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July 7, 2011

The Honorable Audrey J. S. Carrion
Circuit Court for Baltimore City
Courthouse East
111 N. Calvert Street
Baltimore, Maryland 21202

RE.: *Conaway v. Meister*
Civil Action No. 24C11003294

Dear Judge Carrion:

The Reporters Committee for Freedom of the Press ("Reporters Committee") respectfully requests that the Court consider the following letter brief in its deliberation of the above-captioned case. Because the submission of an *amicus curiae* brief at the non-appellate level is procedurally unusual, the Reporters Committee is providing this Court with relevant information in a less formal format. A copy of this correspondence was provided to the Civil Clerk's Office so that the document may be made part of the official docket.

By way of background, the Reporters Committee is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As advocates for the rights of the news media, the Reporters Committee seeks to provide the Court with information about one of the media's means to protect those rights: "anti-SLAPP" statutes, which allow for quick and painless dismissals of cases stemming from constitutionally protected speech about matters of public concern. Anti-SLAPP statutes, including Maryland's, are not tools to deprive plaintiffs of redress of their legally protected injuries, and the Reporters Committee does not claim that the legislative measure can or should be used to deprive, for example, the subject of a false, defamatory and non-privileged report his or her day in court. Rather, the statutes help alleviate a dangerous chilling effect on vital public speech by expeditiously terminating unfounded claims that threaten constitutional free speech rights — claims that, like these, should have never been brought in the first place, given the strong protections for the speech on which they are based.

Accordingly, the Reporters Committee urges this Court to grant Defendant Adam Meister's ("Meister") motion to dismiss this suit under the Maryland anti-SLAPP statute. In so doing, this Court should provide useful guidance to others by interpreting the statute's "bad faith" language the same

way it is interpreted in other contexts and not in a manner that paradoxically requires a SLAPP defendant to endure costly discovery. Such a holding would serve the intent of this state's legislators, conform to the nationwide trend of preventing SLAPPs by ending them early and with little cost to their targets and, perhaps most importantly, help ensure that debate on major public issues in this community remains vigorous and uninhibited.

Introduction

Few areas of speech are entitled to as robust First Amendment protection as that about issues of public concern. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). The First Amendment "reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011) (citing *Sullivan*, 376 U.S. at 270). Speech reporting the content of public records is also entitled to this protection. Public records "by their very nature are of interest to those concerned with the administration of government . . . . The freedom of the press to publish that information is of critical importance to our type of government in which the citizenry is final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

In this case, Baltimore City Councilwoman Belinda Conaway ("Conaway") alleges that Internet journalist Meister's online post about the councilwoman's residence defamed her and caused her to suffer emotional distress. (Compl. ¶¶ 27, 2 p. 6). To support his assertions that Conaway lives outside Baltimore while representing its Seventh Electoral District, in violation of the Baltimore City Charter, Meister relied on a sworn affidavit signed by Conaway and homestead property tax exemption records that identify her Randallstown, Md., home as her principal residence. (Exs. 1–2, Mem. of Law in Supp. of [Def.'s] Mot. to Dismiss).

Whether a city councilwoman actually lives in the area of town she represents is of critical importance to voters who rely on her to represent their interests. Not only is this information not defamatory, it plays an important role in the democratic process. Because of the broad First Amendment protections for such speech, Conaway's claim is meritless.

As such, Meister is entitled to the protection of the Maryland statute allowing for early dismissal of "strategic lawsuit[s] against public participation," or "SLAPP" suits. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807 (2011). In enacting this statute, the Maryland General Assembly intended to provide an effective remedy for those facing suits that threaten to chill their First Amendment rights to speak about issues of public concern. To effectuate the General Assembly's intent, this Court should dismiss Conaway's SLAPP suit at its earliest opportunity.

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The Maryland General Assembly intended to provide an effective remedy for individuals facing suits that threaten to chill their First Amendment rights to speak about issues of public concern.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. *See State v. Bell*, 720 A.2d 311, 315 (Md. 1998). In Maryland, the principle that courts must look first at the plain meaning of the statute is not absolute; rather, the statute must be construed in reference to the purpose, aim or policy of the enacting body. *See Tracey v. Tracey*, 614 A.2d 590, 594 (Md. 1992). Courts must look at the larger context within which the statutory language appears. *See Morris v. Prince George's County*, 573 A.2d 1346, 1349 (Md. 1990) ("Our endeavor is always to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment."). Construction of a statute which is unreasonable, illogical, unjust or inconsistent with common sense should be avoided. *See Tracey*, 614 A.2d at 594.

