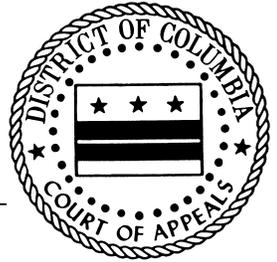


No. 19-CV-1222



Clerk of the Court
Received 07/18/2020 12:01 AM

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

SIMON BRONNER, *et al.*,

Plaintiffs-Appellees,

v.

LISA DUGGAN, *et al.*,

Defendants-Appellants.

On Appeal from the Superior Court of the District of Columbia
(Hon. Robert R. Rigsby, Judge)
Case No. 2019 CA 001712 B

**BRIEF OF *AMICI CURIAE* MEMBERS OF THE “PROTECT THE
PROTEST” TASK FORCE IN SUPPORT OF APPELLANTS AND
REVERSAL**

Lauren C. Regan
Rebecca Chapman
The Civil Liberties Defense Center
1430 Willamette St. #359
Eugene, Oregon 97401
(541) 687-9180

Marco Simons
[REDACTED]
D.C. Bar No. 492713
EarthRights International
1612 K Street NW #800
Washington, D.C. 20006
Tel: 202-466-5188
Fax: 202-466-5189

Counsel for Amici Curiae

RULE 29(a)(4)(A) DISCLOSURE STATEMENT

Amici are nonprofit organizations, each of which certifies it has no parent corporation and has not issued any shares of stock to any publicly held corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT.....	5
I. Appellees’ tort suit is a quintessential SLAPP.....	5
II. The Anti-SLAPP Statute requires a claim-by-claim analysis, backed by evidence beyond the complaint.	11
a. Pleadings alone cannot meet the evidentiary burden.	13
b. The Anti-SLAPP Statute requires a claim-by-claim analysis.....	16
c. The Anti-SLAPP Statute requires a detailed assessment of the elements of each claim.	18
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>Competitive Enter. Inst. v. Mann</i> , 150 A.3d 1213 (D.C. 2016), as amended (Dec. 13, 2018), <i>cert denied sub nom</i> <i>Nat’l Review, Inc. v. Mann</i> , 140 S.Ct. 344 (2019).....	passim
<i>Fridman v. Orbis Bus. Intelligence Ltd.</i> , ___ A.3d ___, 2020 WL 3290907, No. 18-CV-919 (D.C. June 18, 2020).....	passim
<i>Frisby v. United States</i> , 35 App. D.C. 513 (D.C. Cir. 1910).....	13
<i>Resolute Forest Prods. v. Greenpeace Int’l</i> , No. 17-cv-02824, 2019 U.S. Dist. LEXIS 230211 (N.D. Cal. Sept. 24, 2019).....	10, 18

Statutes

D.C. Code § 16-5501	11, 15, 16, 17
---------------------------	----------------

Other Authorities

Council of the District of Columbia, Report of Cmte. On Pub. Safety and the Jud. On Bill 18-893 (Nov. 18, 2010)	11
George Pring, <i>SLAPPs: Strategic Lawsuits against Public Participation</i> , 7 PACE ENVTL. L. REV. 3 (September 1989).....	5, 6
Robert T. Sherwin, <i>Ambiguity in Anti-SLAPP Law and Frivolous Litigation</i> , 40 COLUMBIA J.L. & ARTS 431 (2017).....	11, 12, 15

Rules

Rule 12(b)(6)	15, 19, 20
---------------------	------------

INTERESTS OF AMICI CURIAE

Amici curiae are nonprofit nongovernmental human rights, environmental, civil rights, and free speech organizations that have joined together through the “Protect the Protest” Task Force (“PTP”) to protect the First Amendment rights of public interest advocates against the threat of Strategic Lawsuits Against Public Participation. A more detailed description of *amici* is set forth in Appendix A.

