I’ll Huff and I’ll Puff — But then You’ll Blow My Case Away: Dealing with Dismissed and Bad-Faith Defendants Under California’s Anti-SLAPP Statute

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A wolf once saw a lamb who had wandered away from the flock. He did not want to rush upon the lamb and seize him violently. Instead, he sought a reasonable complaint to justify his hatred. “You insulted me last year, when you were small”, said the wolf. The lamb replied, “How could I have insulted you last year? I’m not even a year old.” The wolf continued, “Well, are you not

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cropping the grass of this field which belongs to me?” The lamb said, “No, I haven’t eaten any grass; I have not even begun to graze.” Finally the wolf exclaimed, “But didn’t you drink from the fountain which I drink from?” The lamb answered, “It is my mother’s breast that gives me my drink.” The wolf then seized the lamb and as he chewed he said, “You are not going to make this wolf go without his dinner, even if you are able to easily refute every one of my charges.”

I. INTRODUCTION

Although the legal taxonomy of SLAPP suits—that is, the recognition and labeling of Strategic Lawsuits Against Public Participation—has been relatively recent within the American legal landscape, lawsuits that have attempted to interfere with the public’s right to petition have existed since the American Revolution, lurking in various and seemingly less deleterious incarnations, much like wolves in sheep’s clothing. Essentially, SLAPP actions are lawsuits directed at private citizens, primarily as retaliation for some specific exercise of the political process. What alarms us about SLAPPs is that they can surface in the form of various kinds of actions in diverse factual circumstances. Whether the lawsuit is a slander action against a group of concerned citizens for what they said about Corporation Y during a protest against Corporation Y’s mistreatment of employees, or whether


4. *Id.* at 8-9.

5. *See Pring, SLAPPs, supra* n. 2, at 7 n. 6.
the lawsuit is a claim for interference with contract against an environmental group that had successfully appealed to the courts to enjoin a private developer’s plans to clear-out a wilderness for parking spaces, so long as that particular cause of action is being used as a weapon against a private citizen’s engagement of the political process and not just to seek actual relief, the lawsuit can be considered a SLAPP action. Its bite no longer hurts just the private litigant but penetrates to a constitutional level to damage the First Amendment right to petition. If a private party is sued for having utilized the court system to effect some sort of political change, then that suit subverts the purposes for which the courts were instituted. Suits filed against other instances of petitioning impart no lesser detrimental effects. In this way, SLAPPs can be characterized as the Big Bad Wolf of the recent American legal fable.

Historically, because this kind of interference with the public’s petitioning right could be disguised within different kinds of legal and factual contexts, there was “virtually no recognition—by the legal profession, courts, academia, government, or the public—of their similarity or linkage.” Thus, “[t]he tendency was (and often still is) to view them as unrelated and to apply conventional legal labels.” This Big Bad Wolf was a master of disguises. So, not surprisingly, the work of creating a common cause of action to identify cases featuring that shape-shifting wolf in order to “deal with them as a new, unitary

6. See id. at 5-6.
7. See Pring & Canan, Getting Sued, supra n. 3, at 2 (“From city hall to Congress, neighborhood to nation, soapbox to sit-in, picket lines to prime time, Americans feel they have a ‘right’ to speak out on important issues, to each other and to their government officials. We accept the risk of equally public and hard-hitting rebuttal from the other side, but we assume that the system, which encourages us to speak out, will protect us when we do. [¶] That assumption is no longer valid. The ominous new risk for those who express their views to the government is that opponents—not content with rebuttal in the same public forums—will drag citizens out of the political arena and into the courthouse with staggering personal lawsuits.”).
8. Id.
9. Although the wolf has historically been characterized as a devious and villainous figure throughout western folklore and literature—and not to mention within this Article—a study of the wolf that not only reveals some of the origins of such negative human perceptions, but also offers a powerful and impressive counter-portrait, can be found in Barry Lopez’s Of Wolves and Men. Barry Lopez, Of Wolves of Men (Scribner 1978).
10. Pring & Canan, Getting Sued, supra n. 3, at 3 (endnote omitted).
11. Id.
type of litigation"12 only began to occur in the 1980s with studies promulgated by George W. Pring, a law professor, and Penelope Canan, a sociology professor, both from the University of Denver.15 Ever since then, the hunt for the wolf lurking in sheep’s clothing has been vigilant and many states have found solutions to curb such intrusions upon the public’s right to petition by adopting legislation that, as Kathryn Tate observed, “addresses the need for expediting judicial review, as well as monetary recovery, for the party who has been SLAPPed.”16 Where no legislative action has taken place, state courts have crafted their own “common law” solutions “that target activities aimed at petitioning the government for action on issues of public importance.”15 Grassroots efforts to educate the unsuspecting public have also cropped up.16

As of early 2009, twenty-six states and one U.S. territory have enacted so-called anti-SLAPP statutes to protect their citizens from victimization by SLAPP suits.17 California adopted its own anti-

