollander's reporting could be categorized as petitioning activity, the financial remuneration she received from the *Review* disqualified her from the protections of the Massachusetts anti-SLAPP law.

ARGUMENT

Both of the Superior Court's rulings are in error. They ignore the plain language of the anti-SLAPP statute, and, if allowed to stand, would undermine the legislature's intent – to protect a broad array of petitioning activities and encourage community members to inform themselves about and be engaged in the democratic process.

Contrary to the assertion in Plaintiff-Appellee's brief (p. 13), neither Hollander nor *amici* argue for an absolute immunity from suit for journalists or other advocates under the anti-SLAPP statute. *Amici* recognize that the anti-SLAPP statute only provides a qualified immunity, protecting petitioning activities that have a reasonable factual and legal basis. What *amici* argue is that the simple fact of gainful employment by a newspaper, another media outlet or an advocacy organization is insufficient by itself to deprive an individual of the protections of the anti-SLAPP law.

The text of Massachusetts' anti-SLAPP law does not limit the type of party that may benefit from its protections, so long as that party engages in petitioning activity. Newspapers, through their reporters, engage in news reporting to influence, inform, and bring about governmental consideration of issues and to foster public participation in order to effect such consideration. This type of petitioning activity is exactly what the legislature sought to protect by enacting the anti-SLAPP law. Because newspapers, by necessity, petition through the reporting of their staff, a categorical exclusion of reporters from the scope of the anti-SLAPP law would chill expression far more effectively than any SLAPP suit could.

Hollander's meager remuneration for her reporting should not deprive her of the anti-SLAPP law's protection. Fustolo's lawsuit targets Hollander's petitioning activity — her reports about meetings and events directly related to ongoing government proceedings involving Fustolo. Moreover, Hollander's articles were part and parcel of her efforts as an activist (efforts shared by other residents of the area) to shed light on Fustolo's record and cause the

relevant government agencies to take appropriate action.

I. FACTUAL REPORTING BY COMMUNITY NEWSPAPERS AND THEIR EMPLOYEES QUALIFIES AS PETITIONING ACTIVITY UNDER THE ANTI-SLAPP STATUTE

A. COMMUNITY NEWSPAPERS ARE NOT CATEGORICALLY BARRED FROM PROTECTION UNDER THE ANTI-SLAPP STATUTE.

The Massachusetts anti-SLAPP law does not limit the type of party that may bring a special motion to dismiss. Rather, the statute's protections extend to "any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition." Mass. G. L. c. 231, § 59H. In enacting the statute, "the Legislature intended to enact very broad protection for petitioning activities," Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 162 (1998), and the statute enumerates five types of activities that fall within its scope, including *any written or oral statement* "[1] made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; [2] any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental

proceeding; [3] any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; [4] any statement reasonably likely to enlist public participation in an effort to effect such consideration; or [5] any other statement falling within constitutional protection of the right to petition government." Mass. G. L. c. 231 § 59H.

Courts in Massachusetts have found the anti-SLAPP law's protections apply to a wide range of parties, including limited liability corporations, SMS Financial V, LLC v. Conti, 68 Mass. App. Ct. 738, 746-47 (2007); citizens groups, see Plante v. Wylie, 63 Mass. App. Ct. 151, 156 (2005); and hosts of community blogs, MacDonald v. Paton, 57 Mass. App. Ct. 290, 291-92 (2003). Consistent with the recognition that the anti-SLAPP remedies are available to many types of parties, this Court has noted that "there is no statutory requirement that petitioning parties directly commence or initiate proceedings." Kobrin v. Gastfriend, 443 Mass. 327, 338 (2005).

As this Court stated in N. Am. Expositions Co. Ltd. P'ship v. Corcoran, 452 Mass. 852, 864 (2009), communication is "protected under the anti-SLAPP

Statute" where it has "the potential or intent . . . directly or indirectly to influence, inform, or bring about governmental consideration of the issue." 70 Mass. App. Ct. 411, 420 (2007) (quoting Global NAPs, Inc. v. Verizon New England, Inc., 63 Mass. App. Ct. 600, 607 (2005)). *Amici* recognize that not every news article or piece of opinion journalism published by the news media will necessarily satisfy this inquiry and thus be covered by the anti-SLAPP law. But by engaging in factual news reporting, newspapers often influence and inform both the public and governmental bodies about community issues and grievances.

