SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL, Plaintiff, v. EXXONMOBIL OIL CORP., Defendant.	Case No. 2016 CA 2469 Judge _____

Nonparty Competitive Enterprise Institute's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a)

Pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5504(a) ("the D.C. Anti-SLAPP Act" or "the Act"), nonparty Competitive Enterprise Institute ("CEI") hereby moves for an order providing that, as a prevailing party on a motion brought under D.C. Code § 16-5502(a), it is entitled to an award of its costs, including reasonable attorney's fees.

CEI filed a special motion pursuant to the Act to dismiss the civil action initiated by U.S. Virgin Islands Attorney General Claude Walker to issue a harassing and retaliatory subpoena to CEI. CEI substantially prevailed on that motion when Attorney General Walker subsequently filed a praecipe consenting to termination of his action and revocation of the issuance of the subpoena to CEI that he obtained from this Court. The Act therefore "entitles" CEI "to a presumptive award of reasonable attorney's fees on request." *Doe v. Burke*, 133 A.3d 569, 578 (D.C. 2016). The accompanying memorandum and the memorandum in support of CEI's Special Motion To Dismiss, which CEI hereby incorporates to avoid duplicative briefing, demonstrate CEI's entitlement to that relief.

Accordingly, CEI respectfully requests that the Court grant CEI's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a), and find that

CEI is entitled to an award of its costs and attorney's fees in responding to the subpoena in an amount to be proven.

Rule 12-I(a) Certification

Pursuant to Rule 12-I(a), counsel for CEI wrote counsel for Attorney General Walker on May 10, 2016, to ascertain whether he consents to compensate CEI's costs and attorney's fees incurred in connection with the subpoena. Attorney General Walker's counsel represented that he does not.

Oral Hearing Requested

The Anti-SLAPP Act requires an expedited hearing on CEI's Special Motion To Dismiss, D.C. Code § 16-5502(d), and CEI requests a hearing on this motion pursuant to Rule 12-I(f). To further judicial and party economy, CEI respectfully requests that the Court hear arguments on CEI's Special Motion To Dismiss, Motion for Sanctions, and Motion for Costs and Attorney's Fees at the same expedited hearing.

Dated: May 27, 2016 Respectfully submitted,

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN (D.C. Bar No. 985166)
DAVID B. RIVKIN, JR. (D.C. Bar No. 394446)
BAKERHOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Competitive Enterprise Institute

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UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL, Plaintiff, v. EXXONMOBIL OIL CORP., Defendant.	Case No. 2016 CA 2469 Judge _____

Memorandum of Points and Authorities in Support of Nonparty Competitive Enterprise Institute's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a)

CEI substantially prevailed on its Special Motion To Dismiss Pursuant to the D.C. Anti-SLAPP Act ("Act") when Attorney General Walker filed a praecipe consenting to dismissal of his Superior Court civil action and withdraw of the subpoena to CEI that he obtained in that action. As a prevailing party on a special motion to dismiss under the Act, CEI is entitled to an award of its costs, including reasonable attorney's fees. *See* D.C. Code § 16-5504(a). Accordingly, it hereby moves the Court to find that it is entitled to such an award, in an amount to be proven.

Factual Background

Less than a week after publicly announcing that he would use his powers to target opponents of his energy and climate change policy agenda, Attorney General Walker opened a civil action in this Court to issue a harassing and abusive subpoena on CEI, which his counsel served on CEI on April 7, 2016. On May 16, CEI moved the Court to dismiss that action pursuant to the D.C. Anti-SLAPP Act and moved for sanctions, both of which motions remain outstanding. The relevant factual background concerning Attorney General Walker's public statements and the issuance of the subpoena is recited in CEI's

memorandum in support of its Special Motion To Dismiss, which CEI hereby incorporates to avoid duplicative briefing.

On the night of Friday, May 20, Attorney General Walker, through his counsel, filed a praecipe consenting to nearly all of the relief requested in CEI's Special Motion To Dismiss. It states, in its entirety:

> **NOTICE OF TERMINATION OF ACTION AND CONSENT TO REVOKE ISSUANCE OF SUBPOENA**
>
> Please take notice that Plaintiff, the United States Virgin Islands Office of the Attorney General, as requested by non-party Competitive Enterprise Institute, hereby terminates the action and consents to revoke the issuance of the subpoena to non-party Competitive Enterprise Institute.