Amici have relevant, first-hand knowledge of the consequences of these abusive lawsuits, which have the purpose and effect of chilling important perspectives on issues of significant public concern. The District of Columbia’s Anti-SLAPP Statute is one of the strongest such laws in the country. *Amici* write to offer relevant knowledge of the protections afforded by the statute to citizens of the District engaged in the exercise of their First Amendment rights, to explain why such protection is crucially needed, and to provide context to the decision of the Superior Court, which, if not reversed, would significantly undermine the protections afforded by the Anti-SLAPP Statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

“Strategic Lawsuits Against Public Participation” (“SLAPPs”) are lawsuits that pose particular dangers not only to the individuals and organizations they target, but also to our society, to human rights, and to the rule of law. SLAPPs pose a serious threat to civil society and free speech. Without protection from SLAPPs, ordinary citizens and public interest advocates would stay silent rather than run the risk of being punished for speaking out against the powerful.

The Superior Court accepted that the claims in this case arise out of acts “in furtherance of the right of advocacy on issues of public interest,” the basic characteristic of a SLAPP suit. Amended Order (“Am. Order”) at 35 (Dec. 12, 2019). In general, these claims are founded on the idea that political advocacy can form the basis of actionable claims, and that individuals acting in furtherance of their deeply-held beliefs (rather than their pecuniary or familial interests) are breaching their fiduciary duty to a nonprofit organization. The implications of allowing such claims to proceed are staggering. To take but one example, in recent weeks and months many nonprofit organizations have taken action in solidarity with the Movement for Black Lives – including organizations where this is arguably not part of their “mission,” where their leadership may not have previously disclosed their personal positions on police violence, and where these

positions may not be representative of their membership.¹ Under the Superior Court’s ruling, members of such organizations may well have claims for breach of fiduciary duty arising out of this basic free speech activity.

Protecting individuals’ rights to engage in political speech and advocacy is precisely the reason that the District of Columbia has joined many states in passing a so-called “Anti-SLAPP” statute (“the Statute”). The mechanism by which the Statute mitigates the economic and human cost of frivolous lawsuits is the creation of a special motion to dismiss that requires a minimum evidentiary showing early in the litigation process. The Statute creates a two-prong procedure. First, the movant must demonstrate that the pertinent issues are matters of public interest. Second, upon satisfying this first prong, the burden is shifted to the non-moving party (*i.e.*, the SLAPP-er or plaintiff) to demonstrate that its claims are likely to succeed on the merits. The Statute does not define “likely to succeed on the

¹ *See, e.g.*, Ramón Cruz, *A Movement Moment* (June 23, 2020) <https://www.sierraclub.org/articles/2020/06/board-of-directors-black-lives-matter> (last visited July 14, 2020) (noting that the board of the Sierra Club, an environmental organization, recently endorsed “the Movement for Black Lives’s demands: Defund the police, invest in Black communities, and get Donald Trump out of office”). Indeed, the Sierra Club has long had a vigorous debate over immigration policy, in which a group of members attempted a takeover of the board on an anti-immigration platform. *See, e.g.*, Associated Press, *Immigration issue divides Sierra Club*, East Bay Times (Apr. 9, 2005), <https://www.eastbaytimes.com/2005/04/09/immigration-issue-divides-sierra-club/> (last visited July 14, 2020). Under the Superior Court’s ruling, such political controversies could easily end in litigation.

merits,” but this Court has recognized the non-moving party must submit some form of evidence in addition to its pleadings to demonstrate that it is likely to succeed on the merits. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), as amended (Dec. 13, 2018), *cert denied sub nom Nat’l Review, Inc. v. Mann*, 140 S.Ct. 344 (2019).

While there remains some ambiguity about what type and what quantum of evidence must be presented, it is clear that simply restating the allegations of the SLAPP complaint is insufficient. *See id.* at 1228, 1236. *See also Fridman v. Orbis Bus. Intelligence Ltd.*, ___ A.3d ___, No. 18-CV-919, 2020 WL 3290907, at *7 (D.C. June 18, 2020). Moreover, such evidence must be applied to a claim-by-claim, element-by-element analysis of the non-moving party’s suit to determine whether it is indeed likely to succeed on the merits. *Mann*, 150 A.3d at 1236.

In the instant case, the Superior Court correctly found that Appellants’ acts were in furtherance of the right of advocacy on issues of public interest, but erroneously found that Appellees had carried their evidentiary burden. Had the Superior Court performed the correct scrutiny of Appellees’ claims, as required by the Statute, the special motion to dismiss would have been granted, as Appellees presented *no* evidence whatsoever. The Superior Court failed to implement the standard painstaking analysis described in *Mann*, inasmuch as it both incorrectly treated Appellees’ allegations as evidence and also failed to perform a claim-by-

claim, element-by-element analysis of that “evidence” as applied to Appellees’ claims.

