MAINE SUPREME JUDICIAL COURT

Sitting as the Law Court

No. Was-10-678

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

Appellants,

-v.-

THE MAINE DEMOCRATIC PARTY, THE DEMOCRATIC NATIONAL COMMITTEE, KERRY-EDWARDS 2004, INC., THE BALLOT PROJECT, INC., DOROTHY MELANSON, TERRY MCAULIFFE and TOBY MOFFETT,

Appellees.

ON APPEAL FROM THE DECISIONS AND ORDERS ENTERED BY THE SUPERIOR COURT OF WASHINGTON COUNTY ON NOVEMBER 16, 2010 AND DECEMBER 29, 2010 AT NO. CV-09-57

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants Ralph Nader ("the Candidate") and his 2004 Maine presidential electors Christopher Droznick, Nancy Oden and Rosemary Whittaker ("the Voters") respectfully submit this Reply Brief of Appellants in response to the Brief of Appellees Maine Democratic Party, the Democratic National Committee ("DNC"), Kerry-Edwards 2004, Inc., Dorothy Melanson and Terry McAuliffe (collectively, the "DNC Defendants"), which was submitted on May 27, 2011 ("DNC Br."), and in response to the Brief of the Ballot Project, Inc. and Toby Moffett (the "Moffett Defendants," and, together with the DNC Defendants, "Defendants"), which was submitted on May 25, 2011 ("Moff. Br.").

The Candidate and Voters' opening brief ("CV Br.") set forth multiple grounds for reversal, including: 1) the Superior Court erroneously applied the anti-SLAPP statute, 14 M.R.S. § 556, in abrogation of the common law; 2) the Superior Court erroneously concluded that the anti-SLAPP statute protects Defendants' conduct, but failed to address undisputed allegations and evidence demonstrating that it does not; 3) the anti-SLAPP statute is unconstitutional as applied by the Superior Court; and 4) the Superior Court erroneously imposed an evidentiary burden on the Candidate and Voters that is practically impossible to meet. As set forth below, Defendants do not and cannot provide grounds for affirming the Superior Court's decision in spite of the foregoing errors. In addition, the Moffett Defendants fail to establish that the Superior Court abused its discretion by awarding them attorneys' fees in the amount of one dollar.

Before turning to the foregoing points, a preliminary matter must be addressed. Specifically, Defendants suggest that the claims raised herein have already been litigated, DNC Br. at 2-3; Moff. Br. at 1-2, 23, but that is incorrect. In fact, the prior litigation to which Defendants refer terminated only because the Court of Appeals for the D.C. Circuit held that the

District of Columbia's statute of limitations barred a D.C. court from hearing the action.[1] *See Nader v. Democratic National Committee*, 567 F.3d 692 (D.C. Cir. 2009). But the D.C. Circuit also concluded that the litigation raised "interesting legal issues of first impression," *id.* at 698, and expressly limited its holding to the procedural issue. "We normally prefer to address the district court's rationale," the Court acknowledged, *id.* at 699, but affirmed on the limitations ground only, "without addressing the district court's decision or the ultimate merits." *Id.* at 702.

The D.C. Circuit likely declined to affirm the merits and rationale of the lower court decision because, among its most obvious errors, that decision repeatedly cites to bad case law. *See, e.g., Nader v. DNC*, 555 F. Supp. 2d 137, 148 (D.D.C. 2008) (citing *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 829 F. Supp. 420, 426 (D.D.C. 1993), *rev'd at* 48 F.3d 1260, 1263 (D.C. Cir. 1995)); *id.* at 160 (citing *Houlahan v. World Wide Ass'n of Specialty Programs and Schools*, 2006 WL 2844190, *8 n.12 (D.D.C. Sept. 29, 2006), *vacated by Houlahan*, No. 04-01161 (D.D.C. Feb. 6, 2007)). Although Defendants are well aware of these and other errors, they nevertheless urge this Court to adopt the lower court's rationale. DNC Br. at 2, 19; Moff. Br. at 18, 22, 25. Like the D.C. Circuit, this Court should decline the invitation.

ARGUMENT

I. Defendants Fail to Provide Grounds for Affirming the Superior Court's Error in Construing the Anti-SLAPP Statute to Abrogate the Common Law.

