INTRODUCTION AND STATEMENT OF THE CASE

In its appeal, Plaintiff/Appellant CITY OF LONG BEACH ("Appellant" or "Long Beach") seeks to revive its moribund SLAPP[1] lawsuit and to continue to chill the free speech rights of Respondents.

Defendant/Respondent CALIFORNIA CITIZENS FOR NEIGHBORHOOD EMPOWERMENT ("CCNE") is a *state* general purpose political committee and Defendant/Respondent KINDE DURKEE ("Durkee") is CCNE's professional treasurer. Respondents lawfully exercised their constitutionally protected free speech rights by raising and spending money in various jurisdictions, one of which was the City of Long Beach.

In its overreaching and now-dismissed lawsuit, Long Beach sought to impose its local campaign finance laws on CCNE, a *state* committee, relative to the amounts CCNE could legally raise and the disclosure it would be required to make.

Given the chilling and misguided character of the lawsuit, and in the face of clear state preemption of certain provisions of the "Long Beach Campaign Reform Act," specifically Sections 2.01.310(B) and 2.01.610 (the "Long Beach Contribution Limits") and 2.01.630 (the "Long Beach

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[1] "SLAPP" stands for "Strategic Lawsuit Against Public Participation."

Notification Requirement"), Long Beach sought not only damages but also injunctive relief against Respondents.

As Respondents demonstrated in the trial court, while Long Beach is permitted to regulate political candidates and committees operating exclusively in Long Beach, it is not permitted to regulate, much less sue, a state committee such as CCNE, or CCNE's treasurer Durkee.

Respondents sought dismissal of this case under the "Anti-SLAPP" statute, CCP section 425.16, because the case implicated their First Amendment and Article 1, Section II free speech rights and because Long Beach was unable to prove a probability of prevailing on its claim, a prerequisite to continuing its lawsuit.

As set forth below, statutory and case law, as well as administrative interpretations by the California Fair Political Practices Commission (the "FPPC") and the Los Angeles City Ethics Commission ("LACEC"), make it clear that ***the trial court was correct in granting Respondents' special motion to strike and in dismissing Long Beach's lawsuit. Accordingly, this Court should affirm the trial court's ruling in its entirety.***

STATEMENT OF FACTS

On April 17, 2002, Long Beach filed and served its "Complaint for Damages and Injunctive Relief" against Respondents. (Clerk's Transcript ("CT"), 4-19). The Complaint alleged principally that CCNE illegally accepted campaign contributions above the $500 limit for the purpose of making "independent expenditures" in support of a candidate for Mayor in the April 9, 2002 Long Beach election. The Complaint also sought injunctive relief against Respondents.

Long Beach's lawsuit, however, is fundamentally and fatally flawed insofar as CCNE is a *state* general purpose committee and took no action which would subject it to the Long Beach Campaign Reform Act.

The Complaint *correctly* alleged that "CCNE was and is a 'general purpose committee' duly formed under the laws of the State of California to support or oppose candidates or ballot measures in various municipal and state elections...." (CT 4-5).

CCNE's campaign statements confirm that it was formed long before Long Beach's 2002 elections and that it raised and spent money outside of Long Beach. For example, CCNE's Statement of Organization (Form 410), filed March 28, 2001 with the California Secretary of State, reveals CCNE to be a ""General Purpose Commitee" -- that is "Not formed to support or

oppose specific candidates or measures in a single election," as well as a "STATE Committee." (CT 151-152).

CCNE's "Recipient Committee Campaign Statement" (Form 460) and "Supplemental Independent Expenditure Report" (Form 465) for the period 1/1/01 - 3/24/01 reveal that on March 20, 2001, CCNE made $3,881 in "independent expenditures" to support Hector Cepeda for Los Angeles City Council, District 15. (CT 153-161).

CCNE's Forms 460 and 465, as well as its "Late Contribution Report" (Form 497) for the period 3/25/01 - 4/10/01 reveal that during that time period CCNE made another $2,404 in "independent expenditures" to support Hector Cepeda, as well as contributing $250 to West Hollywood City Council candidate Jeffrey Prang. (CT 162-167).

CCNE's Form 460 for the period 5/8/01 - 6/30/01 reveals that during that time period CCNE contributed $200 each to Los Angeles City Council candidates Jan Perry, Judith Hirshberg and Hector Cepeda, as well as $100 to West Hollywood City Council candidate John Duran. (CT 168-175).