Amici urge this Court to reverse the decision of the Superior Court. Its demonstrably erroneous application of the incorrect standard, if allowed to stand, would eviscerate the protections afforded by the D.C. Anti-SLAPP Statute and create inconsistent precedent at the Superior Court level.

ARGUMENT

I. Appellees’ tort suit is a quintessential SLAPP.

The goal of a SLAPP is to stop individuals or groups from exercising their political right to free speech, to punish them for engaging in such speech, or to deter others from doing the same in the future. SLAPPs accomplish this nefarious goal by masquerading as legitimate lawsuits designed to survive a motion to dismiss for failure to state a claim, thus forcing defendants into expensive and lengthy litigation. SLAPPs usually are camouflaged as torts: defamation, business torts such as interference with business relations, judicial torts, conspiracy or RICO claims, and nuisance.

Over three decades ago, Professor George Pring warned of a new and disturbing trend he had observed: American citizens were being sued simply for “speaking out on political issues.” George Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 Pace Env’tl. L. Rev. 3, 4 (Sept. 1989). Chillingly,

Pring described SLAPPs as “dispute transformation devices, a use of the court system to empower one side of a political issue, giving it the unilateral ability to transform both the forum and the issue in dispute.” *Id.* at 12. Unfortunately, SLAPPs have proliferated since Pring first coined the term. Indeed, as reflected in Appellees’ suit, SLAPPs remain a tool deployed by powerful interests to silence those who disagree with them.

SLAPPs strike at a wide variety of traditional American political activities. Historically, people and organizations have been sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, or even speaking out on social media. Most troubling to *amici*, however, is the growing trend of powerful corporations and political entities suing those engaging in First Amendment protected protests and boycotts.

Amici have substantial experience representing individuals and groups who have been “SLAPPed.” As members of the Protect the Protest task force, *amici* have not only successfully defended citizens and groups from bullying SLAPPs, but also have advocated for Anti-SLAPP laws, and educated activists and lawyers nationally on how to avoid and defend against SLAPPs. In 2019, *amici* successfully defended nine residents of the town of Weed, California, who spoke

out against a corporation that claimed it owned the rights to the town's main source of spring-fed drinking water. With *amici*'s assistance, the suit was successfully unmasked as a SLAPP and dismissed. The nine citizens had nothing to do with the property dispute (or quiet title action); the corporation named them as defendants simply for spite and intimidation.

Amici have also been actively involved in defending activists from the oil and energy industry's attempt to use RICO-based SLAPPs to attack and silence people and groups who are attempting to protect land, water, and Indigenous rights from exploitation and corporate profiteering.² *Amici* have helped community activists in Alabama defend themselves from a defamation SLAPP brought by a landfill operator after they opposed the dumping of hazardous coal ash in a landfill in their town.

SLAPPs are not limited to environmental activism. *Amici* have provided legal defense to nonprofit organizations, activists, community organizers, media organizations, and journalists in SLAPP cases around the country. *Amici* also actively engage in SLAPP policy discussions and has advocated for the adoption of anti-SLAPP laws at the federal level, as well as the state level. Recently *Amici*

² See, e.g., Paul Barrett, *How a Corporate Assault on Greenpeace is Spreading*, Bloomberg Businessweek (Aug. 28, 2017), <https://www.bloomberg.com/news/articles/2017-08-28/how-a-corporate-assault-on-greenpeace-is-spreading> (last visited July 9, 2020).

assisted with the drafting of anti-SLAPP laws or amendments to laws in Texas, Kentucky, Virginia, and Colorado.³

Over the past several years, through their work defending against SLAPPs and educating the legal community about SLAPPs, *amici* have seen SLAPPs proliferate in the U.S. and around the world. It is clear that any activist, organizer, or private citizen speaking out on any political issue, typically on behalf of the less-popular or less-powerful, is at risk of facing a SLAPP.

