SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL,	:	
Plaintiff,	:	Case No. 16-002469
v.	:	
EXXONMOBIL OIL CORP.,	:	
Defendant.		

[PROPOSED] ORDER

Upon reviewing the unopposed motion of the Center for Individual Rights ("CIR") to file an amicus brief in support of the motion of the Competitive Enterprise Institute seeking costs under D.C.'s Anti-SLAPP Act, and concluding that good cause supports CIR's motion, it is hereby GRANTED.

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The Hon. _________________
Superior Court of the District of Columbia

Service To: Linda Singer
Andrew Grossman

Method: The Court's Electronic Filing System

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AMICUS BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF THE MOTION SEEKING COSTS UNDER D.C.'S ANTI-SLAPP ACT

The Center for Individual Rights ("CIR") respectfully submits this amicus brief in support of the motion of defendant Competitive Enterprise Institute ("CEI") seeking costs, including reasonable attorneys' fees, pursuant to D.C.'s Anti-SLAPP Act (D.C. Stat. §§ 16-5501, *et seq.*). It addresses only whether the Anti-SLAPP Act authorizes a court to award fees under a "catalyst theory," and whether CEI has met one of the elements of that theory, whether their special motion to dismiss was a "genuine" motion (*i.e.*, not frivolous or groundless).

Background

The D.C. Anti-SLAPP Act was designed to provide broad protection – broader than that afforded by the First Amendment – to those speaking on issues of public interest in the District of Columbia. CIR adopts the background statement sets forth in CEI's motion. In addition, CIR notes that, subsequent to the filing of CEI's motion, Plaintiff has withdrawn the subpoena issued by the D.C. Superior Court and terminated the action, and this Court has ordered the action terminated.

Argument

The language of the attorneys' fee provision should be interpreted broadly to adopt the "catalyst theory," and permit an award of fees if a motion or threat of motion under the Anti-SLAPP Act caused Plaintiff to withdraw his subpoena and thus provided the relief sought by the motion. Alternatively, and as discussed in the authorities cited in CEI's memorandum of law in support of its special motion to dismiss (at p. 18), this Court might resolve CEI's special motion to dismiss and then determine the propriety of an award of fees.[1]

In *Sierra Club v. EPA*, 322 F.3d 718 (D.C. Cir. 2003), the District of Columbia Circuit Court of Appeals concluded that the language of the statute before it (the Clean Air Act) authorized an award of fees under the "catalyst theory," and then described that theory as follows:

> Having held that the "whenever ... appropriate" standard authorizes recovery under a catalyst theory, we turn to the question of whether such an award is "appropriate" in this case. On this issue, *Buckhannon* provides useful guidance. Though the Court split five to four on the propriety of catalyst recovery under the

[1] Some of the authorities cited by CEI conclude that a voluntary dismissal (*Rauhauser v. McGibney*, 2014 WL 6996819 (Tex. App. Ct. 2014)) or a dismissal for failure to state a claim (*Wright Development Corp., LLC v. Walsh*, 939 N.E.2d 389 (Ill. 2010)) do not moot the underlying Anti-SLAPP motion to dismiss because the latter provides for other relief (primarily, *res judicata* effect and/or attorneys' fees) that goes beyond what those other dismissals provide. CIR does not address this alternative theory in this amicus brief; if the Court chooses to follow those authorities, it would be unnecessary to address the "catalyst theory" that CIR discusses here.

"prevailing party" standard, all nine Justices agreed, albeit in *dictum,* on the correct standard for whether a lawsuit qualifies as a catalyst. In a passage arguing that the majority should have given greater weight to lower court decisions approving catalyst recoveries, the dissent synthesized decisions that had articulated the standard:

> The array of federal court decisions applying the catalyst rule suggested three conditions necessary to a party's qualification as "prevailing" short of a favorable final judgment or consent decree. A plaintiff first had to show that the defendant provided "some of the benefit sought" by the lawsuit. Under most Circuits' precedents, a plaintiff had to demonstrate as well that the suit stated a genuine claim, *i.e.,* one that was at least "colorable," not "frivolous, unreasonable, or groundless." Plaintiff finally had to establish that her suit was a "substantial" or "significant" cause of defendant's action providing relief. In some Circuits, to make this causation showing, plaintiff had to satisfy the trial court that the suit achieved results "by threat of victory," not "by dint of nuisance and threat of expense." One who crossed these three thresholds would be recognized as a "prevailing party" to whom the district court, "in its discretion," could award attorney's fees.