The several non-Long Beach independent expenditures and contributions disclosed in CCNE's campaign statements demonstrate that CCNE is indeed a *state* general purpose recipient committee, and not a Long Beach city committee. As set forth below, CCNE's state committee

status prevents Long Beach from legally regulating and suing CCNE and Durkee based on Long Beach's local campaign laws.

STANDARD OF REVIEW

While Long Beach briefly discusses the applicable standard of review and cites to *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721 (AOB 5), Respondents expand upon and clarify the appellate court's role at this stage of a SLAPP suit.

> "In reviewing a judgment of dismissal after the trial court grants a special motion to strike pursuant to section 425.16, we use our independent judgment to determine whether defendants acted in furtherance of their right of petition or speech in connection with a public issue. (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819-821.) Defendants bear the burden to make this prima facie case. If defendants meet their burden, we then consider whether plaintiffs have produced sufficient admissible evidence to establish the probability of prevailing on the merits on every cause of action asserted.... The motion to strike is properly granted if, as a matter of law, the properly pleaded facts do not support a claim for relief." *Mission Oaks*, 65 Cal.App.4th at 721.

Respondents, both at the trial court and herein, have indeed met their burden and have demonstrated that by making independent expenditures in support of certain political candidates they were engaging in

constitutionally protected free speech and that CCP section 425.16 applies. Long Beach, however, did not at the trial court and does not before this court, demonstrate a probability of prevailing. Accordingly, using the applicable standard of review, this court should affirm the trial court's granting of Respondent's special motion to strike.

LEGAL DISCUSSION

1. CCP Section 425.16, the "Anti-SLAPP Statute," Clearly Applies to This Case.

Long Beach asserts that its Complaint is not subject to a special motion to strike pursuant to CCP section 425.16, arguing that "It is the position of the City that the 'anti-SLAPP' statute was never intended to, and cannot, pertain to enforcement actions of this nature." (AOB 6).

An analysis of the Complaint, the text of CCP section 425.16 and applicable case law, however, make it absolutely clear that Long Beach's lawsuit is a SLAPP and that the Anti-SLAPP statute indeed applies.

The Complaint speaks of: 1) CCNE's status as a political committee duly formed to support or oppose candidates or ballot measures in various state or municipal elections; 2) the acceptance of political campaign contributions; and 3) the making of independent expenditures supporting a Long Beach Mayoral candidate (CT 4-8).

The Complaint's causes of action clearly arise from CCNE's and Durkee's acts in furtherance of their rights of free speech under the United

States or California Constitution in connection with a public issue: to wit, their political contributions, expenditures and communications to voters as protected by the First Amendment to the United States Constitution and Article 1, Section 2 of the California Constitution.

SLAPP suits are aimed at preventing citizens from exercising their political rights or punishing those who have done so. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 645). As the Second District Court of Appeal stated in *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944:

> "SLAPP lawsuits stifle free speech. [*Church of Scientology v. Wollersheim* (1995) 42 Cal.App.4th at p. 652.] They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system, is the means by which our society evaluates [and validates] those opinions. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate political debate. The SLAPP action here has no place in our courts."

A. Notwithstanding Long Beach's "Charter City" Status, Its Local Campaign Ordinance Is Preempted by State Law In This Instance.

Long Beach argues (AOB 6 - 9) that charter cities' "home rule" authority exempts Long Beach from State law relative to political campaign finance regulation. In citing Article XI, Section 5 of the California Constitution, however, Long Beach fails to emphasize that the power of a charter city is limited to "municipal affairs" and that "in respect to other [non-municipal affair] matters they [charter cities] shall be subject to general laws." (See *CalFed Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 13 – the Constitution "implicitly recognizes state legislative supremacy over matters not within the ambit of [municipal affairs].")

While many – even most – aspects of local elections are indeed municipal affairs, Long Beach's plenary power and "arm of the law" are not so long as to reach *state* general purpose committees that merely happen to make independent expenditures in connection with Long Beach elections.

