STATE OF MAINE
WASHINGTON, ss.

SUPERIOR COURT
DOCKET NO. CV-09-57

RALPH NADER, CHRISTOPHER DROZNICK, NANCY ODEN, AND ROSEMARY WHITTAKER

Plaintiffs,

v.

MAINE DEMOCRATIC PARTY, THE DEMOCRATIC NATIONAL COMMITTEE, KERRY-EDWARDS 2004, INC., THE BALLOT PROJECT, INC., DOROTHY MALANSON, TERRY McAULIFFE, AND TOBY MOFFITT,

Defendants.

DECISION AND ORDER

This matter is before the Court on Special Motion to Dismiss (14 M.R.S. § 556) as well as Motions to Dismiss pursuant to M.R.Civ.P. 12(b), filed by all Defendants. This matter was initially argued on August 6, 2010, and again on November 5, 2010. All parties have submitted multiple memoranda, affidavits and other materials in support of their positions.

Background

Plaintiffs filed a 175 paragraph complaint which distills down to several alleged theories of recovery.

Plaintiffs allege that as candidates for President and Vice President of the United States, Mr. Nader and Mr. Camejo ("Candidates") and their supporters and voters were subjected to a civil conspiracy engaged in collectively by the Defendants. They allege that through a course of conduct engaged in by the Defendants, agents and co-conspirators between June and September of 2004, they filed twenty-four complaints in 17 States and five complaints with the Federal Election Commission. It is alleged that these complaints were baseless and calculated to harass and embarrass the Candidates electors through the abuse of subpoenas and discovery requests and to obstruct and drain funds from the Candidates, thereby interfering with Candidates right to run for public office. Through their allegations, Plaintiffs allege the Defendants have committed the torts of Abuse of Process and Malicious Prosecution through their conspiracy. In opposition to the Special Motions filed by the Defendants, Plaintiffs submitted multiple affidavits and exhibits suggesting the activities of one or more Defendants in multiple states were prompted by fraud, misfeasance and baseless allegations directed at interfering with the Candidates right to run for public office.

Defendants responded on two levels. Initially, they filed more typical Motions to Dismiss M.R.Civ.P. Rule 12(b). Secondarily, but on a higher level of priority, they filed a Special Motion to Dismiss under 14 M.R.S. § 556. In support of the Special Motions, they submitted affidavits and cases in multiple states suggesting that one or more Defendants or their alleged agents lawfully contested the action of those collecting nominating Petitions on behalf of the Candidates. By statute, these Special Motions are to be advanced and heard with as little delay as possible.

The Special Motion to Dismiss

The Special Motion statute, 14 M.R.S. § 556, requires that, when a moving party (here the Defendants) asserts that the Plaintiffs' claims are based on the Defendants' exercise of their right of petition under the Constitution of the United States or the Constitution of Maine, the moving party (Defendants) may bring a Special Motion to Dismiss. Here, Defendants Moffitt and Ballot Project brought a separate Special Motion and the other Defendants included a Special Motion as an addition to multiple other grounds in their Motion to Dismiss the Plaintiffs' lawsuit. Nonetheless, all Defendants sought the protection of this

statute claiming that their actions were in furtherance of their right of petition under the First Amendment to the U.S. Constitution and Article 1 of the Maine Constitution. [1]

Levels of Analysis

Initially, from the Plaintiffs' perspective, it is as if this were a sporting event and the officials (society) missed the first foul by the Defendants and wants to penalize Plaintiffs for the alleged 'retaliatory' foul! Plaintiffs (not unlike Morse, Maietta and Schelling) take the position that their initial conduct was intimately involved with the First Amendment Right of Petition seeking to get the Candidates nominated in the several states. It was the Defendants who at every turn impeded that right and intentionally caused Plaintiffs' resources, financial, personnel and otherwise, to be depleted. Plaintiffs are the victims of that first uncalled foul as they see it.

On another level, society has said that by way of checks and balances that the exercise of the First Amendment Rights are subject to review, both administratively and through the courts to test their compliance with the appropriate rules and standards set out

[1]The litigation has become known as strategic lawsuits against public participation and identified by the acronym "SLAPP."

by society in the 'laws,' in this case established by each individual state, regarding how individuals are to be included/nominated on state ballots for national office.

