

Cindy A. Cohn (SBN 145997)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415)436-9333 x 108
Fax: (415) 436-9993

Kevin P. Guichon
33 Belmont Street, Apt. #2
Charlestown, MA 02129

Amicus Curiae in support of Appellant, SCOTT CARGLE

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT**

AMPEX CORPORATION, ET AL.	)	District Court of Appeal
Plaintiffs and Respondents,	)	Case No. A099344
v.	)	DIVISION FOUR
SCOTT CARGLE,	)	Contra Costa County No.
Defendant and Appellant,	)	C0103627

**BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION
AMICUS CURIAE**

DEPARTMENT 17

THE HONORABLE JAMES R. TREMBATH

BRIEF OF AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF AMICUS CURIAE.....	1
EFF'S INTEREST IN THIS CASE	1
AUTHORITY TO FILE THIS AMICUS BRIEF	3
STATEMENT OF THE CASE	3
I. California Code of Civil Procedure §425.16 Confirms That Scott Cargle Qualifies as a Prevailing Party Entitled to Attorneys' Fees and Costs as a Successful Defendant of a SLAPP Suit	3
II. Respondents' Voluntary Dismissal Did Not Divest the Trial Court of Jurisdiction to Award Cargle Attorneys' Fees Pursuant to CCP §425.16.....	4
A. Respondents Filed a SLAPP Suit Against Cargle Requiring Him to Incur Legal Costs to Defend His First Amendment Rights	4
B. Cargle Timely Filed a Special Motion to Strike Respondents' Complaint Under CCP §425.16 and Sought to Retain His Free Speech Right to Speak Anonymously on the Internet	5
C. Respondents Filed a Voluntary Dismissal, Attempting to Preclude the Court from Hearing Cargle's Motion to Strike	5
D. The Trial Court Erroneously Ruled that It Lacked Jurisdiction to Award Cargle Attorneys' Fees	6
E. The Trial Court's Ruling Defeats The Purpose of CCP §425.16; to Deter Parties from Filing SLAPP Suits	7
STATEMENT OF FACTS.....	7
ARGUMENT	9

BRIEF OF AMICUS CURIAE

I.	The trial court erred when it ruled that it lacked jurisdiction to apply California's anti-SLAPP statute (Cal. Civ. Proc. Code §425.16) and consider Cargle's request for attorneys' fees.....	9
A.	Under California Law, after a voluntary dismissal, a court does not rule on a motion to strike, but retains jurisdiction to award fees.....	9
B.	Respondents' Voluntary Dismissal Entitles Cargle to a Presumption of Prevailing Party Status.....	11
C.	A Voluntary Dismissal of a SLAPP Suit Can Only Achieve Success for a Plaintiff By Chilling the SLAPP Victim's Right to Free Speech	11
II.	The Trial Court's Failure to Rule on Cargle's Motion To Strike Nullifies the California Legislature's Intent to Deter Plaintiffs from filing SLAPP Suits. The Court's Ruling Leaves Unchallenged Respondents' Power to Chill the Free Speech of Persons Communicating On the Internet.....	13
A.	Respondents used a SLAPP suit to identify Cargle and file a separate action in a jurisdiction that lacks an effective remedy. ...	13
B.	The California Legislature designed CCP §425.16 to deter SLAPP suits	14
C.	Assessment of attorneys' fees allows the victim of a SLAPP suit relief from the financial burden of frivolous litigation, promoting the free exchange of opinion on the Internet	15
D.	The Legislature designed a motion to strike to provide an expedient remedy to cancel the chilling effect that SLAPP suits have on free expression.....	16
	CONCLUSION	17
	CERTIFICATE OF COMPLIANCE	19

