## STATEMENT OF THE CASE

On April 17, 2002, Plaintiff and Appellant, City of Long Beach ("City"), filed a Complaint for Damages and Injunctive Relief against Defendants and Respondents, California Citizens for Neighborhood Empowerment and its treasurer, Kinde Durkee ("CCNE"). (C.T. 4-24). The Complaint's First Cause of Action alleged that CCNE accepted campaign contributions in excess of the limitations permissible under Long Beach Municipal Code sections 2.01.310 and 2.01.610, for the purpose of making "independent expenditures" in support of a candidate for mayor of the City of Long Beach in the April 9, 2002 election. (C.T. 4-6).

The Complaint's Second Cause of Action alleged that CCNE failed to timely notify the City Clerk and all other candidates of independent expenditures made by CCNE, as required by Long Beach Municipal Code section 2.01.630. (C.T. 6-7). The Third Cause of Action sought injunctive relief from further violations of Long Beach Municipal Code, Chapter 2.01 ("the Long Beach Campaign Reform Act"). (C.T. 7).

Each cause of action was authorized by Long Beach Municipal Code section 2.01.1120 (C.T. 18).

CCNE filed an Answer to Complaint on June 3, 2002. (C.T. 25-30). On August 8, 2002, CCNE filed an Application for Leave to File Special

Motion to Strike, along with an Order Permitting California Citizens for Neighborhood Empowerment and Kinde Durkee to File a Special Motion To Strike Beyond the Sixty Day Deadline. (C.T. 31-134). On August 8, 2002, the trial judge granted CCNE's Application. Thereafter, CCNE filed a Special Motion to Strike Plaintiff's Complaint on August 16, 2002. (C.T. 136-223).

The City filed an Opposition to the Special Motion to Strike [C.T. 225-259], to which CCNE filed its Reply to the Opposition on September 12, 2002. (C.T. 260-283).

On September 24, 2002, the trial court, after hearing arguments, granted CCNE's Special Motion to Strike, and dismissed the Complaint in its entirety. Although the parties briefed the underlying constitutionality of the City's statute, the court did not reach these issues and its ruling was relatively narrow and focused. After finding that the motion was timely the court ruled:

1. The Complaint "arises from the defendant's free speech or petition activity," thus triggering the application of 425.16. (R.T. 7:22).

2. The plaintiff, City, failed to meet its burden to show a probability that it would prevail on the merits. (R.T. 7:22 - 9:17).

The Judgment of the trial court is appealable, as provided by Code of Civ. Proc. section 425.16(j). Appellant, City, filed a timely Notice of Appeal,

pursuant to Code of Civ. Proc. section 904.1(a)(13) [C.T. 290-293], and now seeks an Order from this Court reversing the Judgment of the trial court.

## STATEMENT OF FACTS

In 1994, the people of the City of Long Beach, by initiative, enacted the Long Beach Campaign Reform Act, which thereafter was codified as Chapter 2.01 of the Long Beach Municipal Code ("LBMC"). (C.T. 9-19). The Constitutional right to enact such a statute, and its applicability to defendants, was briefed below but did not form a basis for the trial court's ruling.

The primary section at issue is LBMC section 2.01.610, which provides that any "person" (defined to include any individual, organization or political action committee, LBMC § 2.01.210D) who makes an independent expenditure in support of or in opposition to a candidate in a city election shall not accept any contribution in excess of the amount of $600 (the contribution limit for candidates for the Office of Mayor). (C.T. 16).

Just prior to the Long Beach municipal primary election due to be held on April 9, 2002, CCNE filed a Recipient Committee Campaign Statement with the Secretary of State and with the Long Beach City Clerk (C.T. 243-250). As this statement is central to the complaint and the instant appeal, it merits close scrutiny. It reveals that for the period in question, the committee

received $28,900 and spent $26,919.76. (C.T. 245). Five "persons" are listed as contributing the following amounts:

| | |
|---|---|
| Camden Realty - Houston, TX | $ 7,500 |
| Capital Foresight - Los Angeles, CA | 1,000 |
| Long Beach Police Officers Ass'n PAC - Long Beach, CA | 15,000 |
| Marsha Naify - Long Beach, CA | 5,000 |
| Quality Technology - Bellflower, CA | 400 |

(C.T. 246).

Setting aside $200 listed as monetary contributions, the <u>only</u> expenditures during this period were "independent expenditures" on behalf of Dan Baker, candidate for Long Beach Mayor ($26,719.76). (C.T. 247-249).