Completing the sports analogy, society is saying by the anti-SLAPP statute that if the initial exercise of First Amendment Rights is done properly, then the initial administrative or judicial review will not impede it and those administrative and judicial reviews are a legitimate cost to the initiators in terms of time, money and other resources. However, if not done properly, that initial exercise will be modified or stopped at the administrative or judicial level consistent with society's intentions. So far, there is no foul by the initiator or the opposition if either uses the tools society has made available (Constitutional Rights and laws). If, however, the initiator (exercising their First Amendment Rights) seeks to hold the opposition (exercising their First Amendment Rights) accountable for damages by filing a law suit (SLAPP) there is a foul, unless the initiators can show the opposition's actions intruding on the initiators' actions were devoid of any reasonable factual support or had no arguable basis in law. Absent the initiators making that showing (burden on them at the early stage of their

lawsuit), that foul translates to dismissal of the initiators lawsuit and a potential award of attorney's fees. If the initiators do make that showing, then the foul is on the opposition and the underlying litigation by the initiators goes forward seeking financial damages from the opposition.

Plaintiffs and Defendants are each claiming foul and it is for this Court to analyze the facts in the context of applying 14 M.R.S. § 556.

The Activity Protected by § 556

Up to this point our Law Court has only dealt with three cases applying 14 M.R.S. § 556. *See Morse Bros., Inc. v. Webster*, 2001 ME 70, 772 A.2d 842; *Maietta Const., Inc. v. Wainwright*, 2004 ME 53, 847 A.2d 1169; and *Schelling v. Lindell*, 2008 ME 59, 942 A.2d 1226.

The *Morse* and *Maietta* cases each involved a plaintiff petitioning one or more administrative bodies for permits or permission to construct a bark mulching plant (*Morse*) or purchase city property and removing soil (*Maietta*). In each instance these actions were contested through multiple appeals through administrative hearings and appeals to the

Superior Court (*Morse*) or opposition to actions of a contractor (*Maietta*) with the City of South Portland, which was contested in the City Council and through newspaper and television reports. The Plaintiff in *Schelling* criticized a former legislator in the newspaper and the legislator responded in detail in the newspaper prompting a defamation suit by Schelling. In each instance, the Law Court concluded that the conduct of the respective defendants was protected by 14 M.R.S. § 556.

Each of these cases involved the party initiating the litigation subject to the Section 556 Motion, having exercised their rights under the First Amendment to the United States Constitution (and the Maine Constitution), be it in the context of freedom of speech or the right to petition the government. It must be kept in mind, however, that the focus of this statute is to protect the rights of the 'defendant' who allegedly is exercising his First Amendment Rights to challenge the actions of the initiator. The initiator is only protected if he/she/it can show that the actions of the opposition were without factual or legal basis. *See* 14 M.R.S § 556.

Each of these three cases have provided insight into the meaning of this statute within their factual context. In *Maietta*, the Court specifically discussed the 'purpose' of Maine's anti-SLAPP statute:

> Section 556 was designed to combat "litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants." *Morse Bros.*, 2001 ME 70, ¶ 10, 772 A.2d at 846 (quoting *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 44 Cal.Rptr.2d 46, 48 (1995)). Section 556 targets plaintiffs who "do not intend to win their suits; rather they are filed solely for delay and distraction, and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances." *Morse Bros.*, 2001 ME 70, ¶ 10, 772 A.2d at 846 (quoting *Dixon v. Superior Court*, 30 Cal. App. 4th 733, 36 Cal.Rptr.2d 687, 693 (1994)).

Maietta, 2004 ME 53, ¶ 6, 847 A.2d at 1173.

In *Morse*, the Law Court referenced Massachusetts law to note that "(t)he typical mischief that the anti-SLAPP legislation intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." Morse, 2001 ME 70, ¶ 10, 772 A.2d at 846 (quoting *Duracraft Corp. v Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935, 940 (1998)).