The central issue raised by this appeal is whether the Superior Court misconstrued the anti-SLAPP statute, in abrogation of the common law, by concluding that it requires dismissal of the Candidate and Voters' valid claims for wrongful use of civil proceedings and abuse of

[1] Two related actions were also dismissed in reliance on this statute of limitations holding. The first was filed in Virginia against two Virginia residents, but was transferred to D.C., *see Nader v. McAuliffe*, 2009 U.S. App. LEXIS 24737 (D.C. Cir. Oct. 30, 2009), and the second was filed after a Grand Jury investigation by the Attorney General of Pennsylvania revealed that state employees had illegally prepared Defendants' Pennsylvania challenge using taxpayer funds and resources. *See Nader v. DNC*, 2009 U.S. App. LEXIS 24747 (D.C. Cir. Oct. 30, 2009).

process. CV Br. at 11-15; A20-A21; A25-A26. Tellingly, the DNC Defendants make no attempt to address this issue until the last two pages of their brief, and even then, their only response consists of an overt misrepresentation. According to the DNC Defendants, the Candidate and Voters argue that the anti-SLAPP statute "cannot apply to any tort claim." DNC Br. at 28. But the Candidate and Voters make no such argument. On the contrary, they expressly acknowledge that the anti-SLAPP statute "establish[es] a procedure for defending against [tort] claims." CV Br. at 13. Therefore, there is no dispute between the parties as to whether "the anti-SLAPP statute applies to torts generally," as the DNC Defendants suggest. DNC Br. at 29.

Because the DNC Defendants choose to address a non-issue, they completely fail to address the error that the Superior Court actually committed. Specifically, the Superior Court concluded that the anti-SLAPP statute required it to dismiss the tort claims raised herein, despite its express rejection of the assertion that such claims are "meritless," despite its finding that such claims bear none of the hallmarks of "typical" SLAPP litigation, and despite its conclusion that such claims warrant "further analysis and development through the evolution of normal civil litigation process." A24-A26. In other words, the Superior Court misconstrued the anti-SLAPP statute to abrogate two common law causes of action, by applying it to compel dismissal of valid claims for wrongful use of civil proceedings and abuse of process. This was error.

As the Law Court has expressly recognized in all three of its decisions construing the anti-SLAPP statute, the Legislature's intent was to provide protection from "meritless" litigation only. *Morse Bros., Inc. v. Webster*, 772 A.2d 842, 846 (Me. 2001) (emphasis added); *Maietta Const. Co. v. Wainwright*, 847 A.2d 1169, 1173 (Me. 2004); *Schelling v. Lindell*, 942 A.2d 1226, 1229 (Me. 2008)). Had the Legislature intended to protect defendants from meritorious litigation, by contrast, either by curtailing or by eliminating any common law cause of action, it could have done so only by adopting "clear and unambiguous language" to that effect. *Picher v. Roman*

Catholic Bishop of Portland, 974 A.2d 286, 294 (Me. 2009). Obviously, the anti-SLAPP statute contains no such language, and therefore, it cannot be construed to compel dismissal of valid tort claims, as the Superior Court did in this case.

Despite the DNC Defendants' effort to confuse the issue, they do make one attempt to suggest that the anti-SLAPP statute might abrogate the common law. DNC Br. at 29 (citing *Maietta Const. Co.*, 847 A.2d at 1174). But the DNC Defendants misread *Maietta*. That case does not construe the anti-SLAPP statute to abrogate the common law in any way. On the contrary, the Law Court concluded in *Maietta* that the anti-SLAPP statute's "actual injury" requirement must be construed to conform with the common law rule that "damages per se are [not] equivalent to actual damages." *Maietta*, 847 A.2d at 1174. The DNC Defendants' assertion that "*Maietta* held that the anti-SLAPP statute imposed higher burdens on certain tort actions" is therefore incorrect. DNC Br. at 29.

The Moffett Defendants similarly fail to address the Superior Court's error in construing the anti-SLAPP statute to abrogate the common law. According to the Moffett Defendants, the Candidate and Voters "appear to argue" that the Superior Court misconstrued the anti-SLAPP statute to compel "dismissal of *every* abuse of process or malicious prosecution claim." Moff. Br. at 12 (emphasis in original). But once again, the Candidate and Voters make no such argument. Instead, for the reasons set forth above, the Superior Court erred by construing the anti-SLAPP statute to compel dismissal of the valid tort claims in *this* case. A24-A26; CV Br. at 11-15.