On May 26, 2016, the Court ordered Attorney General Walker's action terminated and revoked the subpoena.

Argument

I. The Anti-SLAPP Act Presumptively Entitles Prevailing Parties To Costs and Attorney's Fees

A "SLAPP" is a "strategic lawsuit against public participation"—in other words, the abuse of legal process with the "intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights." Ex. C at 1.[1] The D.C. Council enacted the D.C. Anti-SLAPP Act, D.C. Code §§ 16-5501 *et seq.*, to "ensure[] that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates" and thereby "prevent[] the attempted muzzling of opposing points of view." *Id.*

The D.C. Court of Appeals recently held in *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016), that a prevailing anti-SLAPP movant "is entitled to reasonable attorney's fees in the ordinary course—*i.e.*, presumptively—unless special circumstances in the case make a fee

[1] All exhibits referenced herein are exhibits to the Declaration of Andrew M. Grossman in Support of CEI's Special Motion To Dismiss Under D.C. Anti-SLAPP Act and Motion for Sanctions.

award unjust." The movant in that case prevailed on a special motion to quash under the Act, see D.C. Code § 16-5503, and so moved for costs and fees pursuant to the Act's general fee-shifting provision, § 16-5504(a), which provides: "The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16‑5502 or § 16‑5503 the costs of litigation, including reasonable attorney fees." The Superior Court denied the fee motion, on the grounds (1) that the suit was not "a classic SLAPP suit" because it was not filed for the purpose of inflicting litigation burdens and was not frivolous and (2) that fees were not justified under equitable considerations and the purposes of the Act. *Id*. at 572.

The Court of Appeals reversed, rejecting both of the Superior Court's rationales for denying the requested award. It held, first, that the fee-shifting provision "entitles the moving party who prevails on a special motion to quash to a presumptive award of reasonable attorney's fees on request, 'unless special circumstances would render such an award unjust.'" *Id*. at 578 (quoting *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 416–17 (1978)). "The protections of the Act," it explained, "apply to lawsuits which the D.C. Council has deemed to be SLAPPs" by providing for their dismissal pursuant to a special motion to dismiss or quash. *Id.* at 573. A prevailing movant seeking fees is therefore not required to demonstrate the plaintiff's "improper motive (bad faith) or total lack of merit in the underlying suit." *Id*. at 575. That conclusion, the court explained, was supported by legislative history reflecting "the Council's concern to protect SLAPP targets 'engag[ed] in political or public policy debates,' Committee Report at 4, by special motions and related reimbursement for litigation costs." *Id*. at 577. In that way, awarding fees to a prevailing movant "implicate[s] the strong protective concerns underlying the special motion." *Id*. at 577 n.13.

Second, applying the standard that prevails under the federal Civil Rights Acts, the Court of Appeals held that no "special circumstances" disqualified the movant from a fee award. In particular, it found that the movant's rejection of "a settlement offer" did not vitiate its presumptive entitlement to an award. *Id*. at 578. Adopting the argument of an

amicus curiae, it explained that, had the plaintiff "wished to minimize her potential exposure to a fee award, she could have dismissed her lawsuit at any time." *Id*. at 578–79. Similarly, it rejected the plaintiff's argument that her voluntary dismissal of the entire action precluded a fee award. *Id*. at 572 n.4.

II. CEI Is a Prevailing Party Entitled to an Award of Its Costs and Attorney's Fees

Attorney General Walker having consented to the principal relief sought by CEI in its anti-SLAPP motion—dismissal of his action and withdrawal of the subpoena—CEI is now a prevailing party entitled to its costs, including reasonable attorney's fees. That result is required by the Court of Appeals' decision in *Burke*, furthers the purposes of the anti-SLAPP Act, is consistent with the approach taken by other jurisdictions under similar anti-SLAPP statutes, and is also supported by the "catalyst theory" applied by the Court of Appeals to fee provisions in other statutes.

First, *Burke* makes clear that voluntary dismissal does not vitiate a request for costs and fees under the Act. It held that the anti-SLAPP movant in that case, because he satisfied the standard for dismissal under the Act, was entitled to an award, notwithstanding that the plaintiff had voluntarily dismissed her action. 133 A.3d at 572 n.4. A plaintiff's decision to abandon at an early stage an action that offends the Act, the Court explained, is relevant to "her potential exposure to a fee award," not to the availability of an award in the first place. *Id*. at 578–79. For the reasons explained in CEI's memorandum in support of its Special Motion to Dismiss, CEI was entitled under the Act to the relief to which Attorney General Walker ultimately consented, and that is, as *Burke* explains, the only relevant factor in determining whether an anti-SLAPP movant is presumptively entitled to a fee award. *Id*. at 578. Accordingly, CEI satisfies the statutory standard for an award.