TABLE OF AUTHORITIES

Cases

<u>Chavez v. Mendoza</u> , 94 Cal.App.4th 1083, 114 Cal.Rptr.2d 825 (Dec. 2001).....	18
<u>Columbia Ins. Co. v. Seescandy.com</u> , 185 F.R.D. 573 (N.D. Cal. 1999).....	6
<u>Conroy v. Spitzer</u> , 70 Cal.App.4th 1446, 83 Cal.Rptr.2d 443 (1999).....	19
<u>Cooter v. Gell & Hartmax Corp.</u> , 496 U.S. 384 (1990)	11
<u>Doe v. 2TheMart.com</u> , 140 F.Supp.2d 1088 (W.D. Wash. 2001)	2, 6
<u>Dowling v. Zimmerman</u> , 85 Cal.App.4th 1400, 103 Cal.Rptr.2d 174 (2001)	17, 19
<u>ECash Technologies, Inc. v. Guagliardo</u> , 127 F.Supp.2d 1069 (C.D. Cal. 2000).....	10, 11, 16
<u>Harfenes v. Sea Gate Ass'n</u> , 647 N.Y.S.2d 329 (Sup. Ct. 1995).....	14
<u>Hritz v. Doe</u> , C-1-00-835 (S.D. Ohio).....	2
<u>James H. Rambo, Inc. v. Genovese</u> , 671 N.Y.S.2d 1005 (App. Div. 1998).....	14
<u>Kesler v. Doe</u> , App. No. G029100 (Cal. App. 4th Dist. 2001)	2
<u>Liu v. Moore</u> , 69 Cal.App.4th 745, 81 Cal.Rptr.2d 807 (Cal.App. 2 Dist. 1999).....	passim
<u>Medinex Systems, Inc. v. AWE2BAD4MDNX et al.</u> , CIV0-1-0106-N-EJL (PVT) (N.D. Cal.).....	2
<u>Pre-Paid Legal Services, Inc. of Florida v. Sturtz et al.</u> , No. CV798295 (Cal. Super. Santa Clara Cty.)	2
<u>Rural/Metro Corp. v. John/Jane Doe 1 et al.</u> , C 00-21283 (N.D.Cal.).....	2
<u>Simmons v. Allstate Ins. Co.</u> , 92 App.4th 1068, 112 Cal.Rptr.2d 397 (Sept. 2001).....	18

BRIEF OF AMICUS CURIAE

<u>Thomas v. Los Angeles Times Communications, LLC</u> , 189 F.Supp.2d 1005 (C.D. Cal. 2002)	17
<u>United States ex rel. Newsham v. Lockheed Missiles & Space Company, Inc.</u> , 190 F.3d 963 (9th Cir. 1999).....	16
<u>Wilcox v. Superior Court</u> , 27 Cal.App.4th 809, 33 Cal.Rptr.2d 446 (1994)	16, 18

Statutes

Cal. Civ. Proc. 41(a).....	7, 10, 11
Cal. Civ. Proc. Code §425.16	passim
Cal. Code Civ. Proc. §904.1	1
N.Y. Civ. Rights Law §76-a (1)(a).....	13
N.Y. Civ. Rights Law §76-a (1)(b)	13

Rules

California Rule of Court 13(c)	3
--------------------------------------	---

Cindy A. Cohn (SBN 145997)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415)436-9333 x 108
Fax: (415) 436-9993

Kevin P. Guichon
33 Belmont Street, Apt. #2
Charlestown, MA 02129

Amicus Curiae in support of Appellant, SCOTT CARGLE

**IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE FIRST APPELLATE DISTRICT**

AMPEX CORPORATION, ET AL.	)	District Court of Appeal
Plaintiffs and Respondents,	)	Case No. A099344
v.	)	DIVISION FOUR
SCOTT CARGLE,	)	Contra Costa County No.
Defendant and Appellant,	)	C0103627

**BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION
AMICUS CURIAE**

DEPARTMENT 17

THE HONORABLE JAMES R. TREMBATH

BRIEF OF AMICUS CURIAE

STATEMENT OF AMICUS CURIAE

Electronic Frontier Foundation (EFF) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. With over 8,000 members, EFF represents the interests of Internet users in both court cases and the broader policy debates surrounding the application of law in the digital age. EFF opposes misguided legislation, initiates and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

EFF'S INTEREST IN THIS CASE

EFF believes that free speech is a fundamental human right and that free expression is vital to society. The vast web of electronic media that now connects us has heralded a new age of communications, a new way to convey speech. New digital networks offer a tremendous potential to empower individuals in an ever over-powering world. While EFF is mindful of the serious issues that may arise when information, ideas and opinions flow free, EFF is dedicated to addressing such matters constructively while ensuring that fundamental rights are protected.

Thus, EFF's interest in this case. EFF has represented individuals involved in several "Doe" litigations and has advised many others, both in California state courts and in various state and federal courts nationwide.