A State general purpose committee, such as CCNE, is regulated by the Political Reform Act (Government Code section 81000, et seq.) and not each and every city in which it happens to make independent expenditures. Indeed, where the subject of a statute is one of statewide concern and the

statute is reasonably related and narrowly tailored to that concern, the conflicting city ordinance ceases to be a municipal concern and is invalid. (See *Barrajas v. Anaheim* (1993) 15 Cal.App.4th 1808, 1813; and *Johnson v. Bradley* (1992) 4 Cal.4th 389, 404).

Interpreting the law as Respondents read it does not interfere with Long Beach's ability to regulate the "manner in which" and the "method by which" its municipal officers are elected. Notwithstanding Long Beach's protestations to the contrary, its charter cannot and does not trump the United States Constitution, the California Constitution or the Political Reform Act.

If the "home rule" provisions were as Long Beach insists, one would have to question why the charter City of Los Angeles, through its Ethics Commission, has taken the position stated in the Olson Advice Letter (CT 199-207) and the Independent Expenditure Memo (CT 208-211) cited in Respondents' trial court moving papers, which is entirely consistent with Respondents' position in this matter as discussed in greater detail below.

For the reasons set forth in Respondents' trial court moving papers (CT 136-223) and reply papers (CT 260-283), and because Respondents' legal and factual assertions are unrebutted in Long Beach's trial court opposition papers (CT 225-259) and the Appellant's Opening Brief, it is

clear that Long Beach overstepped its bounds in attempting to enforce its local ordinance against a state political committee and that the trial court was correct in concluding that Long Beach has no probability of prevailing in this case.[2]

B. CCP Section 425.16(d) Does Not Exempt Long Beach From the Provisions of the Anti-SLAPP Statute.

Long Beach next argues (at AOB 9-11) that CCP section 425.16(d) provides it with the legal right to sue Respondents with impunity and to avoid the reach of the Anti-SLAPP statute. Long Beach was unsuccessful with this argument at the trial court, and the argument remains unsuccessful here.

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[2] In addition to being inapplicable to Respondents because of state law preemption issues, Long Beach's ordinance suffers from a serious constitutional flaw which also renders it unenforceable. "Independent expenditures" are those made completely independent of candidates, represent the spender's "pure speech" and cannot constitutionally be limited. (*Buckley v. Valeo* (1974) 424 U.S. 1). For this reason, independent expenditures normally are treated separately in campaign finance regulatory schemes. A committee engaging only in independent expenditures cannot constitutionally be limited in its expenditures. It follows, therefore, that it is similarly unconstitutional to limit contributions to independent expenditure committees, as Long Beach purports to do in Municipal Code section 2.01.610. Based on this theory, the City of Irvine, after lengthy Federal Court litigation, abandoned its local ordinance which sought to regulate committees which made independent expenditures in Irvine. See "Stipulation for Entry of Judgment" and "Judgment" in *The Lincoln Club of Orange County, et al. v. City of Irvine*, United States District Court Case No. SACV99-1262 AHS (Anx) (CT 271-277).

CCP section 425.16(d) provides that "This section shall not apply to any enforcement action ***brought in the name of the people of the State of California*** by the Attorney General, district attorney, or city attorney, ***acting as a public prosecutor***." (emphasis added).

A simple review of Long Beach's Complaint (CT 4-8) makes it clear that the "Anti-SLAPP" statute applies to this case. ***This action is not being "brought in the name of the people of the State of California," nor is the Long Beach City Attorney "acting as a public prosecutor."***

Indeed, the Complaint's caption reads "CITY OF LONG BEACH, a municipal corporation, by and through Long Beach City Attorney ROBERT E. SHANNON v. CALIFORNIA CITIZENS FOR NEIGHBORHOOD EMPOWERMENT," et al., not "People of the State of California v. California Citizens for Neighborhood Empowerment, et al." and the case is styled as a "Complaint for Damages and Injunctive Relief (Violation of Chapter 2.01 of the Long Beach Municipal Code)."

In the Complaint's very first paragraph, Long Beach makes clear that it is proceeding under Municipal Code section 2.01.1120, entitled "Civil action" and not section 2.01.1110, entitled "Criminal action." Throughout the Complaint, the civil, rather than criminal, nature of the case is apparent, and the Complaint seeks civil, and not criminal, penalties. For example,

paragraph 10 of the Complaint references Municipal Code sections 2.01.630 and 2.01.1140 and claims that "City is entitled to three times the amount of illegal contributions accepted by CCNE together with attorneys' fees...." Finally, the Complaint (at 5:20-21) references the Code of ***Civil*** Procedure regarding verification requirements.