To the extent that the Moffett Defendants attempt to address that error, they do so only by directly contradicting the Superior Court's express findings. In rejecting the Moffett Defendants' assertion that it had found the instant litigation to be "meritless," the Superior Court observed that "the merits of Plaintiffs' underlying claims have yet to be evaluated." A26. The Moffett Defendants nonetheless insist that "the merits *were* so evaluated." Moff. Br. at 12 (emphasis in

original). But the Superior Court is the more persuasive authority as to the basis for its own opinion, and the Superior Court unequivocally indicated that it would not have dismissed the Candidate and Voters' claims, "but for" its (erroneous) conclusion that the Law Court's decisions construing the anti-SLAPP statute compelled that result. A25.

Accordingly, the Superior Court misconstrued the anti-SLAPP statute to compel dismissal of the Candidate and Voters' valid claims for wrongful use of civil proceedings and abuse of process, and thereby abrogated two causes of action that have been firmly established under Maine common law for nearly 100 years or more. *See Saliem v. Glovsky*, 172 A. 4, 6 (Me. 1934) (citing early cases recognizing both torts); *Morse Bros., Inc.*, 772 A.2d at 846 (observing that both torts remain the "traditional safeguards against meritless actions"). Because Defendants fail to provide grounds for affirming the Superior Court's decision in spite of this error, reversal is proper.

II. Defendants Fail to Carry Their Initial Burden of Showing That Their Conduct Qualifies as an Exercise of the Right to Petition.

The reason that Defendants cannot reconcile the conflict between the common law and the Superior Court's application of the anti-SLAPP statute is that they seek to invoke the statute's protection without satisfying their "initial burden" of demonstrating that the claims against them are "based on some activity that would qualify as an exercise of [their] First Amendment right to petition." *Schelling*, 942 A.2d at 1229. That is, Defendants are attempting to wield the anti-SLAPP statute as a "sword to preempt legitimate complaints," rather than as a "shield" to protect against meritless litigation. *Maietta Const. Co. v. Wainwright*, 2003 Me. Super. LEXIS 248, *10 (Me. Super., July 29, 2003), *aff'd*, 847 A.2d 1169 (Me. 2004). But because Defendants do not dispute allegations and evidence in the record demonstrating that

their conduct does not qualify as an exercise of the right to petition, they fail to satisfy their initial burden, and they cannot invoke the anti-SLAPP statute's protection.

As a threshold matter, Defendants' initial burden is not satisfied, as the DNC Defendants incorrectly asserted in the proceedings below, "once Defendants have merely asserted a claim based on the exercise of the right to petition." DNC Defs. Reply to Pl. Evid. Sub. at 6 (emphasis added) (quotation marks omitted). Instead, Defendants must "make a threshold showing through the pleadings and affidavits that the claims against [them] are 'based on' [their] petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Demeuse v. WGME, Inc.*, 2010 Me. Super. LEXIS 63, *18 (Me. Super., May 4, 2010) (quoting *Duracraft Corp. v. Holmes Prod. Corp.*, 691 N.E.2d 935, 943 (Mass. 1997)). Where Defendants fail to make that showing, therefore, they cannot invoke the anti-SLAPP statute's protection. *See, e.g., id.* at *19 (denying protection because defendants were not petitioning for redress of their own grievances); *Jamison v. OHI*, 2005 Me. Super. LEXIS 161, *8-*10 (Me. Super. Nov. 29, 2005) (denying protection because defendants were not petitioning but complying with statutorily mandated reporting requirements); *Liberty v. Bennett*, 2010 Me. Super. LEXIS 2, *10 & n.5 (Me. Super. Jan. 19, 2010) (denying protection because defendant's alleged defamation and other acts in connection with litigation were not petitioning).[2]

A. Undisputed Allegations and Evidence in the Record Demonstrate That Defendants or Their Agents Filed False and Baseless Claims and Unlawfully Interfered With the Candidate and Voters' Campaign.

[2] Defendants may quibble with the name, DNC Br. at 17 & n.2, but the Law Court has also followed the "*Duracraft* standard" as applied by the lower courts cited herein. *See, e.g., Morse Bros.*, 772 A.2d at 848 n.2, 849 (citing *Donovan v. Gardner*, 740 N.E.2d 639, 642 (Mass. 2000) (citing *Duracraft*, 691 N.E.2d 935)); *Maietta*, 847 A.2d at 1173 (citing *Duracraft*, 691 N.E.2d 935).