BRIEF OF AMICUS CURIAE

E.g., Doe v. 2TheMart.com, 140 F.Supp.2d 1088 (W.D. Wash. 2001); Kesler v. Doe, App. No. G029100 (Cal. App. 4th Dist. 2001); Medinex Systems, Inc. v. AWE2BAD4MDNX et al., CIV0-1-0106-N-EJL (PVT) (N.D. Cal.); Rural/Metro Corp. v. John/Jane Doe 1 et al., C 00-21283 (N.D.Cal.); Pre-Paid Legal Services, Inc. of Florida v. Sturtz et al., No. CV798295 (Cal. Super. Santa Clara Cty.); Hritz v. Doe, C-1-00-835 (S.D. Ohio). EFF has also helped over a dozen individuals who have been sued based upon their speech activities online find counsel and is part of a coalition of nonprofit organizations concerned about the rising problems caused by these sorts of cases. The coalition has a website gathering information about these cases at www.cyberslapp.org.

Based upon this close involvement, EFF believes that the problem of misuse of the legal system to conduct investigations into the identity of Internet speakers is a large and growing one. America Online reported that it has received 475 civil subpoenas in the year 2000 alone, more than one per day.¹ As occurred in this case, the legal system is not being used to bring meritorious actions, but instead is being used as a free-form investigative and intimidation tool. And the tool is effective, often once an anonymous speaker knows that those he criticizes have learned his or her identity, he or she simply stops speaking.

A lawsuit is filed to silence a citizen from exercising his or her constitutional free speech rights. The mechanism of the chill is the

¹ AOL Amicus brief in *Melvin v. Doe*, Superior Court of Pennsylvania, Pittsburg Division, Cases 2115 WDA 2000 & 2116 WDA 2000, available at www.cyberslapp.org/litigation/brief/MelvinAOLamicusbrief.pdf

discovery of the identity of a once-anonymous speaker. Once that mechanism is successful, the case is dismissed. While updated for the Internet age, this scenario is exactly the sort of thing that the legislature sought to prevent in passing California's anti-SLAPP statute. The recovery of attorneys' fees for such blatant misuse of the California legal processes is an important disincentive to such acts. By refusing to apply the plain language of the statute (and the will of the California legislature), the Superior Court erred. And if the decision is not overturned, California may become a safe haven for use of its legal system to unmask legitimate critics.

AUTHORITY TO FILE THIS AMICUS BRIEF

EFF has filed a motion for leave to file this brief under California Rule of Court 13(c). As detailed in the Declaration of Barak Weinstein filed in support of EFF's motion, Respondent has declined to give consent to EFF for leave to file this brief. Appellant has given consent.

STATEMENT OF THE CASE

I. California Code of Civil Procedure §425.16 Confirms That Scott Cargle Qualifies as a Prevailing Party Entitled to Attorneys' Fees and Costs as a Successful Defendant of a SLAPP Suit

The Electronic Frontier Foundation ("EFF") requests this Court to enter an order confirming Scott Cargle as a prevailing party under California Code of Civil Procedure §425.16 (CCP §425.16). EFF also asks the Court to enter an order awarding Cargle reasonable attorneys' fees for the trial court action and on appeal. In the alternative, EFF requests the Court to remand the case to the trial court for a hearing on Cargle's request

BRIEF OF AMICUS CURIAE

for attorneys' fees and costs under CCP §425.16 (c).

II. Respondents' Voluntary Dismissal Did Not Divest the Trial Court of Jurisdiction to Award Cargle Attorneys' Fees Pursuant to CCP §425.16

The trial court possessed jurisdiction to award Cargle attorneys' fees pursuant to CCP §425.16. See infra pp. 12-16. Respondents' voluntary dismissal of its SLAPP suit did not divest the trial court's jurisdiction to hear Cargle's motion to strike or to award him attorneys' fees. CCP §425.16 and the California Legislature's intent to deter plaintiffs from filing SLAPP suits require reversal of the trial court's ruling and imposition of attorneys' fees against Respondents.

A. Respondents Filed a SLAPP Suit Against Cargle Requiring Him to Incur Legal Costs to Defend His First Amendment Rights

On September 7, 2001, Respondents, Ampex Corporation and Edward J. Bramson ("Bramson"), filed suit against John Doe 1, an anonymous internet user calling himself "exampex". Respondents' Complaint alleged defamation based on statements "exampex" posted on a Yahoo! message board that criticized the management of Ampex Corporation ("Ampex").²

² Yahoo! operates message boards on the Internet where companies may agree to allow users to post comments and/or chat with other internet users. Yahoo! established a message board devoted to Ampex. See Dendrite Int'l, Inc. v. John Doe No. 3, 342, N.J. Super. 134, 775 A.2d 756 (N.J. Super. Ct. Ch. Div. 2001).