Second, any other approach would conflict with the purpose and policies of the Act. The principal purpose of the Act is "[t]o prevent the attempted muzzling of opposing points of view," Ex. C at 4, and fee awards plainly serve that end, by deterring abusive legal

actions aimed at chilling protected advocacy. Fee awards also "encourage the type of civil engagement" protected by the Act, *id.*, by assuring potential targets of abusive legal actions that their legal expenses will be compensated. Application of the Act's fee-shifting provision in these circumstances is necessary to further those ends because it prevents SLAPP perpetrators from abusing judicial process to impose unwarranted burdens on parties for the purpose of chilling their advocacy. Otherwise, a perpetrator could launch an action subject to the Act, force its target to incur significant legal expenses to hire counsel and assess its rights, and then avoid having to reimburse those expenses by dropping the action at the last minute—after the damage has been done. That is, in fact, precisely the course of conduct of Attorney General Walker here: he announced that he would use his powers to harass persons who disagree with his policy views, did so by commencing a civil action to obtain a harassing and abusive subpoena against CEI, and thereby forced CEI to incur legal expenses responding to that action. Fee awards are necessary in these circumstances to achieve the Act's ends by deterring future abuses by Attorney General Walker and other SLAPP perpetrators, remedying CEI's injuries, and assuring other parties exercising their right of advocacy in the District that they need not fear harassing legal actions on account of their advocacy.

Third, that very logic has prevailed under other jurisdictions' similar anti-SLAPP statutes. For example, California courts have interpreted the fee provision of California's anti-SLAPP act, Cal. C.C.P. § 425.16(c)(1), as permitting fee awards when an offending action is voluntarily dismissed after the filing of an anti-SLAPP motion. *See S.B. Beach Properties v. Berti*, 138 P.3d 713, 717 n.2 (Cal. 2006) (citing cases). As those courts have recognized, denying fees in such circumstances "works a nullification of an important provision" of the anti-SLAPP statute by allowing procedural chicanery to trump substantive rights. *Liu v. Moore*, 69 Cal. App. 4th 745, 751, 81 Cal. Rptr. 2d 807 (1999). "[T]he critical issue is the merits of the defendant's motion to strike. This is as it should be. Persons who threaten the exercise of another's constitutional rights to speak freely and petition for the

redress of grievances should be adjudicated to have done so, not permitted to avoid the consequences of their actions by dismissal of the SLAPP suit when a defendant challenges it." *Id.* at 752. Adjudication of fee requests in those circumstances "provides both financial relief in the form of fees and costs, as well as a vindication of society's constitutional interests." *Id.*

Similarly, the Supreme Court of Illinois has held that a fee award under that state's anti-SLAPP statute was available when the trial court granted a motion to dismiss that had been filed prior to an anti-SLAPP motion. *Wright Dev. Grp., LLC v. Walsh*, 939 N.E.2d 389, 396–97 (Ill. 2010). It explained:

> The purpose of the Act is to give relief, including monetary relief, to citizens who have been victimized by meritless, retaliatory SLAPP lawsuits because of their "act or acts" made "in furtherance of the constitutional rights to petition, speech, association, and participation in government." 735 ILCS 110/15 (West 2008). As an expression of intent to "protect and encourage public participation in government to the maximum extent permitted by law" (735 ILCS 110/5 (West 2008)), the legislature deemed the mere dismissal of SLAPP lawsuits insufficient…. The instant appellate court's failure to undertake the question of whether the plaintiff's lawsuit could be identified as a SLAPP directly contradicts the legislature's explicit expression of public policy regarding the efficient process to identify and adjudicate SLAPPs. 735 ILCS 110/5 (West 2008). The mootness finding also contradicted the legislature's express finding of public policy in favor of an award of attorney fees and costs to prevailing movants. 735 ILCS 110/5 (West 2008).

Id. at 396–97. As discussed above, that reasoning applies equally to D.C.'s anti-SLAPP Act, which was enacted to provide the same protections.