Public political dissent has never been more crucial and, through the power of the internet, has become even more accessible to all. SLAPPs pose particular dangers, not just to individuals, but to our society, human rights, and the rule of law. SLAPPs target advocates, community leaders, journalists, professors, whistleblowers, and everyday people who exercise their Constitutional rights. Their true purpose is to silence criticism and inhibit dissent. Although the majority of SLAPPs are eventually dismissed, a SLAPP does not need to result in a judgment on the merits to have its intended effect. A meritless lawsuit can take

³ Joe Mullin, *Critical Free Speech Protections Are Under Attack in Texas*, Electronic Frontier Foundation (Mar. 14, 2019), <https://www.eff.org/deeplinks/2019/03/critical-free-speech-protections-are-under-attack-texas> (last visited June 28, 2020); *Factsheet: Kentucky's Anti-SLAPP Legislation*, Protect The Protest, <http://www.protecttheprotest.org/wp-content/uploads/2020/02/Kentucky-SLAPP-Factsheet.pdf> (last visited June 28, 2020).

years to resolve, draining a defendant's resources, reputation, and morale. And that is precisely the point.

Most of the tort claims in Appellees' suit are quintessential SLAPP claims: an attempt to silence and punish those who advocate for a matter of public interest masquerading as legitimate claims. Although couched in terms of "breach of fiduciary duty" and other recognized torts, most of these claims arise out of the notion that Appellants' choice to advocate for their beliefs – while leaders of a nonprofit organization that is so engaged in public advocacy that it has an "Activism Caucus" – violates the best interests of the organization and the rights of its members with opposing viewpoints. The Superior Court did not find that Appellants were alleged to have been acting in their own pecuniary interest, or to benefit their family members, or some other traditionally accepted fiduciary conflict; instead the Appellants were alleged to have been pursuing "their personal political agenda." Am. Order at 19 (quoting Complaint ¶ 262). Courts should not be policing which viewpoints advocated for by an organization or its leadership are truly in the organization's best interests, and tort claims are not the proper way to resolve this issue.

Every hallmark of a SLAPP can be found in Appellees' case. Appellees have cast a wide net, attempting to draw in parties who are only tangentially related. They have filed multiple complaints in multiple courts across jurisdictions to

attempt to remain in litigation as long as possible. Most importantly, nearly every neutral-appearing tort claim actually arises out of Appellants' political advocacy and specifically the boycott resolution – a matter of public interest. Indeed, the Superior Court easily and correctly held that Appellants were acting in furtherance of the right of advocacy on issues of public interest: “[t]he 2013 resolution and associated acts constitute a communication of views to members of the public related to community well-being, and thus an issue of public interest.” Am. Order at 35. Even if *some* of the claims in the suit are sufficiently alleged to survive a motion to dismiss, that does not change the fact that the suit is an “action[] brought *primarily* to chill the valid exercise of freedom of speech.” *Resolute Forest Prods. v. Greenpeace Int’l*, No. 17-cv-02824, 2019 U.S. Dist. LEXIS 230211 at *5 (N.D. Cal. Sept. 24, 2019) (emphasis added) (granting fees under California’s anti-SLAPP statute despite the fact that some claims survived).

Amici have seen SLAPPs become endemic and epidemic; laws like the D.C. Anti-SLAPP Statute are an important bulwark against them. Without such strong anti-SLAPP protections – and without adherence to the special motion to dismiss evidentiary requirement – anyone who has the courage to speak out on political issues against the interests of the powerful runs the risk of being subjected to SLAPP harassment via the lengthy and expensive process of defending themselves from a frivolous lawsuit.

Anti-SLAPP statutes are one of the few mechanisms that exist to mitigate the effects of such bullying litigation aimed at thwarting lawful First Amendment activities. D.C.’s Anti-SLAPP Statute is one of the strongest in the United States. *Amici* urge this Court to keep it that way.

II. The Anti-SLAPP Statute requires a claim-by-claim analysis, backed by evidence beyond the complaint.

The District of Columbia Anti-SLAPP Statute, D.C. Code § 16-5501, was designed to “ensure that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates.” Council of the District of Columbia, Report of Cmte on Pub. Safety and the Jud. on Bill 18-893 (Nov. 18, 2010). The Statute creates a special motion to dismiss, and provides that if the party filing the special motion “makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.” D.C. Code § 16-5501(b). The Statute is silent on what “likely to succeed on the merits” means in this context.