The record in this case is replete with allegations and evidence demonstrating that Defendants' 29 complaints included numerous false and baseless claims of fraud against the Candidate and Voters. To cite several examples:

- In Maine, on the basis of a typographical error misidentifying an elector known as "J." as "John" rather than "Joseph," Defendants' complaint alleged that "the apparent use of a fictitious person as a presidential elector constitutes a misrepresentation to all Maine citizens who signed the petition," (Affidavit of Theresa Amato ("Amato Aff."), Ex. I);

- In Maine, Defendants' second complaint alleged "on information and belief," that the Candidate and Voters' petition circulators "fraudulently concealed the identity of the candidate…and misled signers into signing the petition," A47;

- In New Hampshire, Defendants' complaint alleged that the Candidate's "nominating petition circulation process is so tainted with misrepresentation, falsity, forgery, misconduct, and deceit that all nominating petitions…are invalid," (Amato Aff., Ex. L);

- In New Hampshire, Defendants' second complaint alleged that "individuals soliciting signatures to place [the Candidate] on the ballot engaged in widespread fraud and dishonesty," (Amato Aff., Ex. M);

- In Arkansas, Defendants' complaint alleged that "Arkansas has been subjected to a concerted effort to get [the Candidate] on the ballot through fraud, deceit and forgery," and further, that "these dishonest tactics…have already been evidenced and proven in other states," (Amato Aff., Ex. P);

- In Arkansas, Defendants' complaint included an entire separate count for "systematic fraud," which alleged that "there has been systematic fraud across the country by those attempting to place [the Candidate's] name on the ballot. This fraud has surfaced in Arkansas," (Amato Aff., Ex. P);

- In West Virginia, Defendants' complaint alleged that the Candidate's "attempt to secure West Virginia ballot status for the 2004 presidential election has been fraught with irregularities, misrepresentations and fraud," (Amato Aff., Ex. S).

The foregoing list is by no means exhaustive, and several additional examples were cited in the Candidate and Voters' opening brief. CV Br. at 2. Not once, however, have Defendants attempted to show, by pleadings, affidavits or otherwise, that any of these false claims had any basis in fact or law – nor can they. None of these false claims were supported by reasonable

evidence, and none were sustained by any court or administrative body. It is therefore undisputed that Defendants' complaints against the Candidate and Voters included false and baseless claims of fraud. It is also undisputed that Defendants or their agents publicized these and other false claims of fraud by means of press releases, press conferences and other public statements that generated nationwide coverage in the news media. A46-A47, A51-A53, A59, A62, A65-A66, A69, A73-A74; (Amato Aff., Ex. B, Ex. E, Ex. N, Ex. O, Ex. R, Ex. V); (Affidavit of Nancy Oden, Ex. A); (Affidavit of Gregory Kafoury ("Kafoury Aff."), Ex. F); (Affidavit of Mark Brown ¶ 12, Ex. D); (Affidavit of Basil Culyba ("Culyba Aff."), Ex. A, Ex. B).

The record also includes undisputed allegations and evidence, supported by affidavits, demonstrating that in the few states where Defendants prevailed, their challenges often "succeeded" as a direct result of their agents' unlawful interference with the Candidate and Voters' campaign. In Oregon, for example, approximately 100 individuals infiltrated the Candidate and Voters' nominating conventions under false pretenses and prevented them from complying with state election laws. ("Kafoury Aff. ¶¶ 5-7). Thereafter, private investigators came to the homes of the Candidate and Voters' petition circulators, and falsely threatened them with jail time, felony conviction, and a fine of up to $100,000 if signatures they submitted were found to be invalid. (Kafoury Aff. ¶¶ 10-11). Further, according to an eyewitness, teams of individuals were organized to sabotage the Candidate and Voters' nomination petitions by deliberately signing them in a manner that would invalidate entire pages. (Affidavit of William Gillis, Ex. A). If not for such unlawful interference, the Candidate and Voters' Oregon nomination petitions would have included the signatures required by state law. (Kafoury Aff., Ex. G); (Affidavit of Daniel Meek).