Similarly, the Texas Court of Appeals has held that an anti-SLAPP movant is entitled to relief, including fees, when he knows at the time of his motion that the plaintiff intends to withdraw the offending lawsuit. *Rauhauser v. McGibney*, -- S.W.3d --, 2014 WL 6996819, at *3 (Tex. App.–Ft. Worth 2014). That is because the statute entitles the movant to greater relief—including "dismissal with prejudice, attorney's fees, and sanctions"—than a mere voluntary dismissal. *Id.* at *2. Allowing the plaintiff to evade those consequences, the court recognized, "frustrates" the statute's purpose. *Id.* at *3.

Finally, the same result would prevail under the "catalyst theory" that the Court of Appeals has applied to fee provisions in other statutory schemes. *See Frankel v. District of Columbia Office for Planning and Econ. Dev.*, 110 A.3d 553, 556–58 (D.C. 2015). The catalyst theory requires a "causal nexus" between a legal action claimed to be subject to a fee award and the desired result (whether in whole or in part) of that action—for example, when a legal action under the D.C. Freedom of Information Act leads the agency to disclose some or all of the requested information. *Id*. at 556. In this instance, there is an obvious causal nexus between CEI's Special Motion To Dismiss and Attorney General Walker's subsequent consent to dismiss his civil action and withdraw the subpoena.

Accordingly, whether or not CEI's Special Motion To Dismiss is moot—an issue that CEI expects to address in reply to Attorney General Walker's response to its Special Motion To Dismiss—it is presumptively entitled under the Act to an award of its costs, including reasonable attorney's fees.

III. No "Special Circumstances" Disqualify CEI from an Award of Its Reasonable Costs and Attorney's Fees

No "special circumstances" undermine CEI's entitlement pursuant to Section 16-5504(a) to an award of its costs, including reasonable attorney's fees. The "special circumstances" standard is drawn from federal civil rights law and has rarely been found to defeat a party's entitlement to a fee award. As the Federal Judicial Center has explained:

> In every Supreme Court case in which the defendants have argued that special circumstances exist, the Court has rejected the claim, with one notable exception involving a case in which the plaintiffs recovered nominal damages. Courts of appeals have followed this lead, rejecting most claimed special circumstances, including claims based on the defendant's willingness to enter into an early settlement; the lawsuit's conferring a private benefit on the plaintiff but no larger public benefit; the plaintiffs' ability to pass their litigation costs on to consumers; the plaintiff's proceeding in forma pauperis while benefiting from court-appointed counsel; the failure of a consent decree to mention fees; an award of injunctive relief only; a third party's financing the plaintiffs' suit; and the routine nature of the case.

Alan Hirsh, Diane Sheehey & Tom Willging, Awarding Attorneys' Fees and Managing Fee Litigation 19–20 (3d ed. 2015) (footnotes citing supporting case law omitted).[2] The "one notable exception," it should be said, did not actually preclude fees based on a finding of special circumstances, but simply held that a "court may lawfully award low fees or no fees" if that is what is reasonable based on a prevailing party's very limited success—in that instance, the plaintiff had sought $17 million in damages but obtained only nominal damages. *See id*. at 43; *Farrar v. Hobby*, 506 U.S. 103, 114–15 (1992).

By contrast, CEI has obtained the substantial portion of the relief sought in its Special Motion To Dismiss: Attorney General Walker has consented to dismissal of his action and to withdraw of the subpoena targeting CEI. Although this is not the complete relief sought by CEI, *cf*. D.C. Code § 16-5502(d) (providing that "dismissal shall be with prejudice"), it is nearly so.

Nor does Attorney General Walker's counsel's unusual May 13 letter to CEI present a special circumstance that would make an award unjust. Although that letter states that the Attorney General would act "to revoke issuance of the subpoena…and terminate the Superior Court action," it also states that the Attorney General "has not made a decision on whether to move to compel or to withdraw or amend [his] subpoena to CEI" and that the Attorney General may act at any time "to move to compel your client's compliance with the subpoena in its current form." Ex. O. Although murky, these statements do indicate that the Attorney General refused to end his action in a way that actually provided CEI meaningful, durable relief—i.e., either by dismissing the action with prejudice or by withdrawing the underlying U.S. Virgin Islands subpoena so that it could not be enforced.