This legislative silence as to the “likely to succeed on the merits” standard is a “ticking time bomb of ambiguity that threatens to compromise the safeguards anti-SLAPP statutes provide.” Robert T. Sherwin, *Ambiguity in Anti-SLAPP Law*

and Frivolous Litigation, 40 COLUMBIA J.L. & ARTS 431, 435 (2017). Here is the dilemma:

Once an anti-SLAPP dismissal motion is filed, the trial judge must first determine whether the defendant/movant has carried his burden of proving that the lawsuit relates to his public participation. If the judge believes the defendant carried that burden, then the plaintiff/non-movant must establish that the case has whatever degree of merit the statute prescribes. So, to succeed in their respective endeavors, the parties must necessarily offer something to the court—some sort of evidence to persuade the judge on those two questions. What form that evidence must take is [the source of potential conflict]. More to the point, what does the “evidence” need to look like? Affidavits? Live witness testimony? Facts alleged in the parties’ pleadings? The majority of states’ laws [including D.C.’s] are silent on this precise question

Id. at 440.

Fortunately for those who are SLAPPED in the District of Columbia, these questions have been answered by this Court. In *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016), this Court conducted a painstaking and thorough analysis of the language in the D.C. Anti-SLAPP Statute and concluded that “likely to succeed on the merits” requires an evidentiary showing beyond the allegations set forth in the pleadings alone, holding that “the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion.” *Id.* at 1232.

a. Pleadings alone cannot meet the evidentiary burden.

The Superior Court found that Appellants' acts were in furtherance of the right of advocacy on issues of public interest. The Superior Court then held that Appellees "have demonstrated that a number of their claims have merit" and "have successfully demonstrated that they have evidence" supporting them. Am. Order at 35. As far as *amici* can tell, however, that "evidence" consisted solely of the allegations of the Second Amended Complaint. Pleadings alone cannot meet the evidentiary showing required by the Statute; if they could, there would be little difference between a special motion to dismiss and an ordinary motion.

Although it is unusual in our system to require an evidentiary showing at the motion to dismiss stage, this is an essential feature of the Statute. As this Court noted in *Mann*, "[t]he dispositive nature of a court's grant of a special motion to dismiss after the claimant has been required to proffer evidence, but without a full opportunity to engage in discovery and before trial, is critical to our interpretation of the 'likely to succeed' standard." 150 A.3d at 1235. It is clear that pleadings alone cannot satisfy the burden. It has long been the rule that "pleadings are not evidence against the party concerned." *Frisby v. United States*, 35 App. D.C. 513, 517 (D.C. Cir. 1910) (quoting *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)). And *Mann* specifically held that the plaintiff must "present evidence – not simply allegations – and that the evidence must be legally sufficient to permit a

jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor." 150 A.3d at 1221.

This Court carefully analyzed the language of the D.C. Anti-SLAPP Statute and held that the "likely to succeed on the merits" standard requires "more than mere reliance on allegations in the complaint and mandates the production or proffer of evidence that supports the claim." *Id.* In reviewing the trial court's decision on the special motion to dismiss in *Mann*, this Court noted the "hefty volume of evidence in the record." *Id.* at 1252. From the Superior Court's opinion here, however, it does not appear that any evidence outside the Complaint was submitted. That cannot meet the standard announced in *Mann*.

Mann remains the governing standard; just last month this Court restated and revisited the importance of the *Mann* standard:

Our role is "to test the legal sufficiency of the evidence to support the claims." We must affirm a ruling granting a special motion to dismiss if the "claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury." . . . [I]n opposing a special motion to dismiss, the plaintiff must shoulder the burden of showing that his claim is likely to succeed on the merits. In *Mann*, we explained that this requirement "mandates the production or proffer of evidence that supports the claim." Because the "standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying claim and related defenses and privileges," plaintiffs are required to present more than the mere allegations in the complaint.

Fridman, 2020 WL 3290907 at *5-7 (internal citations omitted). The *Fridman* claimants presented three pieces of evidence to demonstrate their defamation claim

was likely to succeed on the merits. *Id.* at *9. Nonetheless, this Court found such evidence was insufficient to show that claimants were likely to succeed on the merits, and dismissed their complaint with prejudice. *Id.* at *12.