In Pennsylvania, approximately 7,000 facially invalid signatures were planted in the Candidate and Voters' nomination petitions. A64-A65. Most such signatures were detected by

petition circulators and removed before the petitions were circulated. (Culyba Aff., Ex. C). A small number, however – equal to 1.3 percent of the total – escaped detection and formed the basis for Defendants' false claims of fraud in that state.[3] A65.

In Ohio, as in Oregon, the Candidate and Voters' petition circulators were threatened and harassed by private investigators who came to their homes and claimed to be investigating them for undisclosed reasons. (Affidavit of Julie Coyle ("Coyle Aff.") ¶¶ 12-15); (Affidavit of Patricia Fridrich ¶¶ 5-8). Defendants' attorneys also subpoenaed 27 petition circulators – most of them volunteers.[4] (Coyle Aff. ¶¶ 7-10); (Brown Aff. ¶ 8); Affidavit of Amy Hanmer ¶¶ 5-8).

Finally, although Defendants now attempt to characterize their conduct as merely "avail[ing] themselves of established procedures under state laws," DNC Br. at 1, they do not dispute that their 29 complaints were filed before 19 tribunals in less than 12 weeks, with the avowed purpose, as they admitted, to "drain," "distract" and "neutralize" the Candidate and Voter's campaign, by "forcing [them] to spend money and resources defending these things." A35, A41.

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[3] The dicta from the Pennsylvania court's opinion, which the Moffett Defendants misleadingly quote without citing the relevant findings, Moff. Br. at 7, 20, is inaccurate for several reasons. Most important, Pennsylvania Supreme Court Justice Thomas Saylor has previously demonstrated that the Pennsylvania court's own findings contradict its dicta, and Defendants themselves do not dispute that conclusion. *See In Re Nomination Paper of Nader*, 860 A.2d 1, 8 n.13 (Pa. 2004). As Justice Saylor emphasized, the record contains "no evidence" to support any allegation of fraud against the Candidate and Voters' campaign. Furthermore, such dicta comes from an opinion entered long before a Grand Jury investigation by the Attorney General of Pennsylvania revealed that Defendants' challenge in that state had been prepared by means of a criminal effort to remove the Candidate from the ballot, which, the Grand Jury found, "began before [his nomination] petitions were even filed." A65; (Culyba Aff. ¶¶ 10-12). For a summary of the Pennsylvania court's complete factual findings, the Court is respectfully referred to the Amended Surreply that the Candidate and Voters were permitted to submit on August 20, 2010, in order to correct similar misstatements of fact in Defendants' prior filings. A2.7.

[4] The Moffett Defendants contend that a lower federal court "repeatedly commented on what it characterized as fraud" in the Candidate and Voters' Ohio signature-gathering effort, but as the appellate court clarified in that case, the Ohio Secretary of State's Hearing Officer "found 'no evidence that [the Candidate's] campaign directed or condoned the collection of signatures in any manner that violated Ohio law,' [and] declined to invalidate the entire [nomination] petition on the grounds of 'pervasive fraud.'" *Nader v. Blackwell*, 545 F.3d 459, 466 n.1 (6th Cir. 2008) (striking down Ohio election code provisions used to remove Candidate from 2004 ballot).

B. Defendants Do Not Have a First Amendment Right to File False and Baseless Claims or to Unlawfully Interfere with the Candidate and Voters' Campaign.

Because Defendants do not dispute the above-cited allegations and evidence, their initial burden under the anti-SLAPP statute is to show that the such conduct constitutes an exercise of the right to petition. *See Schelling*, 942 A.2d at 1229; *Demeuse*, 2010 Me. Super. LEXIS 63 at *18. They did not do so, and they cannot. The Supreme Court has expressly held that the First Amendment does not immunize false claims or baseless litigation. *See McDonald v. Smith*, 472 U.S. 479, 484 (1985) (citations omitted). Furthermore, "other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes…cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)).

Rather than attempting to meet their initial burden, Defendants attempt to redefine their conduct. The DNC Defendants assert, for example, that "the only activity at issue in this case is the filing of complaints and the use of judicial process." DNC Br. at 18. In a similar vein, the Moffett Defendants assert that "filing a lawsuit is unquestionably an exercise of the right to petition," and, they contend, that "should end the inquiry." Moff. Br. at 10. But Defendants are wrong on both the facts and the law. The activity in this case not only involves the filing of multiple false and baseless claims, the manufacture of evidence, sabotage, harassment and unlawful interference with the Candidate and Voters' campaign, *see supra* Part II.A, but also, as a matter of law, such conduct does not qualify as an exercise of the right to petition. *See McDonald*, 472 U.S. at 484; *California Motor Transport Co.*, 404 U.S. at 513.