Sierra Club v. E.P.A., 322 F.3d 718, 726 (D.C. Cir. 2003) (quoting *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept of Health and Human Services*, 532 U.S. 598, 627-28 (2001) (Ginsburg, J., dissenting) (citations omitted)).

Here, the language and legislative history of the attorneys' fee provision in D.C.'s Anti-SLAPP support an award of costs and fees pursuant to the catalyst theory. Moreover, with respect to one element of the theory, whether the "suit was colorable" – which, in this context, must translate into whether CEI's motion was colorable – CEI can clearly meet the standard because the subpoena issued by the Attorney General of the Virgin Islands was a "claim" under the Anti-SLAPP Act.

I. SECTION 5504(A) SHOULD BE CONSTRUED TO INCORPORATE THE "CATALYST THEORY"

D.C. Code Section 16-5504(a) provides that a party that successfully makes a special motion to dismiss under the Anti-SLAPP Act is entitled to "the costs of litigation, including reasonable attorney fees." The D.C. Court of Appeals has held that a successful movant should be presumptively entitled to those costs and fees. *Doe No. 1 v. Burke*, 133 A.3d 569 (2016) (holding that an individual who successfully makes a special motion to quash under D.C. Code § 16-5503(a) is entitled to costs and fees in the absence of special circumstances). Moreover, if it meets the requirements of the catalyst theory, CEI should be entitled to its costs and fees even if Plaintiff's withdrawal of the subpoena renders it unnecessary to decide the special motion. *But see* n.1, *supra*.

In *Settlemire v. D.C. Office of Employee Appeals*, 898 A.2d 902, 907 (D.C. 2006), the D.C. Court of Appeals held that the phrase "prevailing party" in D.C. Code § 1-606-08 "[g]enerally . . . is understood to mean a party 'who has been awarded some relief by the court' (or other tribunal)" (quoting *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 , 603 (2001)).[2] However, in *Frankel v. D.C. Office for Planning and Economic Dev'ment*, 110 A.3d 553 (2015), the Court of Appeals distinguished *Settlemire* when different language in the relevant attorneys' fee statute (*viz.*, D.C.'s FOIA law) evinced an intent to provide a broader entitlement to fees:

> *Settlemire* was not a FOIA case, and its holding does not control

[2] D.C. Code § 1-606.08(a) provides that the "Hearing Examiner or Arbitrator" in an merit personnel system appeal "may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice."

> the interpretation of a different statute containing different language. The provision at issue in *Settlemire* – D.C. Code § 1-608.08 – only provides awards to a "prevailing party," whereas the FOIA statute provides awards to a party that "prevails in whole or in part." D.C. Code § 2-537(c). This difference suggests that the D.C. Council intended to authorize attorney's fees in FOIA cases more often than in other types of cases.

Frankel, 110 A.3d at 557. The *Frankel* court went on to hold that a court could award fees pursuant to the "catalyst theory" under D.C.'s FOIA statute. *Id.* at 558.

The relevant attorney fees provision in the D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a), provides that "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 . . . the costs of litigation, including reasonable attorney fees." Thus, the relevant provision uses the broader "prevails in whole or in part" language that the *Frankel* Court found significant in concluding that fees could be awarded pursuant to the catalyst theory.

In reaching that conclusion, the *Frankel* Court also relied upon the purposes of the attorneys' fee provision in the FOIA Act. It noted, for example, that D.C. agencies risked almost nothing by refusing to comply with a request for public documents. *Id.* at 558. It further noted that the purpose of the fee award provision was to encourage citizens to seek the release of information wrongfully withheld. *Id.* It held that the catalyst theory advanced "these goals by allowing more litigants to recover attorney's fees and creating an incentive for the D.C. government to disclose more documents in the first place." *Id.*