In addition to conflicting with the binding law of this Court, the Superior Court’s approach here undermines the basic purpose of the Statute. In effect, by allowing the allegations of the pleadings to substitute for evidence, the Superior Court applied the ordinary Rule 12(b)(6) standard to Appellees’ special motion to dismiss – precisely what the D.C. Anti-SLAPP Statute was crafted to avoid. Commentators have suggested that the requirement of presenting “evidence – as opposed to just pointing to unsworn-to ‘facts’ in his pleadings – is the only appropriate way” to effectuate the purpose of any Anti-SLAPP statute. Robert T. Sherwin, *Ambiguity in Anti-SLAPP Law and Frivolous Litigation*, 40 *Columbia J.L. & Arts* 431, 463-64 (2017). Allowing a special motion to dismiss to be defeated on mere allegations, where the court has already found that the defendants were “communicating views to members of the public in connection with an issue of public interest,” D.C. Code § 16-5501(l)(B), would dilute the Statute into little more than a heightened-pleading standard at best, easily exploited by those who seek to silence dissent.

b. The Anti-SLAPP Statute requires a claim-by-claim analysis.

The D.C. Anti-SLAPP Statute allows, by its plain text, a special motion to dismiss “any *claim*,” in which the movant must show that the “the *claim at issue* arises from an act in furtherance of the right of advocacy on issues of public interest,” after which the non-moving party must show “that the *claim* is likely to succeed on the merits.” D.C. Code 16-5502(a)-(b) (emphasis added). Thus the Statute protects speech not only by shifting the burden onto the non-moving party to make an evidentiary showing, but also by requiring that the reviewing court make a claim-by-claim analysis of the evidence presented. The Superior Court here, however, apparently failed to conduct such an analysis, concluding only that “a number of [Appellees’] claims have merit” despite the fact that it had already dismissed many of them. Am. Order at 35.

“The standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying *claim* and related defenses and privileges.” *Mann*, 150 A.3d at 1236 (emphasis added). The analysis performed by this Court in *Mann* provides the exemplar by which anti-SLAPP “likely to succeed on the merits” analyses must be performed. Each claim must be assessed individually. For example, to determine whether the defamation claim in *Mann* was sufficiently substantiated to survive the special motion to dismiss, the Court delineated the relevant elements of defamation and

then examined each element against the claims made by each party and the evidence presented. On the basis of such analysis, the Court held that the defendant “hurdled the Anti-SLAPP statute’s threshold showing of likelihood of success on the merits because the evidence he has presented is legally sufficient to support findings by the fact-finder” that the elements of defamation will be met. *Id.* at 1240, 1241-61. The Court then proceeded to apply the same analysis to the remaining claim of intentional infliction of emotional distress. *Id.*

This claim-by-claim analysis is crucial, not just to distinguish the Anti-SLAPP Statute from Rule 12, but also for evaluating whether attorneys’ fees are appropriate. While attorneys’ fees are discretionary under the Statute, they are potentially available to a party who prevails “in part” on a special motion to dismiss, D.C. Code § 16-5504(a). Where the major thrust of a lawsuit is chilling political advocacy, attorneys’ fee awards are a critical element of the Anti-SLAPP Statute; they are the main deterrent to a proliferation of SLAPP suits. The Superior Court here, however, did not consider attorneys’ fees at all because it did not grant the special motion to dismiss as to any claims. At a minimum, the Statute requires that where claims fall under the Statute, and at least some are dismissed as meritless, an award of attorneys’ fees should be considered.

This is consistent with how anti-SLAPP statutes are generally applied. Thus, for example, the federal court in *Resolute Forest Products*, applying California’s

anti-SLAPP statute, awarded attorneys' fees to several Greenpeace entities⁴ even though several claims survived their motion to dismiss, rejecting the plaintiff's argument that fees for work relating to the dismissed claims should be reduced because two claims survived. 2019 U.S. Dist. LEXIS 230211 at *16-17. The court ultimately awarded \$794,868.62 in fees even as the non-dismissed claims proceeded to discovery. *See* Order Granting Motions for Attorneys' Fees, ECF No. 314, *Resolute Forest Prods. v. Greenpeace Int'l*, No. 17-cv-02824 (N.D. Cal. Apr. 22, 2020), available at <https://www.greenpeace.org/usa/wp-content/uploads/2020/04/Tigar-Order-Granting-Attorneys-Fees.pdf>.

c. The Anti-SLAPP Statute requires a detailed assessment of the elements of each claim.