Maryland's anti-SLAPP statute defines a SLAPP suit as one:

> (1) Brought in bad faith against a party who has communicated with a federal, State, or local government body *or the public at large* to report on, comment on, rule on, challenge, oppose, or in any other way exercise rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body or *any issue of public concern*;
>
> (2) Materially related to the defendant's communication; and
>
> (3) Intended to inhibit or inhibits the exercise of rights under the First Amendment of the U.S. Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights.

Md. Code Ann., Cts. & Jud. Proc. § 5-807(b) (emphasis added). The statute makes clear that a defendant in a SLAPP suit like the one filed by Conaway

> is not civilly liable for communicating with a federal, State, or local government body or the public at large, if the defendant, without constitutional malice, *reports on*, comments on, rules on, challenges, *opposes*, or in any other way exercises rights under the First Amendment of the Constitution or Article 10, Article 13, or Article 40 of the Maryland Declaration of Rights regarding any matter within the authority of a government body or any issue of public concern.

Id. § 5-807(c) (emphasis added). A defendant in an alleged SLAPP suit may move to dismiss the suit, and the court "shall hold a hearing on the motion to dismiss as soon as practicable." *See id.* § 5-807(d)(1).

The General Assembly passed its anti-SLAPP law in 2004 to protect individuals from "defending costly legal challenges to their lawful exercise of such constitutionally protected rights as free speech, assembly, and the right to petition the government." *See* Md. Dep't of Legis. Servs., Fiscal and Policy Note, S.B. 464, at 2 (2004) [hereinafter Fiscal and Policy Note], *available at* http://mlis.state.md.us/pdf-documents/2004rs/fnotes/bil_0004/sb0464.pdf. The purpose is to help defendants avoid the psychological and monetary costs of litigation. *See id.* Even meritless suits can tie defendants up in costly discovery procedures, causing them to think twice before speaking in the future. In Maryland SLAPP suits, the plaintiffs' goal "is often not to win the case, but rather to cause the defendants to devote such significant resources to defending it that they are unable to continue the challenged activities." *See id.* The litigation itself is the primary evil to be avoided. *See id.*

Amendments to the statute in 2010 broadened its protections. One change added "or any issue of public concern" to the definition of a SLAPP suit, broadening the types of activity protected. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1); 2010 Md. Laws 368. Another removed an intent requirement. Rather than requiring defendants to show that the SLAPP suit is "intended to inhibit the exercise of rights under the First Amendment," the statute now defines a suit as one that "[is] intended to inhibit *or inhibits* the exercise of rights under the First Amendment." *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(3) (emphasis added).

Conaway's lawsuit plainly satisfies the statutory definition of a SLAPP suit. Meister was communicating with the public at large about an issue of public concern. Conaway has now sued him for doing so, thereby inhibiting his exercise of the First Amendment rights of free speech and the press. Accordingly, a consideration of the context in which the Maryland anti-SLAPP statute was adopted requires dismissal of Conaway's suit.

This case is just one of countless claims nationwide that illustrate the importance of anti-SLAPP statutes. Indeed, SLAPPs have become an all-too-common tool for intimidating and silencing critics, often lacking the financial backing of large media companies, who speak out or provide information about vital issues of significant public interest. For example, Dallas resident Avi Adelman has blogged weekly for the past 12 years about the proximity of restaurants and bars to his neighborhood and is "no stranger to waking up at 3 a.m. to cover a shooting two blocks from his house, talk to witnesses, upload the story [onto his blog BarkingDogs.org] and hop back into bed 45 minutes later." The Reporters Committee for Freedom of the Press, *In the Age of New Media, Who Counts as a Journalist?*, The News Media & the Law, Winter 2011, at 27, 27, *available at* http://rcfp.org/x?NGnN.

Last December, the co-owner of a neighborhood bar located near a shooting sued Adelman for libel and slander, copyright and trademark infringement and interference with the sale of a business after Adelman reported that the co-owner had been cited by the Texas Alcoholic Beverage Commission and his business partner had been taken into custody on an

immigration violation. *See* Pet. for TRO, *Rosales v. Adelman*, No. CC-10-08658-E (Dallas County Dec. 13, 2010), *available at* http://www.scribd.com/doc/46120293/TRO-Rosales-Adelman. The plaintiff also moved for a temporary restraining order prohibiting any future blog content about him or the bar, which a Dallas County trial court denied. The case is currently in the pleadings stage and would likely fail on its legal merits if fully litigated. Perhaps more significantly, though, such litigation would likely impose a financial burden that could threaten the existence and maintenance of Adelman's important journalistic enterprise. As such, a remedy that allows for dismissal of the case before crippling litigation costs are incurred is essential to protect and foster citizen participation that is the heart of our democracy.