In light of the Attorney General's threat to compel compliance, coupled with the inexplicable reservation of up to "5 court days" for the Attorney General to undertake whatever action he was contemplating, CEI's only prudent course was to seek relief

[2] Available at http://www2.fjc.gov/sites/default/files/2012/AttFees2.pdf.

immediately under the Act. In addition, CEI had to file within those five court days to ensure that its rights under the Act would not expire and to provide a route for it to obtain a binding judgment with *res judicata* effect, so that Attorney General Walker would not be able to continue to threaten it with potential enforcement of the subpoena—as his letter indicates he intends to do. And, in any instance, CEI had already incurred significant expenses in responding to the subpoena—including drafting its Special Motion To Dismiss after Attorney General Walker refused to respond to its earlier objections to the subpoena—that CEI has a right to recoup under the Act.

Although these circumstances may be unusual—CEI is not aware of an attorney general publicly announcing his intention to chill the speech of his policy opponents and then marching straight to court to do so—they are not the kind that would make a fee award unjust. Quite the opposite.

Conclusion

For the foregoing reasons, the Court should grant CEI's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act and find that CEI is entitled to an award of its costs and attorney's fees in responding to the subpoena in an amount to be proven.

Dated: May 27, 2016

Respectfully submitted,

/s/ Andrew M. Grossman
ANDREW M. GROSSMAN (D.C. Bar No. 985166)
DAVID B. RIVKIN, JR. (D.C. Bar No. 394446)
BAKERHOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Competitive Enterprise Institute

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UNITED STATES VIRGIN ISLANDS OFFICE OF THE ATTORNEY GENERAL, Plaintiff, v. EXXONMOBIL OIL CORP., Defendant.	Case No. 2016 CA 2469 Judge _____

(Proposed) Order Granting Nonparty Competitive Enterprise Institute's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a)

This matter comes before the Court on Nonparty Competitive Enterprise Institute's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a). The Court, having considered the papers filed in support of the Motion and the opposition thereto, and heard argument on this Motion, finds as follows:

1. The Court finds that Nonparty Competitive Enterprise Institute has made a prima facie showing pursuant to D.C. Code § 16-5502, that Plaintiff U.S. Virgin Islands Attorney General Claude Walker's action pursuant to the Uniform Interstate Depositions and Discovery Act, D.C. Code §§ 13-441 *et seq.* ("UIDDA"), to obtain a subpoena on CEI is a claim that arises from CEI's acts in furtherance of the right of advocacy on issues of public interest. The Court finds that that claim is not likely to succeed on the merits because, *inter alia*, the subpoena is defective under UIDDA, violates CEI's First Amendment rights and privileges, was obtained in bad faith, and is unduly burdensome in a manner not commensurate with any legitimate need.

2. Attorney General Walker's consent to termination of his action and withdraw of the subpoena renders CEI "a moving party who prevails, in whole or in part, on a motion brought under § 16-5502." D.C. Code § 16-5504(a).

3. Accordingly, CEI is presumptively entitled under the D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a), to an award of its costs, including reasonable attorney's fees, associated with Attorney General Walker's UIDDA action. *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016).

4. The Court finds that no "special circumstances" undermine CEI's presumptive entitlement to an award of its costs and reasonable attorney's fees and that such an award is particularly warranted in this instance in light of the purpose and policies of the D.C. Anti-SLAPP Act.

FOR THESE REASONS, IT IS HEREBY ORDERED THAT:

CEI's Motion for Costs and Attorney's Fees Under D.C. Anti-SLAPP Act, D.C. Code § 16-5504(a), is hereby GRANTED.

CEI shall file a bill of costs, including reasonable attorney's fees, within 14 days of the entry of this Order.

Attorney General Walker shall file his objections, if any, to CEI's bill of costs within 14 days of service of CEI's bill of costs.

CEI shall file its reply in support of its bill of costs, if any, within 7 days of service of Attorney General Walker's objections.

IT IS SO ORDERED.

_____

District of Columbia Superior Court Judge

Certificate of Service

I hereby certify that on May 27, 2016, I caused a copy of the foregoing Motion to be served by CaseFileXpress on the following:

Linda Singer, Esq.
Cohen Milstein Sellers and Toll, PLLC
1100 New York Ave., N.W., Suite 500
Washington, D.C. 20005

Counsel for the U.S. Virgin Islands Office of the Attorney General

By: /s/ Andrew M. Grossman
Andrew M. Grossman