In *Doe No. 1 v. Burke*, the Court of Appeals similarly viewed the legislative history of the D.C. Anti-SLAPP Act, noting that the Committee Report accompanying the bill underscored the "threat to free expression posed by SLAPP suits 'over the past two decades' and the corresponding need for local Anti-SLAPP legislation" and "recognized the substantial cost to defendants . . . of litigating SLAPP actions even equipped with the means the Bill provided." *Doe No. 1 v. Burke*, 133 A.3d at 575 (internal cites omitted). The costs imposed on parties against whom SLAPP claims are made, as well as the chilling effect those claims have on free expression, exist regardless of whether the claim is withdrawn just before a court can act. Indeed, the party making such SLAPP claims can be analogized to D.C. agencies under the D.C. FOIA. Just as there is no cost to the latter wrongfully withholding documents without an attorney's fee provision that incorporates a catalyst theory, so, too, there would be little cost to Plaintiff here repeatedly issuing and serving, and then withdrawing, subpoenas on CEI and other similarly-situated non-profits. *See* Declaration of Andrew Grossman In Support of The Competitive Enterprise Institute's Special Motion To Dismiss ("Grossman Decl."), Ex. O.[3]

For these reasons, Section 5504(a) authorizes this Court to award fees regardless of whether the claim that was the subject of a Section 5502 special motion to dismiss was withdrawn.

II. THE ISSUANCE OF A SUBPOENA HERE IS A "CLAIM" FOR PURPOSES OF THE D.C. ANTI-SLAPP ACT

As set forth at the outset of this Argument, the "catalyst theory" in federal courts

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[3] Another useful analogy might be to Rule 37(a)(4) of this Court's Rules of Civil Procedure. That rule authorizes an award of expenses (with limitations not relevant for this purpose) on discovery motions "[i]f the motion is granted *or* if the requested discovery is provided after the motion was filed" (emphasis added). Rule 37(a)(4) is specifically incorporated into motions for protective orders pursuant to the last sentence of Superior Court Civil Rule 26(c), and thus applies when discovery requests are withdrawn after a motion for a protective order is filed.

generally provides for attorney's fees when the plaintiff had a colorable claim that led (or "substantially caused") the defendant to provide plaintiff with some of the relief plaintiff sought. In the context of the Anti-SLAPP Act, the movant is in the place of the plaintiff in a federal statute authorizing fees and costs. Here, there can be no doubt that CEI received some of the relief that it sought by its special motion to dismiss – a withdrawal of the subpoena. This section addresses whether CEI's special motion to dismiss was "colorable," *i.e.*, not frivolous or groundless. It was more than colorable; indeed, it was meritorious because the Anti-SLAPP Act is properly interpreted to cover motions against a subpoena seeking documents reflecting speech protected by the Act.

The Anti-SLAPP Act states that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a). CEI did file such a special motion to dismiss. The issuance of a subpoena pursuant to D.C.'s Uniform Interstate Depositions and Discovery Act (D.C. Code §§ 13-441, *et seq.*) is a "claim" for purposes of the D.C. Anti-SLAPP Act. Moreover, because the Anti-SLAPP Act should be interpreted broadly to achieve its aim of deterring the use of D.C.'s courts to inhibit speech on matters of public interest, the Act should be interpreted to apply in this action to Plaintiff's effort to use the D.C. courts to quell speech on the issue of climate change.

The Anti-SLAPP Act does not define the term "claim," but states that it "*includes* any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief." D.C. Code § 5501(2) (emphasis added). Although somewhat circular (since it includes the term "claim" in the enumeration), this provision plainly evinces an intent to interpret "claim" broadly to include any use of the courts to achieve a goal through some kind of legal process. In that sense, Plaintiff's effort to have this court issue a subpoena on his behalf to obtain documents from CEI is plainly a "claim." It is a claim that he is entitled to view documents in CEI's possession, something that he would have no right to do without this Court's aid. Further, it is a judicial "filing" – a paper filed with this Court and given a case number by the clerk's office of this Court – requesting relief (the production of documents) purportedly to achieve Plaintiff's ostensible goal of investigating business misconduct. Grossman Decl., Ex. B (Subpoena), Att. A at 1:

> ExxonMobil is suspected to have engaged in, or be engaging in, conduct constituting a civil violation of the Criminally Influenced and Corrupt Organizations Act, 14 V.I.C. § 605, by having engaged or engaging in conduct misrepresenting its knowledge of the likelihood that its products and activities have contributed and are continuing to contribute to Climate Change in order to defraud the Government of the United States Virgin Islands . . . and consumers in the Virgin Islands, in violation of 14 V.I.C. § 834 (prohibiting obtaining money by false pretenses) and 14 V.I.C. § 551 (prohibiting conspiracy to obtain money by false pretenses).