B. Cargle Timely Filed a Special Motion to Strike Respondents' Complaint Under CCP §425.16 and Sought to Retain His Free Speech Right to Speak Anonymously on the Internet

On January 10, 2002, Appellant timely filed a Special Motion to Strike under California Code of Civil Procedure §425.16. (CT 001.) Prior to the hearing on Appellant's Motion to Strike, Respondents served Yahoo! with a subpoena, directing the Internet Service Provider ("ISP") to reveal the identity of the anonymous internet user "exampex". (CT 550) Yahoo! provided Appellant with notice that it had received the subpoena. Appellant filed a motion to quash the subpoena. (CT 550.) The court denied the motion.³ (CT 550.) Yahoo! then complied with the subpoena, revealing Scott Cargle, a New York resident, as the user of the internet name "exampex". (CT 059.)

C. Respondents Filed a Voluntary Dismissal, Attempting to Preclude the Court from Hearing Cargle's Motion to Strike

After using legal process to extinguish Cargle's First Amendment

³ The trial court rendered moot the issue concerning Cargle's First Amendment right to speak anonymously on the internet by denying his motion to quash the subpoena. (CT 550) However, Courts have generally required a party issuing a subpoena to make a specific offer of proof in order to protect internet subscriber anonymity. Doe v. 2Themart.com, Inc., *supra* 140 F. Supp. 2d at 1093,1095 (acknowledging that "[t]he free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously."); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."); Dendrite Intern. v. Doe No. 3, 342 N.J. Super. 134, 141, 775 A.2d 756 (2001) ("[P]laintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.").

right to speak anonymously on the internet, Respondents voluntarily dismissed all claims in this case under Cal. Civ. Proc. 41(a). (CT 049, 081.) On March 28, 2002, Respondents filed a complaint in New York Supreme Court. The Complaint contained factual allegations and causes of action identical to the California suit. (CT 050.)

D. The Trial Court Erroneously Ruled that It Lacked Jurisdiction to Award Cargle Attorneys' Fees

After the voluntary dismissal of the California action, Appellant asserted its right to a hearing regarding its Motion to Strike under CCP §425.16. The Court conducted a hearing on the Special Motion to Strike on April 23, 2002. (CT 081, 471.) At that hearing, Appellant argued that CCP §425.16 entitled him to attorneys' fees as a prevailing party who successfully defended a SLAPP suit. The trial court denied Appellant's request for fees. (CT 473.) The court erroneously ruled that Respondents had deprived it of jurisdiction by voluntarily dismissing the action. (CT 473.) The court stated, "I'm just telling you that I don't think I have any jurisdiction to do anything in this case. It's dismissed, it's gone, it's eradicated." Rptr's Transcript of Proceedings, Apr. 23, 2002, page 10.

The trial court's order issued the same ruling: "Defendant's motion to strike the complaint pursuant to Code of Civil Procedure §425.16 is denied. This court lacks jurisdiction to consider the motion, because the action has been voluntarily dismissed." (CT 473.)

E. The Trial Court's Ruling Defeats The Purpose of CCP §425.16; to Deter Parties from Filing SLAPP Suits

EFF submits this amicus brief in support of Appellant's appeal. CCP §425.16 and the California Legislature's intent to deter SLAPP suits require reversal of the trial court's error. Precluding Scott Cargle from obtaining attorneys' fees defeats the purpose of CCP §425.16. It allows Ampex and Bramson to chill free speech rights of anonymous internet users through the intimidation caused by the filing of a SLAPP suit. By failing to apply CCP §425.16, the court stifled the purpose of a statute enacted to deter Respondents from pursuing frivolous litigation that restrains free expression.

STATEMENT OF FACTS

The United States Supreme Court has recognized the Internet's potential to support democratic institutions and serve as the ideal "town square." It allows ordinary people without access to significant resources to voice their opinions – profound, profane, or proselytizing though they may be – to all who wish to read them. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997), "[f]rom the publisher's point of view, [the Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, . . . the same individual can become a pamphleteer." *Id.* at 870.

BRIEF OF AMICUS CURIAE

The Supreme Court has held that the Internet is a fully-protected medium of expression. *Id.*

To organize these town criers and pamphleteers so that interested people can find each other, Yahoo has organized outlets for the expression of opinions on various topics. These outlets, called “Message Boards,” are electronic bulletin boards, which exist for every publicly-traded company in the U.S. and permit anyone to submit or post comments and opinions. While nothing prevents an individual from using her real name, most people choose to post messages under a pseudonym, nickname, or a “handle.” Such anonymity facilitates free expression, particularly where controversial topics are discussed. “The decision to favor anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *Watchtower Bible and Tract Society v. Village of Staton*, 122 S.Ct. 2080, 2089 (2002) (quoting *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341-42 (1995)).