Having concluded, not unreasonably, that CCNE had accepted contributions in excess of $600 for the purpose of making independent expenditures on behalf of a Long Beach mayoral candidate, all in violation of LBMC section 2.01.610, the City filed the instant enforcement action based upon the authority conferred by LBMC Section 2.01.1120. The obvious relationship between the nearly equal amounts of contributions made and the expenditures reported during the time period of approximately one month forms the factual basis for the City's enforcement action.

## STANDARD OF REVIEW

The standard of review herein is the independent judgment test. That is, both the question as to whether section 425.16 applies and the question as to whether the plaintiff has shown a probability of prevailing are each reviewed independently on appeal. (Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 713, 721, 77 Cal. Rptr. 2d 1; Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 1064, 82 Cal. Rptr. 2d 10.

In order to satisfy due process, the burden placed upon the plaintiff (if the Special Motion to Strike is applicable) must be compatible with the early stage at which the motion is brought and heard, and the limited (in this case, non-existent) opportunity to conduct discovery. In order to preserve the plaintiff's right to a jury trial, the court's determination of the motion cannot involve a weighing of the evidence. (Looney v. Superior Ct. (1993) 16 Cal. App. 4th 521, 537-538, 20 Cal. Rptr. 2d 182).

## ARGUMENT

### I.

### THE CITY'S COMPLAINT IS NOT SUBJECT TO A SPECIAL MOTION TO STRIKE MADE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16.

Code of Civil Procedure section 425.16, subdivision (b) provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Section 425.16 was enacted in response to a disturbing increase in the number of lawsuits brought primarily to chill the valid exercise of those constitutional rights. (Code Civ. Proc. § 425.16(a)). Thus, section 425.16, frequently referred to as the "anti-SLAPP" statute, provides a procedural mechanism to expeditiously dismiss such frivolous lawsuits.

However, the right of free speech is not absolute and the State in the exercise of its police power may regulate and punish the abuse of this freedom.

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.

**A. The Long Beach Campaign Reform Act Was Enacted Pursuant To The Express Authority Found In The State Constitution, Therefore, No Action Of The Legislature Can Infringe On That Authority.**

At the core of the City's lawsuit is the right of a charter city to regulate its municipal elections through the enactment and enforcement of local laws. This fundamental right is specifically authorized under article XI, section 5, subdivision (b) of the California Constitution, which provides that charter

cities are granted "plenary authority" to regulate the "manner in which" and the "method by which" municipal officials are elected.

After the adoption of the Constitution of 1879, the California Supreme Court declared that "it was 'manifestly the intent' of the drafters 'to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature." Johnson v. Bradley (1992) 4 Cal.4th 389, 394, 14 Cal.Rptr.2d 470 (citing People v. Hoge (1880) 55 Cal. 612, 618). Subsequently, after several incantations, article XI, section 5 of the California Constitution was adopted and provides as follows:

> (a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. **City charters adopted pursuant to this Constitution . . . shall supersede all laws inconsistent therewith**.
>
> (b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) sub-government in all or part of a city **(3) conduct of city elections** and **(4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein ... the manner in which, the method by which, the times at which, and the terms for which the several**

**municipal officers and employees whose compensation is paid by the city shall be elected or appointed ...** (Emphasis added.).

Moreover, case law has consistently upheld the mandate of the California Constitution, holding that municipal elections, by their very definition, are "municipal affairs," that charter cities have exclusive authority to regulate the conduct of municipal elections, including the manner in which municipal officers are elected, and that such provisions are not preempted by inconsistent state law. See Socialist Party v. Uhl (1909) 155 Cal. 776; Rees v. Layton (1970) 6 Cal.App.3d 815, 86 Cal.Rptr. 268; City of Redwood City v. Moore (1965) 231 Cal.App.2d 563, 42 Cal.Rptr. 72.

In Socialist Party v. Uhl, supra, the California Supreme Court held that "the election of municipal officers is strictly a municipal affair ... [and] city charters prevail over the general law as far as regulating the method in which a charter election shall be conducted ... [and] [a]s far as municipal elections are concerned, being municipal affairs, [general law] cannot control them." Id., at 788. The right of a municipal entity to regulate contributions to a political campaign was further reinforced in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d. 659 (1976).