Defendants next claim that the Candidate and Voters "are trying to push their own evidentiary burden back" to Defendants, DNC Br. at 17, but that, too, is incorrect. The allegations and evidence set forth above are undisputed. *See supra* Part II.A. Therefore, no

matter how "broad" the right to petition may be under the anti-SLAPP statute, DNC Br. at 15; Moff. Br. at 10, it does not protect the conduct on which the Candidate and Voters' claims rely, and even Defendants do not claim that it does.

Despite their failure to address the allegations and evidence demonstrating that their conduct does not qualify as an exercise of the right to petition, Defendants contend that the anti-SLAPP statute protects that same conduct, because none of their challenges was found to be "frivolous," Moff. Br. at 14, or "lack[ing] all legal basis or factual support." DNC Br. at 19. But Defendants' false and baseless claims are not immunized simply because they were filed as part of a challenge that may have included non-frivolous claims. The fact remains that the First Amendment does not protect false petitions, *see McDonald*, 472 U.S. at 484, and Defendants cannot cite any authority to support their view to the contrary. DNC Br. 13-18; Moff. Br. 16-23.

Finally, the DNC Defendants object that the Candidate and Voters seek to add "new elements" to the Defendants' initial burden under the anti-SLAPP statute. DNC Br. at 23. But these so-called new elements are the universally recognized hallmarks of SLAPP litigation, and as the DNC Defendants concede, the Law Court has considered them in each of its decisions construing the anti-SLAPP statute. DNC Br. at 25. The complete absence of such factors here thus indicates that this litigation "does not involve the typical subject matter that the statute was intended to address." *Liberty*, 2010 Me. Super. LEXIS 2 at *9. In such cases, courts properly exercise caution "before a statute designed to protect one party's exercise of its right to petition is interpreted to impinge on another party's exercise of its own right to petition – specifically, its right to petition the courts for redress of grievances by filing a lawsuit." *Id.* (citation omitted); *see, e.g.*, *Demeuse*, 2010 Me. Super. LEXIS 63 at *13-*19 (construing anti-SLAPP statute not to apply to "apparently meritorious claims"); *Jamison*, 2005 Me. Super. LEXIS 161 at *8-*10 (same).

In this case, by contrast, despite its recognition that the litigation in no way resembles a "typical" SLAPP suit, A24-A25, the Superior Court accepted Defendants' mere assertion of the right to petition at face value. A12-A15. The Superior Court thus failed to address, for example, whether Defendants may assert a First Amendment right to file false petitions. This was error. Furthermore, because Defendants cannot assert such a right, reversal is also proper on this basis.

III. Defendants Fail to Provide Grounds for Affirming the Superior Court's Unconstitutional Application of the Anti-SLAPP Statute.

Defendants' contention that the Candidate and Voters "waived" their argument that the anti-SLAPP statute is unconstitutional as applied by the Superior Court has no merit. DNC Br. at 29-28; Moff. Br. at 23-26. By its express terms, the Candidate and Voters' challenge is "as applied". CV Br. at 20. Further, the substance of the challenge is that the Superior Court misconstrued the anti-SLAPP statute to compel dismissal of claims that the Superior Court itself considered to be valid, thereby violating the Candidate and Voters' right to petition. CV Br. at 22-23; *see Liberty*, 2010 Me. Super. LEXIS 2 at *9. That argument could not have been made before the Superior Court actually dismissed the Candidate and Voters' claims. A15, A22. Therefore, the argument could not have been raised in the proceedings below, and it is not waived now.

The gist of Defendants' claims in defense of the anti-SLAPP statute's constitutionality, as applied by the Superior Court, is that the Candidate and Voters do not allege a "substantial basis" for their claims, "other than or in addition to the petitioning activities implicated." DNC Br. at 27 (quoting *Duracraft*, 691 N.E.2d at 943); Moff. Br. at 24. But the Candidate and Voters have alleged such a basis – *i.e.*, the false and baseless claims included in Defendants' complaints, for one, and the unlawful interference with the Candidate and Voters' campaign, for another. *See supra* Part II.A. Defendants are therefore incorrect that "there are no allegations in this case

concerning anything but petitioning conduct." DNC Br. at 28. The allegations are in the Complaint, and they are supported by affidavits and evidence. Defendants simply fail to address them. Accordingly, reversal is proper on constitutional grounds, too.