In *Schelling*, the Law Court spoke about the meaning of the right to petition protected by Section 556. The Law Court indicated:

Maine's anti-SLAPP statute very broadly defines the exercise of the "right to petition." The statute includes within the definition of petitioning activity:

Any statement to a legislative, executive or judicial body;

Any statement made in connection with an issue under consideration or review by governmental entity;

Any statement likely to encourage consideration or review of an issue by a governmental entity;

Any statement likely to enlist public participation in encouraging a government body to consider a particular issue; and

Any other statement falling within constitutional protection of the right to petition the government. [2]

As is clear from the language of section 556, the Legislature intended to define in very broad terms those statements that are covered by the statute. Recently, we recognized that broad construction when we construed the meaning of petitioning activity liberally to hold that it was broad enough to encompass a citizen's

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[2] Section 556 (2007) provides in pertinent part:

> [A] party's exercise of its "right of petition" means any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Schelling, 2008 ME 59, ¶ 11 n.2, 942 A.2d at 1230 (quoting 14 M.R.S § 556).

> published communications to newspapers aimed at influencing the outcome of a contractual dispute between the City of South Portland and a contractor.

Schelling, 2008 ME 59, ¶¶ 11-12, 942 A.2d at 1230 (citing *Maietta*, 2004 ME 53, ¶ 7, 847 A.2d at 1173).

While existing case law referred to above makes it clear to this Court that Defendants' actions (or those of the alleged agents/co-conspirators) in challenging Plaintiffs' gathering and filing nomination petitions in the several states constitutes the exercise of the right of petition protected by Section 556. Plaintiffs/Respondents argue that to take advantage of conduct protected by the First Amendment or Article 1 of the Maine Constitution and the First Amendment to the United States Constitution, the burden is initially on the Defendants to show that their conduct is protected by those Constitutions. The point being, that not all speech or petitioning is protected by the Constitution.

Burden of Proof

The Law Court in *Schelling* articulated the burden of proof on a Special Motion to Dismiss as follows:

> To prevail on a special motion to dismiss, the defendant carries the initial burden to show that the suit was based on some activity that would qualify as an exercise of the defendant's First Amendment right

> to petition the government . . . . Once the defendant demonstrates that this is the basis for the suit, and therefore that the statute applies, the burden falls on the plaintiff to demonstrate that the defendant's activity (1) was without 'reasonable factual support, (2) was without an 'arguable basis in law,' and (3) resulted in 'actual injury' to the plaintiff.

Schelling, 2008 ME 59, ¶ 6, 942 A.2d at 1229 (quoting 14 M.R.S. § 556).

Plaintiffs have argued that Defendants' initial burden of showing that Plaintiffs suit was based on Defendants' activity as an exercise of their First Amendment Rights carries, implicitly, an extra burden. That is, accepting that all efforts at speech or petitioning, thought of as First Amendment Rights, are not covered, Plaintiffs request the Court to interpret the initial burden on the Defendants to include a showing that Defendants' questioned activity was covered by the First Amendment, not just that it "qualified" as First Amendment activity. Plaintiffs would have this Court look behind Defendants' activities to discern the 'motivations' behind them.

On the issue of the motives of the Defendants in challenging the nomination petitions of the Candidates, this Court finds it significant that our Court in *Morse,* noted that the defendant Webster was alleged to have appealed adverse decisions of administrative board, for the

most part, without probable cause of success and with the purpose of maximizing delay – allegations similar to those made in Plaintiffs' complaint and affidavits in opposition to the Special Motion. *Morse,* 2001 ME 70, ¶ 7, 772 A.2d at 845.

Furthermore, as noted by the Law Court in *Morse*, the Massachusetts statute is "nearly identical" to the Maine statute. *See id.* ¶ 15, 772 A.2d at 848. To the extent the Massachusetts anti-SLAPP statute and the Maine anti-SLAPP statute are intended to protect the same First Amendment activities in the context of evaluating the first prong of a Special Motion to Dismiss analysis, the Massachusetts Supreme Judicial Court has previously addressed the issue of whether a reviewing court is to look beyond the letter of an anti-SLAPP statute and conduct an expanded inquiry into the potential 'motives' behind certain petitioning activity. In both *Office No. One Inc. v. Lopez*, 437 Mass. 113, 122, 769 N.E.2d 749, 757 (Mass. 2002), and *Fabre v. Walton,* 436 Mass. 517, 523-24, 781 N.E.2d 780, 785-86 (Mass. 2002), the high court of Massachusetts affirmatively held that "motive" or "intent" plays no part in a reviewing court's initial inquiry of the first prong in a Special Motion to Dismiss analysis – the prong the moving party

defendant must meet in order to shift the burden to the plaintiff. This Court finds that analysis persuasive, and the moving party (the Defendants here) need only show that it was involved in petitioning activities protected by the First Amendment.