In addition to requiring an independent evaluation of each claim, the Court's recent decision in *Fridman* further demonstrates that a proper analysis under the Statute requires evaluation of each element in the claim. 2020 WL 3290907 at *10. As *Fridman* concerned defamation claims, this Court found that it was proper for the trial court to have conducted a "public figure analysis prior to ruling on the special motion to dismiss." *Id.* at *8. In analyzing whether the special motion to dismiss was properly granted, this Court first reviewed the trial court's

⁴ Greenpeace, Inc., one of the defendants in the *Resolute Forest Products* case, is a member of the Protect the Protest Task Force.

determination that the defendants' speech was speech was germane to public interest issues, then turned to whether the SLAPP claimants had demonstrated sufficient evidence that defendants acted with malice. *Id.* at *10 (holding that “[e]ven at the special motion to dismiss stage, appellants must proffer evidence capable of showing by the clear and convincing standard that appellees acted with actual malice”).

This is a far cry from the Superior Court ruling at issue here, which simply referred to the general notion that “a number” of the claims at issue “have merit,” piggybacking on its earlier discussion of the ordinary Rule 12(b)(6) motion. Am. Order at 35. Even that discussion, however, leaves much to be desired. The sum total of the Superior Court’s analysis of Count Two, for example:

Plaintiffs allege that Defendants breached their fiduciary duty when they failed to act in the best interest of the ASA in passing the resolution to join the USACBI and by taking actions in furtherance of the resolution. Compl. ¶ 266. Plaintiffs have alleged that the individual Defendants owed some duty to the ASA through their leadership positions, and that the individual Defendants breached that duty by forcing the ASA to commit acts that are outside of its constitution. This is sufficient to state a claim here.

Am. Order at 29 (footnote omitted). The discussion does not mention the elements of a claim for breach of fiduciary duty, let alone discuss them. It does not discuss the business judgment rule, which – much like the “public figure” analysis at issue in *Fridman* – would form part of the jury’s instructions at trial, and thus should have been analyzed at this stage.

Thus the Superior Court not only did not require Appellees to present any evidence, and failed to apply the Anti-SLAPP Statute to claims that it actually dismissed, but also neglected to examine Appellees' claims at the level required by the Statute. Am. Order at 35-36. Far from the multi-page, highly detailed application of the evidence in the record to the elements of the relevant claims performed by the *Mann* Court and the *Fridman* Court, the Superior Court in the instant case performed a perfunctory superficial analysis. *Id.*

CONCLUSION

The “likely to succeed on the merits” standard of the D.C. Anti-SLAPP Statute is, and must remain, a higher bar than the Rule 12 standard. As this Court has noted, “[t]he standards for adjudicating a special motion to dismiss and a Rule 12(b)(6) motion are materially distinct. In ruling on a Rule 12(b)(6) motion, in contrast to a special motion to dismiss under the Anti-SLAPP statute, the court simply determines whether the complaint “contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. There is no requirement that a plaintiff offer any evidence to defeat the motion.” *Fridman*, WL 3290907, at *7. Absent rigorous application of the heightened evidence-based standard, statutorily required to be applied early in litigation by the special motion to dismiss, the D.C. Anti-SLAPP Statute would be rendered toothless, leaving the SLAPPED defenseless.

Amici urge this Court to overturn the Superior Court's patently flawed analysis in the instant case. Not only did the Superior Court treat pleadings as evidence, but it performed absolutely none of the granular claim-by-claim, legal standard analysis clearly delineated in *Mann* and painstakingly followed in subsequent cases. *See Fridman*, 18-CV-919, 2020 WL 3290907. If allowed to stand, the Superior Court's decision will serve as a dangerous and inconsistent precedent that will be relied upon by SLAPPers. It will prevent speakers like those represented by *Amici* from defending themselves against politically motivated lawsuits designed to suppress their speech on the important issues of the day.