Use of anonymous monikers protects the writer’s identity from those who might disagree with her or retaliate against her, and encourage the free flow of postings on these message boards that range from opinionated to speculative to caustic. Indeed, these exchanges can be very heated and, as seen from the various messages and responses on the message board in this case, are sometimes filled with invective and insult. However, most things, if not everything, said on these types of message boards are taken with a grain of salt.

BRIEF OF AMICUS CURIAE

Yahoo has a message board devoted to Ampex Corporation hosted at <<http://messages.yahoo.com/?action=q&board=axc>> (CT 007.) Appellant anonymously posted messages on an Ampex's message board hosted by Yahoo! under the user name "exampex". In the messages, Cargle expressed opinions critical of Ampex management. (See CT 059, Decl. of Scott Cargle.)

In order to identify its critics, Ampex and Bramson filed a SLAPP suit. (CT 050.) Respondents filed the suit naming "John Doe" as a defendant. (CT 050.) Respondents used a subpoena to identify Cargle as one internet user who posted messages critical of Ampex's management. (CT 550.) Then, they dismissed their California suit and re-filed an identical action in New York. (CT 049, 081.) Respondents' tactics require Cargle to defend two legal actions in separate jurisdictions to protect his First Amendment right to speak anonymously on the internet. (CT 049, 081.)

ARGUMENT

I. **The trial court erred when it ruled that it lacked jurisdiction to apply California's anti-SLAPP statute (Cal. Civ. Proc. Code §425.16) and consider Cargle's request for attorneys' fees.**

A. **Under California Law, after a voluntary dismissal, a court does not rule on a motion to strike, but retains jurisdiction to award fees**

California law holds that a court retains jurisdiction to rule on a motion to strike, notwithstanding a voluntary motion to dismiss filed under CR 41(a). Liu v. Moore, 69 Cal.App.4th 745, 751, 81 Cal.Rptr.2d 807

BRIEF OF AMICUS CURIAE

(Cal.App. 2 Dist. 1999). After a voluntary dismissal, the court does not grant a motion to strike filed under §425.16. Rather, the court retains jurisdiction to consider the merits of the motion for the purpose of the award of attorneys' fees and costs under §425.16(c). ECash Technologies, Inc. v. Guagliardo, 127 F.Supp.2d 1069, 1084 (C.D. Cal. 2000) (citing Kyle v. Carmon, 71 Cal.App.4th 901, 907-18, 84 Cal.Rptr.2d 303 (Cal.App. 3 Dist. 1999)).

In ECash, a party's voluntary dismissal did not affect the court's decision to declare the victim of the SLAPP suit the prevailing party under §425.16(c). ECash Technologies, Inc. v. Guagliardo, 127 F.Supp.2d 1069, 1084-85 (C.D. Cal. 2000). The court ruled that §425.16(c) entitled the victim of the SLAPP claims to attorneys' fees and costs. Id.

This conclusion is not diminished by Defendants' belated attempt to voluntarily dismiss those claims premised on the letter. It seems clear that Defendants took this action merely to try to avoid an award of attorneys' fees and costs under Section 425.16. However, the law in California is clear that even though these claims were voluntarily dismissed, this does not absolve the Defendants of liability for fees and costs incurred by Plaintiff in striking the counterclaims.

ECash Technologies, Inc. v. Guagliardo, 127 F.Supp.2d 1069, 1084 (C.D. Cal. 2000).⁴

⁴ The ECash court cited the following California cases, which confirm that a trial court retains jurisdiction to determine a request for attorneys' fees and costs under §425.16(c). Kyle v. Carmon, 71 Cal. App. 4th 904, 918-19, 84 Cal. Rptr. 2d 303 (1999) (affirming award of attorneys' fees following voluntary dismissal); Liu v. Moore, 69 Cal. App. 4th 745, 755, 81 Cal. Rptr. 2d 807 (1999) (voluntary dismissal does not preclude award of attorneys' fees); Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107-108, 77 Cal. Rptr. 2d 600 (1998) (ruling that upon the filing of a voluntary dismissal, a presumption arises that the moving party is the prevailing party and entitled to fees and costs under §425.16(c). See also Cooter

B. Respondents' Voluntary Dismissal Entitles Cargle to a Presumption of Prevailing Party Status

Upon Respondent's filing a voluntary dismissal of all of their claims, a presumption arose under CCP §425.16(c) confirming Appellant, Scott Cargle, as a prevailing party. Coltrain v. Shewalter, 66 Cal.App.4th 94, 107-108, 77 Cal.Rptr.2d 600 (1998) (ruling that upon the filing of a voluntary dismissal, a presumption arises that the moving party is the prevailing party and entitled to fees and costs under §425.16(c)).