Pursuant to this constitutionally conferred authority, the people of the City of Long Beach, by voter initiative, enacted the Long Beach Campaign

Reform Act. (C.T. 9-19). The primary section at issue in the underlying litigation is LBMC section 2.01.610, which provides that any person who makes an independent expenditure in support of or in opposition to a candidate shall not accept any contribution in excess of $600 (the contribution limit for candidates for the Office of Mayor, taking into account inflation and deflation). (C.T. 16). The remedy for violation of this law, and the basis for the City's lawsuit is set forth in LBMC section 2.01.1120 (C.T. 18).

Since this enforcement action is commenced on the clear authority of the State Constitution, no action of the state legislature can infringe on that authority. Thus, the "anti-SLAPP" statute, which deprives the City of the right to full discovery and to fully adjudicate its enforcement action, cannot lawfully be applied to this complaint whether or not the legislature so intended.

**B. The "Anti-SLAPP" Statute Was Not Intended To Apply To This Enforcement Action.**

As previously stated, the instant action is an attempt to enforce the provisions of the City's Campaign Reform Act. It is brought pursuant to the authority conferred by Division XI of LBMC 2.01. (C.T. 18). That Division provides the City with the option of enforcement by way of either a criminal action (LBMC 2.01.1110), or a civil action (LBMC section 2.01.1120).

Code of Civil Procedure section 425.16, subdivision (d) provides that the anti-SLAPP statute "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." It is the City's position that the "enforcement action" against CCNE seeking a civil judgment and to enjoin them from further violations of the Long Beach Campaign Reform Act falls within this exception.

In People v. Health Laboratories of North America, Inc., et al. (2001) 87 Cal.App.4th 442, 104 Cal.Rptr.2d 618, a district attorney brought a civil action seeking civil penalties and injunctive relief for alleged violations of Bus. & Prof. Code sections 17200, 17500 and 17508 (false advertising and unfair competition). Id., at 445. There, the Court denied the defendant's special motion to strike which was filed pursuant to section 425.16(a), based on the statutory exception of section 425.16(d). The Court concluded that the classification of subdivision (d) does not violate the equal protection clauses, and that it "bears directly on furthering the state's legitimate interest of allowing prosecutors [and city attorneys] – who did not create the SLAPP problem – to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction." Id., at 451.

Like Bus. & Prof. Code section 17200, *et seq.*, the Long Beach Campaign Reform Act can be enforced criminally, civilly, and by injunctive relief. Just as in Health Laboratories, et al., supra, the City has filed an

enforcement action seeking civil and injunctive relief. Therefore, just as in Health Laboratories, a Special Motion to Strike made pursuant to Code Civ. Proc. section 425.16(a) should not prevent the City from enforcing its municipal law.

A narrow interpretation of section 425.16(d) to include only criminal prosecutions would clearly exalt form over substance (and result in the unsupportable conclusion that "anti-SLAPP" applies to the civil enforcement provisions of the City statute, but not the optional criminal enforcement provisions). More important, it would ignore the fact that the City, through its City Attorney, is charged with the duty of enforcing its local campaign contribution and expenditure laws on behalf of its citizens – "the people."

Accordingly, reading section 425.16(d) in its broader sense, to include enforcement actions of this nature, is logical and more significantly, fully consistent with the public policy considerations underlying the "anti-SLAPP" statute.

## II.

## ASSUMING ARGUENDO THAT CODE OF CIVIL PROCEDURE SECTION 425.16 APPLIES TO THE INSTANT ENFORCEMENT ACTION, THE CITY HAS DEMONSTRATED A CLEAR PROBABILITY THAT IT WILL PREVAIL ON THE MERITS.

Section 425.16 articulates a "two-step process for determining whether an action is a SLAPP." (Navellier v. Sletten (29 Cal.4th 82, 124 Cal.Rptr.2d

530); see also Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1364, 102 Cal. Rptr. 2d 864.)

> First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. [Citation.] If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that "there is a probability that the plaintiff will prevail on the claim." [Citations.] The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" (Kajima Engineering & Construction, Inc. v. City of Los Angeles (2002) 95 Cal. App. 4th 921, 928 [116 Cal. Rptr. 2d 187]; see also Paul v. Friedman (2002) 95 Cal. App. 4th 853, 862-863 [117 Cal. Rptr. 2d 82].) "Only a cause of action that satisfies both prongs of the anti-SLAPP statute–i.e., that arises from protected speech or petitioning and lacks even minimal merit--is a SLAPP, subject to being stricken under the statute.

(Navellier v. Sletten, 29 Cal. 4th at p. 89.)

Thus, assuming arguendo that section 425.16 is applicable and that the first prong is satisfied, (i.e., that CCNE's activities were of a nature that the statute is designed to address) the Court must next determine whether there is a probability that the City will prevail on its claims.