Amici curiae thus respectfully request that the decision of the Superior Court be reversed and that Appellants' Special Motion to Dismiss be granted.

Dated: July 16, 2020

Respectfully submitted,

/s/ Marco Simons

Marco Simons

D.C. Bar No. 492713

EarthRights International

1612 K Street NW #800

Washington, D.C. 20006

Tel: 202-466-5188

Fax: 202-466-5189

Counsel for Amici Curiae

APPENDIX A
SPECIFIC IDENTITIES AND INTERESTS OF AMICI CURIAE

The following *amici curiae* join in this brief:

MEMBERS OF THE “PROTECT THE PROTEST” TASK FORCE

Amazon Watch is a nonprofit organization focused on protecting the rights of Indigenous peoples in the Amazon Basin. Amazon Watch supports the cause of the more than 30,000 indigenous people and farmers living in and around the “Oriente” region of the Ecuadorian Amazon, where the operations of Chevron’s predecessor, Texaco, caused one of the worst environmental disasters in history. For two decades, Amazon Watch has been involved in activism concerning the pollution in Ecuador, supporting the affected communities’ efforts to obtain remediation, potable water, and funds for health care to address contamination-related illnesses.

The Civil Liberties Defense Center is a nonprofit organization that defends environmental and social justice activists against SLAPP suits and other constitutional attacks in state and federal courts around the country. CLDC is an active participant in the “Protect the Protest” Task Force’s litigation, advocacy, education and outreach work.

Climate Defense Project (CDP) is a nonprofit organization that provides legal and intellectual support to the climate movement through legal representation, public education, and rights training. Its main activities are

supporting criminal cases involving climate protesters, advancing legal arguments in court and in the media, and publishing educational materials.

EarthRights International is a nongovernmental, nonprofit organization that litigates cases on behalf of communities around the world affected by human rights and environmental abuses, and also defends the rights of human rights and environmental defenders, including those who are sued or face other forms of legal harassment for their work. EarthRights has been a member of the Protect the Protest task force since its founding, and has an interest in ensuring that those exercising rights to political speech in various contexts are able to do so without fear of intimidation.

The International Corporate Accountability Roundtable (ICAR) is a nonprofit organization that fights to end corporate abuse of people and planet by advocating for legal safeguards that hold big businesses accountable. ICAR currently acts as the secretariat organization for the Protect the Protest task force.

The Mosquito Fleet is a regional network of activists fighting for climate justice and a fossil-free Salish Sea through on-water direct action and grassroots movement building.

The National Lawyers Guild is the nation's oldest and largest progressive bar association and was the first one in the United States to be racially integrated. Its mission is to use law for the people, uniting lawyers, law students, legal

workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests.

Portland Rising Tide promotes community-based solutions to the climate crisis and takes direct action to confront the root causes of climate change. It works to promote people's right to speak out and protest when environmental or social harm occurs. It is deeply concerned by litigation that seeks to silence and prevent communities who are resisting from having a voice.

Rainforest Action Network (RAN) is a nonprofit organization that campaigns for the forests, their inhabitants and the natural systems that sustain life through education, grassroots organizing, and non-violent direct action. RAN's work includes informing and educating people about environmental and social justice issues, including legal cases such as the lawsuit in Ecuador against Chevron and Chevron's obligation to compensate its victims in Ecuador. RAN has campaigned around the case to support the Ecuadorians who continue to suffer from the effects of ongoing pollution.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via through the court's electronic filing system to the following on the 17th day of July, 2020:

Thomas C. Mugavero
Jeffrey Seaman
John Hatchway
Whiteford, Taylor &
Preston, L.L.P.
3190 Fairview Park Drive,
Suite 300
Falls Church, VA 22042

Mark Allen Kleiman
Richard Renner
525 Main Street, Suite
204
Santa Monica, CA 90405

Maria C. LaHood
Center for Constitutional
Rights
666 Broadway, 7th Floor
New York, NY 10012

Jennifer Gross
The Deborah Project, Inc.
7315 Wisconsin Avenue,
Suite 400 West
Bethesda, MD 20814

/s/ Marco Simons
Marco Simons