In exercising its discretion to determine whether a defendant qualifies as a prevailing party for an attorneys' fees allocation under §425.16(c), the "critical issue is which party realized its objectives in the litigation. Since the defendant's goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant." Kyle v. Carmon, 71 Cal.App.4th 904, 918, 84 Cal.Rptr.2d 303 (1999).

C. A Voluntary Dismissal of a SLAPP Suit Can Only Achieve Success for a Plaintiff By Chilling the SLAPP Victim's Right to Free Speech

The Liu court disagreed with the Shewalter decision to the extent that, in *dictum*, it surmised that a SLAPP plaintiff may have good faith reasons for taking a voluntary non-suit. Liu v. Moore, 69 Cal.App.4th 745, 752, 81 Cal.Rptr.2d 807 (1999). The Liu court explained that, in a SLAPP suit, a settlement or other means of substantially achieving the plaintiff's

v. Gell & Hartmax Corp., 496 U.S. 384, 393-94 (1990) (holding that a court retains jurisdiction to impose Rule 11 sanctions after a plaintiff voluntarily dismisses its action under Rule 41(a)).

goals would validate plaintiff's success in "chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Id. (citing §425.16(a)).

The inherent lack of merit in a suit recognized as a SLAPP validates that a voluntary dismissal could achieve success only by stifling free speech. The plaintiff in a SLAPP suit does not seek a money judgment or merit-based legal remedy. Rather, he seeks only to coerce the SLAPP defendant to cease his speech or petitioning activity. Id. (commenting that a SLAPP plaintiff is not concerned about whether the defendant can pay a money judgment).

A voluntary dismissal operates to continue the oppression of free speech. "The specter of the action being re-filed...would continue to have a significant chilling effect on the defendant's exercise of its First Amendment rights. At that point, the plaintiff would have accomplished all the wrongdoing that triggers the defendant's eligibility for attorneys' fees, but the defendant would be cheated of redress." Liu v. Moore, 69 Cal.App.4th 745, 753, 81 Cal.Rptr.2d 807 (1999). Therefore, pursuant to CCP §425.16(c), Respondents' voluntary dismissal entitles Cargle to an award of reasonable attorneys' fees and costs.⁵ Id.; Coltrain v. Shewalter, 66 Cal.App.4th 94, 107-108, 77 Cal.Rptr.2d 600 (1998) (holding that plaintiff's proposed motive for dismissal, lack of funds, failed to defeat the

⁵ Liu confirmed that CCP §425.16 entitles a successful SLAPP defendant to attorneys' fees and costs on appeal as well as at the trial court level. 69 Cal. App. 4th at 754.

presumption that the defendant was the prevailing party and entitled to attorneys' fees).

II. The Trial Court's Failure to Rule on Cargle's Motion To Strike Nullifies the California Legislature's Intent to Deter Plaintiffs from filing SLAPP Suits. The Court's Ruling Leaves Unchallenged Respondents' Power to Chill the Free Speech of Persons Communicating On the Internet.

A. Respondents used a SLAPP suit to identify Cargle and file a separate action in a jurisdiction that lacks an effective remedy.

Respondents' SLAPP suit has caused Cargle to defend legal actions in California and New York. (CT 050.) New York's anti-SLAPP statute does not provide the effective, early remedy that the California Legislature determined would deter frivolous SLAPP litigation.⁶ Respondents' used the California court system to file a SLAPP suit, identify Cargle as a target anonymous Internet user and dismiss the suit. Respondents then re-filed in a jurisdiction where SLAPP victims lack a mechanism to expeditiously extricate themselves from the suit and recover financial resources incurred defending the suit. Implementation of the goal of §425.16 to deter SLAPP

⁶ New York's anti-SLAPP law applies only to an "action involving public petition and participation." N.Y. Civ. Rights Law §76-a (1)(a). The law defines public petition and participation as "an action...for damages that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to...oppose such application or permission." *Id.* New York law also narrowly defines "public applicant or permittee" limiting qualified parties to persons who have applied for a permit from a government body. N.Y. Civ. Rights Law §76-a (1)(b). Thusfar, New York courts have defined the statute's application narrowly. See *Harfenes v. Sea Gate Ass'n*, 647 N.Y.S.2d 329, 332-33 (Sup. Ct. 1995); *James H. Rambo, Inc. v. Genovese*, 671 N.Y.S.2d 1005, 1005-06 (App. Div. 1998).

suits requires assessment of attorneys' fees and costs against Respondents.