Factual reporting in a newspaper is likely to fall under several of the enumerated petitioning activities in the anti-SLAPP law. Factual reporting can, among other things, "encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" and "enlist public participation in an effort to effect such consideration." Mass. G. L. c. 231, § 59H. Indeed, the news media in Massachusetts frequently provide officials with information that leads to consideration by governmental bodies and encourages the public to become involved. In one relatively recent example, a

WBZ-TV report questioning the accounting practices of Assabet Valley Regional Technical High School led to an inquiry by the Office of the Inspector General. See Priyanka Dayal, IG School Report Blasted; Assabet Denies Hiding $6M, Telegram & Gazette (Worcester), March 19, 2008, at A1.[1]

Two Massachusetts courts have already recognized that newspapers and their publishers are covered by the anti-SLAPP law. In Joyce v. Slager, No. 08-01240-B (Mass. Super. Ct. Apr. 6, 2009), the Plymouth Superior Court granted a community newspaper's motion to dismiss under the anti-SLAPP statute in a defamation suit. The court noted that protection under the anti-SLAPP statute may be extended to commercial entities, including newspapers. Distinguishing Cadle Co. v. Schlichtmann, 448 Mass.

[1] Similarly, a recent article in the Boston Phoenix raising questions about police misconduct led to a review by the Boston Police Department of how a case was built against a man wrongfully convicted of shooting a police officer. See David S. Bernstein, More Than a Few Loose Ends: BPD To Review Cowans Evidence, Boston Phoenix, March 5, 2008. In May 2008, responding to an April story in the Boston Globe describing how a group representing ticket brokers had hired a friend of Speaker DiMasi as a lobbyist, the Massachusetts Republican Party filed a complaint with the Commonwealth's Ethics Commission. See Andrea Estes & Stephen Kurkjian, Ticket Brokers Acknowledge Hiring Speaker's Longtime Friend, Boston Globe, May 14, 2008, at B1.

242 (2007), in which a lawyer was denied anti-SLAPP protection because the statements at issue were made on a website "established solely to advertise and solicit clients," the court noted that "[a]lthough Slager's newspaper may rely on advertising revenue to survive, Slager did not start his newspaper solely to solicit advertisers." Joyce, No. 08-01240-B, slip op. at 7. Following the text of the anti-SLAPP statute, the Joyce court based its decision on whether the conduct in question constituted petitioning activity, not on the nature of the party seeking protection.

Similarly, in Salvo v. Ottoway Newspapers, No. 97-2123-C, 1998 WL 34060940 (Mass. Super. Ct. May 13, 1998), the plaintiff brought a libel action against the publisher of the Salem Evening News. The News had published an article reporting on a development proposal that was about to be presented to the town's planning board and accusing the plaintiff of seeking to build "on what was thought to be unbuildable wetlands." Salvo, 1998 WL 34060940, at *1. Although the Essex Superior Court found that the article in question lacked any reasonable factual support and that the plaintiff's libel claim was thus not subject to dismissal, the court held that the defendant

newspaper fell within the protection of the anti-SLAPP statute. Id. at *2.

Not every statement by the news media, regardless of how tangential it is to an issue under consideration or review by a governmental body, is entitled to the protection of the anti-SLAPP law. See Global NAPs, 63 Mass. App. Ct. at 607 ("tangential statements intended, at most, to influence public opinion in a general way unrelated to governmental involvement" are not covered by the statute). But statements by the news media that are "reasonably likely to encourage consideration or review of an issue" by a governmental body or are "reasonably likely to enlist public participation in an effort to effect such consideration," are covered by the plain language of the anti-SLAPP law's broad definition of petitioning activity. Mass. G. L. c. 231, § 59H.

B. HOLLANDER'S ROLE AS AN EMPLOYEE OF A COMMUNITY NEWSPAPER DOES NOT DEPRIVE HER REPORTING OF THE STATUS OF PETITIONING ACTIVITY AS DEFINED BY THE ANTI-SLAPP STATUTE.

Given that newspapers are entitled to anti-SLAPP protection for their petitioning activity, it would be incongruous to deny that same protection to their reporters. SLAPP suits are brought in retaliation

against individuals or organizations that speak out on a public issue or controversy, effectively intimidating and silencing the target through the threat of an expensive lawsuit. These suits affect not only the target, but may also deter others from voicing similar concerns. Such chilling effects would be greatly amplified if this Court upheld the Superior Court's ruling that newspaper employees are categorically excluded from the anti-SLAPP statute's protections. Reporters would likely refuse to cover public issues for small community newspapers that lack the funds to defend them in court. Such a result would be inimical to the purpose of the anti-SLAPP law.