Based on the above, I find and conclude that under Section 556, the Defendants have satisfied their initial burden of showing that their activity of challenging nomination petitions in several states is activity manifesting their right of petition under the Constitution of the United States and the Constitution of Maine and is protected by 14 M.R.S. § 556. I note and acknowledge that some of these corporate and individual Defendants may not meet the *Morse* characterization of "individual citizens of modest means." *Morse*, 2001 ME 70, ¶ 10, 772 A.2d at 846 (citation omitted). I am, however, satisfied that the focus of this statute and the State and Federal Constitutional Rights they protect, is on the participants and not on their finances or status. The ultimate purpose of 14 M.R.S. § 556 is to encourage and protect the constitutional right of petition and the financial resources of the parties exercising the right of petition is not a

countervailing factor in interpreting or applying this statute.

Secondary Burden

As noted in *Morse*, 2001 ME 70, ¶ 20, 772 A.2d at 849,

> Once the moving party has demonstrated that the statute applies, the burden shifts to the responding party to establish, through pleadings and affidavits, "that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party.

Id. (quoting 14 M.R.S § 556). That is to say, notwithstanding that no discovery has been undertaken in this suit,[3] Plaintiffs have the burden of production and persuasion to satisfy the Court that the Defendants' efforts in the 17 states and before the Federal Election Commission were devoid of any reasonable factual support or any arguable basis in law. This is, without question, a heavy and difficult burden in any stage of litigation, and certainly at this early stage.

For many reasons, an analysis of the submissions related to Maine is instructive. Plaintiffs provided

[3] It is noted by each side that there was earlier litigation raising many of these same points in Virginia and the District of Columbia, such that the parties had accumulated significant information which has been shared with the Court in discharge of the parties' respective burdens under 14 M.R.S. 556.

numerous affidavits, including the affidavit of In House Counsel for the Campaign, Ms. Amato. That affidavit of Ms. Amato (referencing another affidavit) may or may not be sufficient in form to withstand an analysis under M.R.Civ.P 56(e). *See Morse*, 2001 ME 70, ¶ 17, 772 A.2d at 848 (suggesting the application of summary judgment standards), but I am not reviewing it in that context. I review it to determine whether, accepting the representations, it is sufficient to carry Plaintiffs' burden. The affidavits of Ms. Amato and Mr. Burbank indicate that Defendant Melanson/Maine Democratic Chair testified under oath and contradicted her earlier statement that the DNC was not coordinating or financing the Maine litigation against Nader-Camejo. Further, in the Melanson challenge to the Nader nomination petitions (Exhibit I to Amato affidavit), the following was alleged (1) use of a fictitious presidential elector in violation of state statute; (2) failure to file consent forms in violation of state statute; (3) failure to unenroll by candidates as required by state statute; (4) failure to certify electors' status as unenrolled as required by state statute; (5) circulators false affirmations in violation of state statute; (6) officials erroneous acceptance of incorrect or missing address information in violation of state statute.

A formal administrative hearing was held by the Office of the Secretary of State to explore the allegations with exhibits offered and testimony taken pursuant to state statute. The Hearing Officer dismissed the challenge to the fictitious elector, Mr. Snowdeal, finding he existed but was misidentified. As was stated in *Morse*, "that the court reached its decision without difficulty cannot alone establish that the appeal lacked any factual or legal support." *Id.* ¶ 27, 772 A.2d at 851.

The Hearing Officer opined that "[t]he challengers also did not present *sufficient evidence* to support a finding that there was widespread fraud, deliberate concealment or misleading of voter by petition circulators." (Exhibit J attached to Amato affidavit) (emphasis added). The clear implication being that some evidence was presented.