B. The California Legislature designed CCP §425.16 to deter SLAPP suits

The California Legislature declared its intent to deter parties from filing SLAPP suits seeking to chill the valid exercise of freedom of speech.

The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

Cal. Code Civ. Proc. §425.16(a) (West Supp. 2002).

Rarely does a state legislature specifically define the purpose of a statute as the California Legislature did with its anti-SLAPP statute. *Id.* In 1997, the legislature amended §425.16(a), concerned that courts interpreting the statute had failed to implement its full effect. At the end of §425.16, subd. (a), the legislature declared, "[t]o this end, this section shall be construed broadly." Cal. Code Civ. Proc. §425.16(a) (West Supp. 2002).

Courts have recognized that the Legislature enacted §425.16 "in response to [its] concern about civil actions aimed at private citizens to deter or punish them for exercising their political or legal rights." United States ex rel. Newsham v. Lockheed Missiles & Space Company, Inc., 190 F.3d 963, 970 (9th Cir. 1999) (citing Wilcox v. Superior Court, 27 Cal.App.4th 809, 33 Cal.Rptr.2d 446 (1994)). Parties file SLAPP suits with the goal of obtaining economic advantage over a less wealthy or less

sophisticated person by requiring that person to obtain legal counsel and defend a meritless suit. The cost and intimidation of the suit alone remains the goal of the SLAPP plaintiff. The SLAPP plaintiff's objective remains always to stifle the victim's exercise of free speech. ECash Technologies, Inc. v. Guagliardo, 127 F.Supp.2d 1069, 1074 (C.D. Cal. 2000).

C. Assessment of attorneys' fees allows the victim of a SLAPP suit relief from the financial burden of frivolous litigation, promoting the free exchange of opinion on the Internet

The legislature intended the imposition of attorneys' fees to act as a deterrent to potential SLAPP plaintiffs. "The purpose of section 425.16 is clearly to give relief, including financial relief in the form of attorneys' fees and costs, to persons who have been victimized by meritless, retaliatory SLAPP lawsuits because of their 'participation in matters of public significance.'" Liu v. Moore, 69 Cal.App.4th 745, 750, 81 Cal.Rptr.2d 807 (1999) (citing §425.16 (a)). "A reading of section 425.16 clearly shows that the Legislature envisioned *actual relief* for SLAPP defendants when it drafted that statute." Id. at 751; Thomas v. Los Angeles Times Communications, LLC, 189 F.Supp.2d 1005, 1010 (C.D. Cal. 2002).

Dowling v. Zimmerman, 85 Cal.App.4th 1400, 1405, 103 Cal.Rptr.2d 174 (2001) exemplifies the action the Legislature designed courts to take to implement §425.16's deterrent effect. In Dowling, the court declared that "Section 425.16 was enacted in 1992 to deter and prevent SLAPP suits...." Id. at 1414. In Dowling, a SLAPP defendant first appeared in propria persona. Later, the defendant retained counsel to assist

her and file a motion to strike. Id. at 1425. The court held that the defendant could recover attorneys' fees under the statute notwithstanding her initial pro se status. Id. The court also ruled that §425.16 entitled Dowling to recover all reasonable attorneys' fees billed to defend the SLAPP suit, including fees that she did not pay to her attorney. The court explained that only full recovery could promote the deterrent effect of the statute. Id. at 1424-25.

CCP §425.16 requires assessment of all attorneys' fees that Cargle has incurred to defend this action. Recovery of the expenses necessary to defend the SLAPP suit remains the critical element to deterring future SLAPP suits. In this case, recovery of attorneys' fees by Cargle will impact Respondents' decision to pursue the New York action and future SLAPP suits. Fee recovery will also promote free speech on the Internet as anonymous users benefit from the financial remedy offered by CCP §425.16.

- D. The Legislature designed a motion to strike to provide an expedient remedy to cancel the chilling effect that SLAPP suits have on free expression.