This reasoning is supported by the preamble to 1994 House Doc. No. 1520, which added the anti-SLAPP provisions to Mass. Gen. L. ch. 231 and noted the Legislature's recognition that "full participation by *persons and organizations* and robust discussion of issues before legislative, judicial, and administrative bodies *and in other public fora* are essential to the democratic process . . . ." Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161 (1998) (emphasis added). Legislators

recognized the value of protecting the petitioning activity not only of private citizens, but also of advocacy organizations, including community newspapers. Given that these organizations may only engage in such conduct through their staff, it would be contrary to the legislative goal to adopt an interpretation of the statute that would deny its protections to employees of advocacy groups and media entities. Although the decision below deals with a paid employee of a community newspaper, the focus on her status as a paid employee – if applied more broadly – would dramatically undermine anti-SLAPP protection for paid advocates employed by a wide range of environmental, civil rights and other organizations.

As noted above, one court in the Commonwealth has already ruled that a newspaper article "falls squarely with[in] the protection of [the anti-SLAPP law] as a '. . . written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding.'" Salvo, No. 97-2123-C, 1998 WL 34060940, at *2 (quoting Mass. G. L. c. 231, § 59H). This conclusion is in line with this Court's

recognition that, while the anti-SLAPP law was originally conceived to protect against "lawsuits directed at individual citizens of modest means for speaking publicly against development projects," Duracraft Corp., 427 Mass. at 161, the law was designed to provide far broader protection. Id. at 162. Although it was the newspaper publisher in Salvo that was granted protection under the anti-SLAPP law, there is no reason why such protection should not extend to a newspaper's reporters.

In this case, Hollander had been an outspoken community advocate in the North End for years before joining the *Review* to write about development issues. In deciding to accept the position, a primary consideration was the increased influence it would give her with local politicians and governmental officials. (Def.'s Decl. ¶ 13.) Fustolo admits in his complaint that Hollander's articles were the basis for the lawsuit, and that the effectiveness of her advocacy in stirring up community opposition to his projects had previously led him to withdraw applications for variances.

Despite the statute's broad definition of petitioning activity and the close connection between

Hollander's articles and government proceedings, the Superior Court denied Hollander's special motion to dismiss. Citing Kobrin v. Gastfriend, 443 Mass. 327 (2005), the court ruled that her reporting for the community newspaper did not constitute petitioning activity within the meaning of G.L. c. 231, § 59H, because her statements were made as a contractual employee, directed by the publisher of the newspaper to cover neighborhood meetings. Fustolo, No. 06-3595, slip op. at 5. This is both a misreading of Kobrin and an overly narrow view of the role of reporters and community newspapers.

In Kobrin v. Gastfriend, 443 Mass. 327 (2005), the Board of Registration in Medicine hired Gastfriend to investigate Kobrin, a fellow psychiatrist. After his investigation, Gastfriend wrote an affidavit for use by the government in a disciplinary hearing against Kobrin. Based on the contents of that affidavit, Kobrin sued Gastfriend for defamation and related claims, and Gastfriend filed a special motion to dismiss under the anti-SLAPP statute. This Court reversed the trial court's grant of the motion, holding that since Gastfriend "act[ed] solely on behalf of the board as an expert investigator and

witness," he "was not exercising his right to petition or to seek any redress from" a government body. Kobrin, 443 Mass. at 333 (emphasis in original).

The trial court misunderstood the significance of Kobrin, which denied protection under the anti-SLAPP statute to Gastfriend because he was retained by the government (the Board of Registration in Medicine) to act on the government's behalf in investigating another psychiatrist and had "no . . . connection to, or interest in, the allegations against the plaintiff." Kobrin, 443 Mass. at 332, 337. The crucial point is not that Gastfriend was paid but that he, unlike Hollander, was working on behalf of the government and not expressing his own, independent views.

Indeed, the Kobrin Court expressly distinguished the case before it from Baker v. Parsons, 434 Mass. 543 (2001), in which this Court upheld the grant of anti-SLAPP protection to a staff biologist at a non-governmental environmental organization who provided comments on proposed development upon solicitation by the government. That Parsons was an employee of an organization (and was presumably paid for her work) was immaterial to this Court's decision. Instead,

this Court focused on whether Parsons had engaged in activities covered by the anti-SLAPP law's broad definition of the right of petition, noting, inter alia, the fact that she was not "hired by the government" and did not "serve on behalf of the government to further its interests rather than seek redress for [her] grievances." Kobrin, 443 Mass. at 339. Similarly, when evaluating the applicability of the anti-SLAPP law to a suit involving a reporter, a court should focus on whether her reporting constitutes petitioning activity under the statute's broad definition and not merely on her employment status.