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Passage of the Maryland anti-SLAPP statute was part of a nationwide trend of providing a legislative remedy for lawsuits that threaten constitutional free speech rights.

The nationwide campaign against SLAPP suits began more than 20 years ago to combat the troublesome trend of civil suits against individuals who spoke out about issues of public concern. *See* George W. Pring & Penelope Canan, "*Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 Bridgeport L. Rev. 937, 938 (1992). Legislatures recognized that the "costs immediately imposed on the . . . targets can be substantial, including not only attorney's fees, court costs, and litigation expenses but also time and dollar resources diverted from the campaign [on which the suit was based], lost wages, potential credit problems, insurance cancellations, and extreme psychological insecurity." *Id.* at 942. The suits do not succeed on the merits but rather in removing the speaker from the public debate, "chilling the politically outspoken as well as observers, and chilling important public discussion and dispute." *See id.* at 944. What started 20 years ago has swept across the nation: Twenty-seven states, along with the District of Columbia and Guam, have enacted anti-SLAPP laws.[1]

[1] *See* Ariz. Rev. Stat. Ann. §§ 12-751, 12-752 (2011); Ark. Code Ann. §§ 16-63-501 to 16-63-508 (2010); Cal. Civ. Proc. Code § 425.16 (2010); Del. Code. Ann. tit. 10, §§ 8136-8138 (West 2011); D.C. Law 18-0351 (2011); Fla. Stat. § 768.295 (2011); Ga. Code Ann. § 9-11-11.1 (2010); 7 Guam Code Ann. §§ 17101-17109 (2010); Haw. Rev. Stat. § 634F (2011); Ill. Comp. Stat. 110 (2011); Ind. Code §§ 34-7-7-1 to 34-7-7-10 (2011); La. Code Civ. Proc. Ann. art. 971 (2010); Me. Rev. Stat. tit. 14, § 556 (2009); Md. Code Ann., Cts. & Jud. Proc. § 5-807 (West 2011); Mass. Gen. Laws ch. 231, § 59H (2011); Minn. Stat. §§ 554.01 to 554.05 (2011); Mo. Rev. Stat. §537.528 (2011); Neb. Rev. Stat. §§ 25-21,241 to 25-21,246 (2010); Nev. Rev. Stat. §§ 41.650, 41.660, 41.670 (2010); N.M. Stat. Ann. 38-2-9.1 (West 2010); N.Y. Civ. Rights Law § 76-a (McKinney 2011); Or. Rev. Stat. §§ 31.150 to 31.155 (2011); 27 Pa. Cons. Stat. Ann. § 7707 (West 2011); R.I. Gen. Laws Ann. §§ 9-33-1 to 9-33-4 (West 2010); Tenn. Code Ann. §§ 4-21-1001 to 4-21-1004 (2011); Texas H.R. 2973 (enacted); Utah Code Ann. §§ 78B-6-1401 to 78B-6-1405 (West 2010); Vt. Stat. Ann. tit. 12, § 1041 (2011); Wash. Rev. Code Ann. § 4.24.510 (West 2011).

Moreover, despite the absence of an anti-SLAPP statute, the Colorado Supreme Court has recognized that the suits threaten First Amendment rights and requires SLAPP suits to face "heightened scrutiny" when parties file motions to dismiss for failure to state a claim or summary judgment motions. *See Protect Our Mountain Env't v. Dist. Court*, 677 P.2d 1361, 1368–69 (Colo. 1984) ("This standard will safeguard the constitutional right of citizens to utilize the administrative and judicial processes for redress of legal grievances without fear of retaliatory litigation, and, at the same time, will permit those truly aggrieved by abuse of these processes to vindicate their own legal rights.").

Although the procedures required and protections provided under anti-SLAPP statutes vary among states, they generally provide a specific remedy, such as a special motion to strike, to dismiss SLAPP suits as soon as practicable before crippling discovery costs are incurred. *See, e.g.*, Vt. Stat. Ann. tit. 12, § 1041 (2011); *see also* Wash. Rev. Code Ann. § 4.24.525(5)(a) (West 2011) (requiring the court to hold a hearing on a SLAPP defendant's special motion to strike within 30 days of receiving it, unless the court's docket is overbooked). But in states like Maryland where a specific remedy and timeframe are not put forth, courts must interpret the laws in a manner consistent with the statutory design to prevent SLAPPs by ending them early and without great cost to the SLAPP targets. Holding otherwise would result in an illogical, unjust result that defies common sense. *See Tracey*, 614 A.2d at 594.