IV. Defendants Fail to Provide Grounds for Affirming the Superior Court's Error in Imposing a Practically Impossible Burden on the Candidate and Voters.

In an effort to show that the Superior Court did not impose an improper evidentiary burden on the Candidate and Voters, Defendants purport to demonstrate that none of their state challenges and Federal Election Commission complaints were found to be "baseless" or "devoid of any reasonable factual support or any arguable basis in law." Moff. Br. 16-23; DNC Br. 18-23. But even if that were true, it would not be relevant. The Superior Court's error is that it construed the Candidate and Voters' Complaint as alleging "a single universe of claims," and concluded on that basis that it need not decide "whether the Plaintiffs could sustain their burden if some but not all of the Defendants' actions were devoid of merit." A21. In other words, because the Complaint alleges a conspiracy, the Candidate and Voters would fail to carry their burden unless they proved that every one of Defendants' claims was devoid of merit.

The Moffett Defendants contend that the Superior Court's reasoning "should be interpreted to mean precisely the opposite" – that the Candidate and Voters "would have overcome their burden had they demonstrated *any* claim to be baseless." Moff. Br. at 16 (emphasis in original). In addition to contradicting the plain meaning of the Superior Court's words, however, the Moffett Defendants' contention is also demonstrably false. To the limited extent that the Superior Court applied its "single universe" standard to the allegations and evidence, it concluded that the existence of "legitimate legal issues" raised in one of Defendants' 29 complaints obviated the false and baseless claims of fraud raised in that same complaint. A20 n.4 (discussing Defendants' Arkansas complaint); *but see supra* Part II.A. (quoting false and

baseless claim of fraud in Defendants' Arkansas complaint). As a practical matter, therefore, the Superior Court's "single universe" standard required the Candidate and Voters to prove that every one of Defendants' claims was baseless.

As such, the Superior Court should also be reversed on the ground that it imposed an improper evidentiary burden on the Candidate and Voters, which conflicts with the standard followed by other Maine courts. *See, e.g., Demeuse*, 2010 Me. Super. LEXIS 63 at *18 (concluding that statutory text indicates Legislature's intent that anti-SLAPP statute should apply only to claims "based on the moving party's right to petition").

V. The Moffett Defendants Fail to Demonstrate That the Superior Court Abused Its Discretion in Awarding Them Attorneys' Fees of One Dollar.

The Moffett Defendants appeal from the Superior Court's decision to award them attorneys' fees. Moff. Br. at 26. They concede that the award of such costs is "permissive, not presumptive," and that a court "must take into account the merits of the claims" in making its determination. Moff. Br. at 26. But, they assert, the Superior Court's decision to award them one dollar "was a clear abuse of discretion." Moff. Br. at 29.

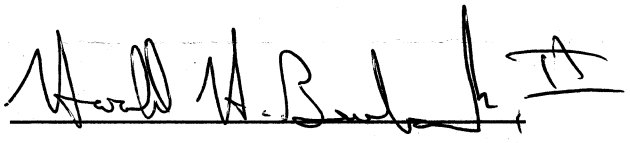
The Superior Court did not abuse its discretion in awarding the Moffett Defendants attorneys' fees. The award of such fees is discretionary under the anti-SLAPP statute. 14 M.R.S. § 556 ("the court *may* award" attorneys' fees) (emphasis added). Further, the Law Court has concluded that courts properly consider the merits of the underlying claims in making such an award. *See Maietta Const. Co.*, 847 A.2d at 1174. In this case, the Superior Court's award of one dollar accurately reflects its evaluation of the merits. A24-A26.

CONCLUSION

For the foregoing reasons, and those set forth in Appellants' opening brief, the Superior Court's Decision and Order entered November 16, 2010 should be reversed, and this case should be remanded to the Superior Court for further proceedings. In addition, the Superior Court's Decision and Order entered December 29, 2010 should be affirmed.

Dated: June 10, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2011, I served two copies of the foregoing Reply Brief of Appellants by First Class mail, on behalf of all Appellants, upon the following:

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