II. RECEIVING PAYMENT FOR HER PETITIONING ACTIVITY DOES NOT DEPRIVE HOLLANDER OF PROTECTION UNDER THE ANTI-SLAPP ACT.

The Superior Court ruled that even if the content of Hollander's articles constituted petitioning activities under G.L. 231, § 59H, she was not entitled to protection under the statute because "the financial benefit she received from the Regional Review's publication of her articles constitutes a private reason" for her petitioning activity. Fustolo, No. 06-3595, slip op. at 8. Because Fustolo's complaint

"would thereby not be based on her petitioning activities alone," the court deemed protection under the anti-SLAPP statute to be inappropriate. Id. This ruling is at odds with the language of the statute, the legislature's intent, and a wide range of rulings interpreting the statute.

The Massachusetts anti-SLAPP law does not specifically exclude parties who receive compensation for their petitioning activities from its protections. Nor does it contain any broader requirement that the petitioning party's sole motivation or purpose be to influence government proceedings. As the Superior Court noted in Margolis v. Gosselin, 1996 WL 293481 at *1 (Mass. Super. Ct. May 22, 1996), "the plain language of Section 59H does not limit its application to public interests or make the motivation of protected parties relevant in any way." Id. at *3; See also Office One, Inc. v. Lopez, 437 Mass. 113, 123 (2002) ("[Defendant's] 'entitlement to petition the FDIC and seek allies to strengthen her effort exists notwithstanding the fact that she was doing so purely for economic self-interest.'" (quoting trial court)).

In fact, such a requirement would be contrary to the plain language of the anti-SLAPP statute which

applies, *inter alia*, to "*any statement reasonably likely* to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding" and to "*any statement reasonably likely* to enlist public participation in an effort to effect such consideration." Mass. G. L. c. 231, §59H (emphasis added). Case law interpreting the statute has borne this out. See, e.g., Global NAPs, 63 Mass. App. Ct. at 607) (whether communication "had the *potential* or intent to redress a grievance, or directly or indirectly to influence, inform, or bring about governmental consideration . . ." (emphasis added); Margolis, 1996 WL 293481 at *3 ("[E]ven if defendant's ultimate aim was to derail plaintiff's project to serve her employer's competitive ends, it is uncontested that defendant's immediate intent was to effect action on the part of [the Massachusetts Department of Environmental Protection].")

Moreover, even if financial remuneration constitutes one motivation for a reporter's petitioning activities, she may have other interests sufficient to confer protection under the anti-SLAPP statute. A reporter is also a member of her

community, and like her neighbors feels the effects of development projects. Leveraging her access to the printed page to promote government action does not change the petitioning nature of her speech, regardless of whether she is compensated. Cf. Thomson v. Town of Andover Bd. of Appeals, No. 931716, 1995 WL 1212920, at *1 (Mass. Super. July 25, 1995) (finding that letters to the editor in a newspaper constitute petitioning activity under the anti-SLAPP statute if they are "'reasonably likely to encourage consideration or review' by the government" or are "'reasonably likely to enlist public participation.'")

A reporter may also have an interest in keeping the public informed about issues affecting her community. Limiting the protection of the anti-SLAPP law to those who have only a personal, non-pecuniary stake in an issue would exclude from protection many efforts at enlisting public participation – whether by community newspapers or by advocacy organizations. Such a limitation is found nowhere in the statute's "very broad protection for petitioning activities." Duracraft, 427 Mass. at 162.

The lower court erred in focusing on the compensation Hollander received for her reporting. As

this Court noted in Office One, Inc., 437 Mass. at 122, the correct focus is on the *conduct* of the party seeking protection under the anti-SLAPP statute, not her motivations. See also Fabre v. Walton, 436 Mass. 517, 524 (2002) ("Notwithstanding his allegations concerning the motive behind Walton's conduct, the fact remains that the *only* conduct complained of is Walton's petitioning activity.") Like many reporters working for community newspapers, Hollander sought to petition the government to address local matters of concern and encourage members of her community to do the same. The minor compensation she received does not change the nature of her conduct.