Long Beach cites *People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442 in support of its claim. However, the *Health Laboratories* case actually makes clear that ***Long Beach cannot escape the reaches of CCP section 425.16.*** First, the fact that the plaintiff in that case is the "People" makes clear the difference between an action brought in the name of the people by a public prosecutor (in which case CCP section 425.16(d)'s exception applies) and a civil action brought by a municipality (in which case the exception does not apply)

Additionally, the *Health Laboratories* case contains numerous references to the fact that it was brought by a public prosecutor. The distinction between public prosecutor plaintiffs and other types of plaintiffs (such as cities) was made abundantly clear by the Court of Appeal, when it stated that:

> "By exempting public prosecutors from its special motion to strike procedure, section 425.16 impliedly classifies defendants in a SLAPP action into two groups: those who

> may avail themselves of the motion to strike remedy because they are parties to an action brought by a plaintiff other than a public prosecutor, and those to whom the anti-SLAPP remedy is unavailable because they are parties to an action brought by a public prosecutor." *People v. Health Labs*, 87 Cal.App.4th at 448.

Clearly, because Plaintiff is the "City of Long Beach" and not the "People of the State of California," Defendants (now Respondents) are within the class of parties to whom the "Anti-SLAPP" statute applies.

Government Code section 36900(a) also makes it clear that Long Beach's lawsuit is not brought in the name of the People and thus the CCP section 425.16(d) exception does not apply.

Government Code section 36900(a) provides, in relevant part, that:

> ***"Violation of a city ordinance ... may be prosecuted by city authorities in the name of the people of the State of California, or redressed by civil action."*** (emphasis added).

Section 36900(a) thus demonstrates that bringing an action in the name of the people and bringing a civil action are mutually exclusive. As Long Beach has elected to redress Respondents' alleged violations of law via a civil action, it follows that ***this case is not brought (either on a de facto or a de jure basis) in the name of the people of the State of California.***

Accordingly, ***the CCP section 425.16(d) exception to the "Anti-SLAPP" statute does not apply to the instant case.***

2. The Trial Court Ruled Correctly in Determining That Long Beach Had Not Demonstrated a Probability of Prevailing.

In a not-so-tacit acknowledgment that CCP section 425.16 indeed applies to this litigation, Long Beach turns to the question of whether it will prevail on its claims, and whether the trial court erred in concluding that Long Beach had not made the requisite showing in this regard (AOB 12-15).

After referring to one item of evidence – CCNE's campaign statement – and listing certain contributions to CCNE and certain independent expenditures by CCNE, Long Beach claims, in a conclusionary manner, that "the City has established a probability that it will prevail...." (AOB 14-15).

Far from establishing a probability of prevailing, however, all Long Beach has done is engaged in conjecture and speculation to attempt to revive its ill-advised SLAPP suit. Long Beach has not proven or made out a prima facie case against Respondents. For at least the following reasons, Long Beach cannot prevail in its lawsuit, and therefore Long Beach cannot demonstrate the requisite probability of prevailing.

A. Long Beach's Contribution Limits Do Not Apply to CCNE.

Government Code section 81009.5(b) (part of the State's Political Reform Act of 1974, as amended, Government Code section 81000, et seq.) limits the authority granted to local agencies such as the City of Long Beach. Indeed, section 81009.5(b):

> "prohibits a local government agency from enacting any ordinance imposing filing requirements 'additional or different' from those set forth in chapter 4 of the Act unless the additional or different filing requirements apply only to: ... the candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose a candidate or to support or oppose the qualification of, or passage of, a local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively." (See In the Matter of Opinion Requested by Lance H. Olson, Esq. (FPPC Opinion 0-01-112, July 9, 2001), 2001 WL 909209, at 4-5) (the FPPC's "Olson Opinion") (CT 178-195).

As interpreted by the California Fair Political Practices Commission (the "FPPC"), Government Code section 81009.5 "provides a uniform approach to filing requirements for candidates and committees active throughout the state while simultaneously preserving flexibility for local

jurisdictions to regulate their local candidates and committees. Commission staff has advised consistent with this thinking." (See FPPC's Olson Opinion, at 7).