Moreover, Plaintiff's claim "arises" from "an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). The subpoena seeks documents that CEI created to communicate, or that reflect communications, on issues of public importance. For example, the subpoena seeks "All Documents and Communications concerning the likelihood that or extent to which any of the products sold by or activities carried out by ExxonMobil directly or indirectly impact Climate Change." Grossman Decl., Ex. B (Subpoena), Att. A at 12 (¶ 2). Since it is public knowledge (that this Court may take judicial notice of) that ExxonMobil's activities include the exploration, production, and sale of oil, this request alone seeks all documents concerning whether the exploration, production, and sale of oil does or does not cause Climate Change. Presumably, this includes any discussion about other possible causes of Climate Change. The subpoena unambiguously includes discussions of "climate legislation" and public policies like a "carbon tax."[4] These things are obviously connected to "an issue under consideration or review by a legislative [or] executive . . . body," D.C. Code § 16-5501(1)(A)(i), and "written or oral statement[s]" on them would thus qualify as "act[s] in furtherance of the right of advocacy on issues of public interest," (*id.* § 16-5501(1)(A)) even if they were not made publicly, which no doubt many of them were, and even if they were not about "environmental, economic or community well-being" or some other issue of public interest (*id.*, § 16-5501(3)), which they obviously were. *See also* CEI Memorandum of Law In Support Of Its Special Motion To Dismiss ("CEI MTD Memo.") at 6.

In this context, the granting of a "special motion to dismiss" under D.C. Code § 16-5502(a) would lead to the same result as a successful motion to quash or motion for a protective order. Although Section 16-5502 was no doubt intended to apply to situations in which a defendant has been sued in a plenary lawsuit, and seeks to have the lawsuit or a cause of action therein immediately dismissed, a "special motion to dismiss" is not a Rule 12(b)(6) motion. There would have been no reason for the D.C. Council to adopt it if it simply duplicated existing law. And it differs at least in part because a "claim" under the Anti-SLAPP statute is broadly

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[4] The subpoena states that "'Climate Change' refers to the general subject matter of changes in global or regional climates that persist over time, whether due to natural variability or as a result of human activity." It further states that documents that use any of the terms "climatology," "global warming," "greenhouse gas," "Kyoto Protocol," "global cooling," "carbon tax," and "climate legislation" (among other phrases), as well as documents concerning "rising sea levels, Arctic and/or Antarctic ice melt, [and] declining sea ice" concern Climate Change. Grossman Decl., Ex. B (Subpoena) at 8.

described and includes many legal proceedings aside and apart from "causes of action" in plenary lawsuits. Thus, it *includes* a "cause of action," but other things as well, and the enumeration in the statute is not intended to be comprehensive. D.C. Code § 16-5501(2). Moreover, it is undisputed that the proceeding here is, at least, an "action." Plaintiff himself called it an "action" in filing his notice of termination on May 20, as did this Court in its May 26 termination order.

Finally, the purpose of the D.C. Council in passing the Anti-SLAPP Act – to protect those engaging in a public dialogue on important issues from the burden of litigation – also supports the application of the Act to these situations and the conclusion that CEI's special motion to dismiss was colorable. As CEI's moving papers shows, the subpoena is broad and responding to it would require substantial time of attorneys and non-attorneys alike. *See* CEI MTD Memo. 16-17. The Anti-SLAPP statute should protect citizens from the unpalatable choice of extensive litigation or caving in. Accordingly, it should be applied in precisely these situations.

Conclusion

For the foregoing reasons, CIR urges this Court to conclude that the withdrawal of the subpoena does not moot CEI's request for attorney fees under the D.C. Anti-SLAPP Act, and that CEI's special motion to dismiss a subpoena was proper under the D.C. Anti-SLAPP Act and can be a basis for an award of fees.

Respectfully submitted,

/s/ Michael E. Rosman

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