> "In making its determination, the court shall consider the pleadings, and supporting and

> opposing affidavits stating the facts upon which the liability or defense is based."

(Code Civ. Proc. § 425.16(2)).

The municipal law pertinent to the City's action is as follows:

> For primary and general elections, no person shall make to any committee which supports or opposes any candidate and no such committee shall accept from each such person a contribution or contributions totaling more than ... (six)[1] hundred dollars for the primary election and (six) hundred dollars for the runoff election for mayor.

(Emphasis added). LBMC section 2.01.310 (C.T. 12).

> Any person[2] who makes independent expenditures supporting or opposing a candidate shall not accept any contribution in excess of the amounts set forth in section 2.01.310.

(Emphasis added). LBMC section 2.01.610.

Finally, Long Beach Municipal Code section 2.01.630 provides:

> Any person who makes independent expenditures of more than two hundred fifty dollars in support of or in opposition to any candidate shall notify the City Clerk and all candidates running for the same seat by telegram, facsimile or any other electronic means approved by the City Clerk each time such an expenditure is made.

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[1] Adjusted upward from five hundred dollars for inflation.

[2] "Person" is defined broadly to include the CCNE (LBMC § 2.01.210D).

The City's Complaint charges CCNE with violating all of the above sections of the Long Beach Municipal Code and includes a complete and certified copy of Chapter 2.01 as an attachment. (C.T. 9-19). Specifically, the allegations are pled at pages 4 through 9 of the Clerk's Transcript. Additionally, the Complaint alleges the remedy sought, including general damages, special damages, attorney fees, and injunctive relief. As such, the Complaint is legally sufficient.

The evidence which the court below was required by statute to consider and which was properly before the court, in addition to the complaint itself, came primarily by way of the Recipient Committee Campaign Statement, filed by CCNE with the Long Beach City Clerk on April 12, 2002. (C.T. 243-250). The Long Beach municipal primary election took place on April 9, 2002. That statement establishes that for the period in question (January 1, 2002, through March 23, 2002) CCNE received $28,900 in monetary contributions and spent $26,919.76 (C.T. 245).

Five "persons" are listed as contributors:

| | |
|---|---|
| Camden Realty, Inc.[3] | $ 7,500 |
| Capital Foresight | 1,000 |
| Long Beach Police Officers Ass'n PAC | 15,000 |

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[3] Although not contained in the record, the City will show that Camden Realty, Inc., though based in Houston, Texas, has substantial realty interests in Long Beach.

| | |
|---|---|
| Marsha Naify[4] | 5,000 |
| Quality Technology | 400 |

All contributions were received between February 26, 2002, and March 23, 2002. (C.T. 246).

Substantially all of the expenditures for this period ($26,819.76) were made by CCNE on March 18 and 20, 2002, and listed as an independent expenditure on behalf of a candidate for mayor of Long Beach. (C.T. 247).

Simply stated, the City has established a probability that it will prevail on its claim that CCNE accepted contributions in excess of $600 from one or more persons (Camden Realty, Capital Foresight, Long Beach Police Officers Ass'n., Marsha Naify of Long Beach) for the purpose of funding an independent expenditure in support of a candidate for mayor in a Long Beach municipal election. The City has established a probability that it can and will prevail on the merits, and has therefore satisfied its burden under the "anti-SLAPP" statute.

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[4] Listed as a resident of Long Beach.

## CONCLUSION

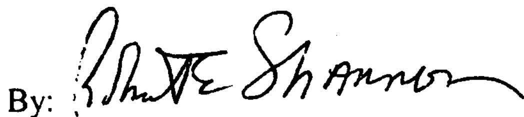
The citizens of Long Beach, for good and compelling reasons, have attempted to place limits on contributions to their local, non-partisan campaigns and to regulate their own municipal election processes. The "Findings and Declarations" stated in LBMC § 2.01.120, as well as the "Purpose" stated in § 2.01.130 fully embody the City's obvious public policy bases for enacting and enforcing limitations on campaign contributions.

The judgment of the court below flies in the face of these fundamental public policy considerations, applies "anti-SLAPP" in a manner which the legislature did not, and constitutionally could not, have intended, and ignores the compelling evidence which would <u>in any event</u> satisfy the statute. The judgment of the trial court should be reversed.

Dated: March 5, 2003

Respectfully submitted,

ROBERT E. SHANNON, City Attorney

By: 

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