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Requiring Maryland defendants to prove "bad faith" when moving for dismissal under the anti-SLAPP statute would contravene the General Assembly's intent.

Notably, Maryland is the only jurisdiction with an anti-SLAPP law that requires a defendant to show "bad faith" on the part of the plaintiff. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807(b)(1). Although there are no Maryland state court published reports interpreting the statute,[2] the U.S. District Court for the District of Maryland, in two instructive but non-binding decisions involving the law, held that factual disputes as to whether the suits were brought in "bad faith" precluded their dismissal. *See Ugwuonye v. Rotimi*, No. PJM 09-658, 2010 WL 3038099, at *4 (D. Md. July 30, 2010); *Russell v. Krowne*, No. DKC 2008-2468, 2010 WL 2765268, at *3 (D. Md. July 12, 2010).

By focusing so squarely on the "bad faith" provision, these courts did not respect the General Assembly's intent when it enacted the statute. *See generally* Fiscal and Policy Note, *supra*. Strictly construing "bad faith" forces defendants to engage in discovery — a lengthy, expensive process that anti-SLAPP statutes are expressly designed to avoid. *See, e.g.*, Ga. Code Ann. § 9-11-11.1(d) (requiring that all discovery in an action be stayed upon the filing of a motion to dismiss or a motion to strike under the state's anti-SLAPP statute). Indeed,

[2] In a case involving a nonparty subpoena issued to the publisher of a Maryland newsletter as part of a civil lawsuit in Arizona, the Court of Special Appeals found that Arizona's rather than Maryland's anti-SLAPP statute applied. *See Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 907 A.2d 855, 861–62 (Md. Ct. Spec. App. 2006).

allowing these cases to proceed to the discovery stage imposes a significant financial burden on defendants who likely cannot afford the costs and thus will opt to remain quiet the next time they observe a public wrong.

Maryland's anti-SLAPP statute does not define "bad faith." *See* Md. Code Ann., Cts. & Jud. Proc. § 5-807. In the absence of a definition, Maryland courts, including this one, should look to other areas of the law where "bad faith" has been broadened by the inclusion of an additional standard — the lack of "substantial justification" for the suit. A significant number of Maryland statutes and rules provide remedies to individuals faced with lawsuits filed in "bad faith" or without substantial justification. *See, e.g.*, Md. Code. Ann., Nat. Res. § 1-507 ("If the court upon application of a defendant determines that an action in which a plaintiff has acquired standing solely by virtue of this subtitle was brought in bad faith or solely for purposes of harassment or delay . . . ."); Md. Rule 1-341 ("If the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney . . . to pay to the adverse party the costs of the proceeding.").[3]

An interpretation that requires a SLAPP defendant to show only that a plaintiff brought a claim without substantial justification and not that the plaintiff acted in "bad faith" — a standard likely to necessitate costly and lengthy discovery — would serve the intent of the General Assembly and mitigate a dangerous chill on important public speech.

[3] *See also* Md. Code Ann., Bus. Reg. § 4.5-707(c)(2)(ii) (2011) ("The court may dismiss the claim, if the claim is frivolous, legally insufficient, or made in bad faith."); Md. Code Ann., Com. Law § 14-1805(b) (2011) ("If it appears to the satisfaction of the court that an action is brought in bad faith or is of a frivolous nature, the court may order the offending plaintiff to pay to the defendant reasonable attorney's fees."); Md. Code Ann., Health Occ. § 7-4A-08(c)(2)(ii) (2011) ("On the basis of its review and any investigation that the Board conducts, the Board shall . . . if the claim is frivolous, made in bad faith or legally insufficient, dismiss the claim.").

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For the foregoing reasons, the Reporters Committee urges this Court to dismiss Conaway's SLAPP suit at its earliest opportunity. The strong community interest in vigorous and robust debate about public issues requires that those exercising their constitutional rights to contribute to the discussion be protected from baseless suits that make them think twice before participating again.

Dated: July 7, 2011
Arlington, VA

Respectfully submitted,

By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2011, I caused to be sent one true and correct copy of the foregoing letter by first-class mail, postage prepaid to:

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Dated: July 7, 2011
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