"Because of the [FPPC's] great expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized." *Californians for Political Reform Foundation v. FPPC* (1998) 61 Cal.App.4th 472. On the preemption issue, see also *Johnson v. Bradley* (1992) 4 Cal.4th 389, 399 and *CalFed Savings & Loan Association v. City of Los Angeles* (1991) 54 Cal.3d 1, 17.

In addition to the FPPC's opinion regarding this matter, the Los Angeles City Ethics Commission ("LACEC") has similarly weighed in on the issue. In its March 17, 1999 Advice Letter to attorney Laurence S. Zakson regarding the Action Democrats of San Fernando Valley (the "Zakson Letter") (CT 196-198), the LACEC interpreted Los Angeles City Charter section 312 C 7, a provision which mirrors Long Beach Municipal Code section 2.01.310(B).

Just as the FPPC had opined, the LACEC similarly confirmed that generally, a local jurisdiction cannot regulate the amount of contributions to committees that happen to make independent expenditures in the local jurisdiction. "Despite the fact that the Committee received some

contributions in excess of $500, Charter Section 312 C 7 does not prohibit the Committee from making independent expenditures in support of or opposition to candidates for elective City office using any portion of the contributions it received." (See Zakson Letter).

The two exceptions the LACEC set forth in the Zakson letter are if : 1) the committee solicited contributions for the express purpose of supporting or opposing specific candidates for elective City office; or 2) the contributor expressly "earmarked" the contribution to be used to support or oppose a specific candidate for elective City office. (See also the LACEC's December 7, 2000 letter to Lance H. Olson, CEC Advice Letter 2000-13) (the "LACEC Olson Letter") (CT 214-222).

The LACEC also spelled out this rule in its publication entitled "Frequently Asked Questions About Independent Expenditures." (CT 212-213).

As set forth in the Durkee Declaration (CT 147-149), CCNE and its agents knew of this rule and were instructed not to, and to the best of Durkee's knowledge did not, solicit contributions for the express purpose of supporting or opposing any Long Beach candidates, nor were any CCNE contributions "earmarked."

Accordingly, Long Beach's contribution limits did not apply to CCNE during the 2002 election cycle and thus Long Beach has no probability of prevailing on its First Cause of Action.

B. Long Beach's Cause of Action for Injunctive Relief Also Must Fail.

Given that the Long Beach contribution limit ordinances are preempted by State law and are inapplicable to Respondents, it follows that Long Beach is not able to enjoin Respondents from violating those ordinances. Long Beach's cause of action for injunctive relief, therefore, has no probability of success.

In the trial court, Long Beach essentially admitted that it could not make a showing that it would probably prevail in this lawsuit. Long Beach's trial court opposition brief (CT 230), states that "Plaintiff believes that discovery will demonstrate ...." Long Beach's purported probability of prevailing.

Long Beach acknowledges, therefore, that it filed this case based on a "hunch" but that it has no admissible evidence of any wrongdoing, nor did it properly seek to ascertain any such evidence via the discovery contemplated in the Anti-SLAPP statute.

Long Beach's "hunch" does not form a sufficient basis to thwart and chill Respondents' exercise of their constitutionally protected free speech rights.

The filing of the "Anti-SLAPP" motion stayed all discovery pursuant to CCP section 425.16(g). Although CCP section 425.16 permitted Long Beach to seek permission from the Court to conduct discovery, Long Beach did not do so; and it cannot now speculate as to what discovery might or might not have demonstrated[3].

In SLAPP cases, plaintiffs are supposed to be able to demonstrate a probability of prevailing without forcing defendants to undergo expensive and time-consuming discovery. If they cannot make the required showing of likely success at the outset of the case, their case – as with Long Beach's case here – must be dismissed.[4]

The trial court was correct in doing so, and this court should affirm the trial court in its entirety.

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3 Long Beach impeaches itself by mentioning in its trial court opposition (CT 231:22-23) its supposed need for discovery by stating that "... discovery is absolutely necessary ...." (See also CT 238:20; 26).

4 "... the whole purpose of the [Anti-SLAPP] statute is to provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition." *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 841.

CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court affirm the trial court's ruling in its entirety.

Dated: April 8, 2003

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