III. FIRST AMENDMENT DOCTRINE, WHICH SHOULD INFORM THIS COURT'S INTERPRETATION OF THE ANTI-SLAPP STATUTE, DOES NOT DEPRIVE A PETITIONER OF PROTECTION MERELY BECAUSE SHE IS COMPENSATED FOR HER SPEECH

Because the anti-SLAPP statute protects certain enumerated activities and "any other statement falling within constitutional protection of the right to petition government," Mass. G.L. c. 231, §59H, it is important to note that a financial motivation does not deprive a petitioner of First Amendment protection. For example, protections for petitioning activity under the First Amendment have been interpreted

broadly in antitrust litigation, regardless of the petitioner's motivations.

This principle is confirmed by the Noerr-Pennington Doctrine (arising from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) and United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)) which was developed in the context of the Sherman Antitrust Act, 15 U.S.C. § 1–7 (2008), but has since been applied in various other contexts in which a lawsuit is based on the defendant's right to petition.[2] The comparison between the Anti-SLAPP statute and the Noerr-Pennington Doctrine is particularly apt because in both situations courts are asked to balance the

[2] See, e.g., Westfield Partners, Ltd. v. Hogan, 740 F.Supp. 523, 526 (N.D. Ill. 1990) (extending the doctrine to create "an immunity from suit which allows citizens and companies to petition public officials to take certain action or enact certain provisions."); California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (applying the doctrine to citizen efforts to obtain administrative agency or judicial action as well as legislative change); see also Duracraft Corp. v. Holmes Prods. Corp., 42 Mass. App. Ct. 572, 582–83 (1997), affirmed, 427 Mass. 156 (1998) (quoting Video Int'l Prod. Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075, 1084 (5th Cir. 1988) for the proposition that "the Noerr-Pennington doctrine has been 'expanded . . . to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations."))

defendant's right to petition against the just evaluation of the plaintiff's claim.

In Noerr, the Supreme Court held that the Sherman Act was not violated when a group of railroads, a railroad association, and a public relations firm engaged in petitioning activity against a group of truckers through the publication and distribution of circulars, speeches, newspaper articles, editorials, magazine articles, memoranda, and other documents. Noerr, 635 U.S. at 138–42. Confirming that protected petitioning activities include the actions of paid employees, the Supreme Court stated:

> "The right of people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves . . . . 'If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful . . . .'"

Noerr, 365 U.S. at 139, quoting United States v. Rock Royal Co-op, Inc., 307 U.S. 533, 560 (1939).

Noting that the government likely receives much of the information on which it relies from people who hope to advantage themselves thereby, the Supreme Court stated that denying people with personal

financial interests in a matter the right to petition would not only deprive the government of valuable information, but also "deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." Noerr, 365 U.S. at 139.

Similarly, even if Hollander's motivations were influenced by the direction of her supervisor or the minimal financial compensation she received, the status of her otherwise legitimate petitioning activity should not be affected.

CONCLUSION

For the foregoing reasons, the order of the Superior Court denying the defendant's special motion to dismiss should be reversed. Because Hollander has already demonstrated a reasonable basis for the statements for which she has been sued, this Court should order that her special motion to dismiss be granted. In the alternative, the case should be remanded to the Superior Court to allow the plaintiff a chance to show, by a preponderance of the evidence, (1) that Hollander's exercise of her right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) caused him actual

injury. See G.L. c. 231, § 59H; Baker v. Parsons, 434 Mass. at 553-554.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, CITIZEN MEDIA LAW PROJECT, and LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION

By Their Attorneys,[3]

Paul Holtzman (BBO # 563184)
KROKIDAS & BLUESTEIN LLP
600 Atlantic Avenue
Boston, MA 02110
(617) 482-7211

Sarah Wunsch (BBO # 548767)
ACLU Foundation of Massachusetts
211 Congress Street
Boston, MA 02110
617-482-3170, ext. 323

Christopher T. Bavitz (BBO # 672200)
Clinical Fellow, Cyberlaw Clinic
Harvard Law School
Berkman Center for Internet & Society
23 Everett Street, 2nd Floor
Cambridge, MA 02138
617-384-9125

Dated: October 1, 2009

[3] *Amici* wish to acknowledge the invaluable assistance of Ann Sultan, Columbia University law student and law clerk at Krokidas and Bluestein LLP, and Harvard Law School Cyberlaw Clinic student Lee Baker in the preparation of this brief.

MRAP Rule 16(k) Certification

The undersigned counsel hereby certifies that the foregoing brief complies with the rules of court that pertain to the filing of briefs.

_____
Sarah R. Wunsch

Dated: October 1, 2009

9998\0021\253640.6