The administrative decision was appealed to the Maine Superior Court. (Exhibit K to Ms. Amato's affidavit.) As Justice Studstrup noted with regard to the function of state governments in overseeing elections, "the State may attempt to prevent frivolous candidacies from getting to the ballot. However, this legitimate state interest must be balanced with the candidate's interest in the

availability of political opportunity. *Melanson v. Sec'y of State*, 2004 Me. Super. LEXIS 233, *4 (September 27, 2004)(citing *Lubin v. Parrish*, 415 U.S. 709, 715 (1974)). In discharging that balancing responsibility, Justice Studstrup dealt with the argument that Mr. Snowdeal, as elector, was not properly identified on the ballot. *Id.* *6-*7. The Justice found that the Hearing Officer's decision to reject this challenge was a proper use of discretion as opposed to an abuse of that discretion. *Id.* *8.

He next affirmed the decision of the Secretary concerning what information must appear on the face of the petition pursuant to statue. *Id.* *9. Likewise, he affirmed the Secretary's decision not to require Mr. Nader or Mr. Conejo to file written consents or unenrollment forms as a statutory interpretation entitled to deference. *Id.* *10-*11. Finally, he affirmed the interpretation of the Secretary that the Maine statute in question requiring unenrollment by Mr. Conejo did not apply to candidates for national office. *Id.* *11-*12 The clear inference from Justice Studstrup's decision is that the challenges by the Defendants (here) were not without legal basis, but that he deferred to the Hearing Officer's administrative decision as a proper exercise in judgment.

As stated earlier, the burden on the Plaintiffs was to demonstrate that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law. A review of the material submitted in Maine, Arkansas[4], West Virginia, New Hampshire, Arizona[5], Ohio and Pennsylvania, among others, persuades this Court that the actions taken in the various states which might be attributable to them as part of a civil conspiracy had reasonable factual support and a separate arguable basis in law notwithstanding that the position of the opponents/defendants was often not sustained by the Court.

Accordingly, applying the law countained in 14 M.R.S. § 556 to the facts before me, the Plaintiffs have failed to carry their burden of proof with respect to the Special Motion to Dismiss. That is, the Plaintiffs have failed to

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[4] As a further example, Plaintiffs in ¶¶ 34, 35, and 36 of the Amato affidavit reference allegations of fraud, deceit, forgery and dishonest tactics of the Arkansas Democratic Complaint against them. (*See* Exhibit P to Amato affidavit with selective pages wherein those allegations appear and Exhibit O to Amato affidavit confirming that the selective allegations of systemic fraud were dismissed as part of the Circuit Court Memorandum decision.) The full Arkansas Supreme Court decision, (Exhibit A to Stitham affidavit), confirm that there were multiple legal issues presented and dealt with initially by the Circuit Court and then the Supreme Court which reversed the lower Court. Not in any way judging the appropriateness of either decision, the point is that there were numerous legitimate legal issues in Arkansas beyond the allegations of fraud, deceit, forgery and dishonesty.

[5] *See* Amato Affidavit at ¶ 43 and Stitham Affidavit Exhibit K, the latter showing the statutory construction legal issues that kept the Candidates off the Arizona ballot.

show that the Defendants' right of petition was devoid of any reasonable factual support or any arguable basis in law. In reaching this decision, this Court recognizes that our Law Court has left open as undecided in *Morse*, in terms of whether the Plaintiffs could sustain their burden if some but not all of the Defendants actions were devoid of merit but some were. *Morse*, 2001 ME 70, ¶ 21, 772 A.2d 850-51.

This Court is satisfied that Plaintiffs allegations presented as a conspiracy, with actions taken in furtherance of the conspiracy in several states, including Maine, make the actions of the Defendants a single universe of claims in terms of this analysis. While the Court is satisfied that the Plaintiffs failed in their burden with respect to each of the states alleged, and in particular, the State of Maine, the nature of these allegations do not bring into play the issue left undecided in *Morse*. That issue remains undecided.

The entry will be:

1. Special Motions to Dismiss, 14 M.R.S. § 556, filed by each of the Defendants is granted.[6] This case is dismissed.

2. At the direction of the Court, this Order shall be incorporated into the docket by reference pursuant to M.R. Civ. P. 79(a).

November 15, 2010

Kevin M. Cuddy
Justice, Superior Court

FILED
NOV 16 2010
MARILYN E. BRALEY Clerk

[6] The pending Motions to Dismiss filed pursuant to M.R.Civ.P. 12(b) are now moot in light of this Court's decision and are hereby dismissed.