The Legislature designed the motion to strike as a mechanism to expeditiously detect a SLAPP suit and provide relief to the victim. Simmons v. Allstate Ins. Co., 92 App.4th 1068, 1073-74, 112 Cal.Rptr.2d 397 (Sept. 2001). Early and certain relief remains critical for the statute to deter potential SLAPP plaintiffs. Id. (holding that §425.16 did not allow a SLAPP plaintiff to amend his complaint after a defendant filed a motion to

strike). "Section 425.16 provides a 'fast and inexpensive unmasking and dismissal' of frivolous claims that are subject to the statute." Chavez v. Mendoza, 94 Cal.App.4th 1083, 1089, 114 Cal.Rptr.2d 825 (Dec. 2001) (quoting Wilcox v. Superior Court, 27 Cal.App.4th 809, 823, 33 Cal.Rptr.2d 446 (1994)).

CCP §425.16 also encourages continued public participation in matters of public significance (i.e. anonymous speech on the Internet). The motion to strike acts to eliminate meritless litigation at an early stage in the proceedings and provide SLAPP defendants with a certain financial remedy. Conroy v. Spitzer, 70 Cal.App.4th 1446, 1450, 83 Cal.Rptr.2d 443 (1999); Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1424, 103 Cal.Rptr.2d 174 (2001) ("The legislative intent to afford the victims of SLAPP suits a swift and effective remedy is clear.").

EFF asks this Court to provide Scott Cargle with the expeditious financial remedy the California Legislature intended for victims of SLAPP suits. Assessment of attorneys' fees will provide Cargle relief from a meritless suit and promote free expression of anonymous users of the Internet.

CONCLUSION

Scott Cargle voiced his opinion about Ampex and its management on a public Internet bulletin board. (CT 034.) In order to learn his identity and intimidate him into silence, Respondents' filed suit against him in California. Having gained his identity, they dismissed the suit.

Ampex's sham suit was an unvarnished and successful use of

BRIEF OF AMICUS CURIAE

California's judicial and legal resources to silence anonymous speech. This tactic is one that is increasingly being used by litigants, and will continue to be used by others if it is allowed to stand here.

The California Legislature enacted §425.16 specifically to deter parties from filing SLAPP suits and to provide SLAPP victims with expedited financial relief. Prior caselaw establishes that merely dismissing a SLAPP suit after the goal of silencing opposition is achieved is not a sufficient basis to remove a Court's authority to award attorneys fees.

EFF requests this Court to advance the goals of CCP §425.16 by applying the statute and awarding Cargle his attorneys' fees and costs incurred at the trial court level and on appeal. In the alternative, EFF requests the Court to remand the case to the trial court for a hearing on Cargle's request for attorneys' fees and costs under CCP §425.16 (c).

Dated: February 26, 2003 Respectfully submitted,



Cindy A. Cohn
Attorney for Amicus Curiae
Electronic Frontier Foundation

CERTIFICATE OF COMPLIANCE

I, Cindy A. Cohn, Attorney for Amicus Curiae in the instant matter *Ampex Corporation et al. v. Cargle*, Case No. A099344, hereby certify that the foregoing document was prepared pursuant to and in compliance with California Rule of Court Section 13(c)(1). The brief contains a total of 4,047 words and was formatted in Times Roman, 13-point typeface.

I declare under the penalty that the foregoing is true and correct.

Dated: February 25, 2003 Respectfully submitted,



Cindy A. Cohn
Attorney for Amicus Curiae
Electronic Frontier Foundation

PROOF OF SERVICE

I, the undersigned, hereby declare:

I am over eighteen years of age and not a party to the above action. My business address is 454 Shotwell Street, San Francisco, California 94110.

On February 26, 2003, I caused to be served the following document:

**BRIEF OF THE ELECTRONIC FRONTIER
FOUNDATION AMICUS CURIAE**

via Federal Express, by placing one (1) true and correct copy of the above-mentioned document in a properly addressed and sealed envelope in a pickup box routinely maintained by Federal Express, in conformity with the usual business practices of the Electronic Frontier Foundation, on the following interested parties:

Clerk of the Court
Superior Court of California
County of Contra Costa
725 Court Street
Martinez, CA 94553

Michael Prough, Esq.
Tauri N. Bigknife, Esq.
Morison-Knox, Holden, Melendez & Prough, LLP
500 Ygnacio Valley Road, Suite 450
Walnut Creek, CA 94596
Telephone: (925) 937-9990

Jennifer S. Granick, Esq.
Stanford Law School
Center for Internet and Society
559 Nathan Abbot Way
Stanford, CA 94305
Telephone: (650) 724-0014

declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 26th day of February, 2003, at San Francisco, California.



Barak R. Weinstein