12. Id.
13. See generally Canan, Sociological Perspective, supra n. 2; Canan & Pring, Strategic Lawsuits; Canan & Pring, supra n. 2, Studying Strategic Lawsuits, supra n. 2; Pring, SLAPPs, supra n. 2.
15. Citizen Media Law Project, Responding to Strategic Lawsuits Against Public Participation (SLAPPs) [¶ 5], http://www.citmedia-law.org/legal-guide/responding-strategic-lawsuits-against-public-participation-slapps (last updated July 23, 2008) (“These common law (i.e., judge-made) rules offer similar protections to those provided by some anti-SLAPP statutes.”).
16. For instance, a casual search on the internet uncovers several organization’s websites devoted to teaching the public about SLAPPs, the right to petition, steps to defend a SLAPP suit, and even a support group for those who have been SLAPPed. See e.g., Cal. Anti-SLAPP Project, CASP, http://www.casp.net/ (accessed Mar. 26, 2009); First Amendment Project, First Amendment Resources, Strategic Lawsuits Against Public Participation, http://www.thefirstamendment.org/resources.html#SLAPP (accessed Mar. 26, 2009); Yahoo! Groups, SLAPP: SLAPP Victims’ Support Group, http://groups.yahoo.com/group/slapp/ (accessed Mar. 26, 2009).
17. Those states are: Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, and Washington; Guam is the one U.S. territory that has its own anti-SLAPP legislation. Citizen Media Law Project, supra n. 15, at [¶ 4]; see also Eric David, The Newsroom Law Blog, A Brief Overview of Anti-
SLAPP statute in 1992 when the California Legislature enacted section 425.16 of the California Code of Civil Procedure "to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." In order to effectuate this objective, section 425.16 allows the alleged victim of a SLAPP suit to get rid of the suit via a mechanism of pre-trial judicial review and dismissal. Since its enactment, section 425.16 has been amended three times and has become an active part of the state court dockets. Needless to say, review by the California appellate courts to interpret section 425.16 has also actively ironed out judicial understanding of the statute.

Although the enactment of an anti-SLAPP law is commendable, section 425.16 has its share of flaws. One particular wrinkle that the appellate courts still have not ironed out in interpreting section 425.16 involves the situation where the filer of a SLAPP suit ("the plaintiff-SLAPPer") voluntarily dismisses his SLAPP suit against the victim.

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19. § 425.16(b)(1) ("A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.").


21. Douglas A. Hedenkamp, *Avoiding the Pitfalls of the Anti-SLAPP Statute*, 49 Orange Co. Law. 46 (Sept. 2007) ("Litigants have employed the anti-SLAPP statute (C.C.P. § 425.16) so frequently and successfully that a large body of law interpreting its terms has developed over the past several years.").

22. See e.g. Braun I, *Increasing SLAPP Protection, supra* n. 18, at 1012-34; Paul D. Fogel & Dennis Peter Maio, *Reed Smith L.P., Anti-SLAPP Appeal Angst* [¶ 1] [http://www.reedsmith.com/_db_/documents/Anti-Slapp.pdf](http://www.reedsmith.com/_db_/documents/Anti-Slapp.pdf) (accessed Mar. 26, 2009) ("Anti-SLAPP appeals now are a significant part of California’s appellate docket, with some 60 published opinions (and likely hundreds of unpublished ones) involving anti-SLAPP orders filed in the California courts of appeal and Supreme Court in the last eight years.").
Because the goal of California’s anti-SLAPP statute is to deter the “chilling” effect of SLAPP suits upon the public’s ability to “petition for the redress of grievances”—which includes the cost put forth to defend such suits—the inquiry is whether the plaintiff-SLAPPer’s voluntary dismissal of his or her SLAPP suit is vindication enough to prompt a court to award the defendant-SLAPPee statutory attorney’s fees. If so, then the next question is what possible mechanisms would allow for this determination?

Such investigation has prompted sibling California Courts of Appeal to differ over the last ten years. According to section 425.16, a prevailing defendant of a SLAPP suit gets attorney’s fees and costs. Sounds simple enough. But the simplicity of that rule has sent courts scratching their heads when faced with cases where plaintiff-SLAPPers voluntarily dismiss the SLAPP suit between the time the defendant-SLAPPee has filed a section 425.16 anti-SLAPP motion to strike and the time a court weighs the merits of that motion. Does the defendant-SLAPPee then qualify as the “prevailing defendant” for attorney’s fees? The statute itself gives no advice textually, and two schools of thought have emerged out of the debate, based on a split within California appellate case law. Because this split has been only periodically mentioned within recent legal discourse, an examination of these two divergent roads and a proposed resolution are both worthwhile. As Jerome I. Braun, a California attorney who has written

23. Over the years, different authors and scholars have given various monikers to illustrate and/or designate the parties of a typical SLAPP suit. Some authors, such as Pring and Canan, call the plaintiff who initiates a SLAPP suit the “filer” and the defendant, whose right to petition is being infringed upon, the “target.” See e.g. Pring & Canan, Getting Sweed, supra n. 3, at 9-10. Others have been less genteel and referred to the plaintiff as the “SLAPPer” and defendant as the “SLAPPee.” See e.g. Tate, supra n. 14, at 803-04, 810, 811. This Article will use the terms “plaintiff” and “defendant,” as well as the less-genteel monikers “SLAPPer” and, “SLAPPee.”

24. § 425.16(a), (c).


extensively on section 425.16, has put it, “[a]s there are no pending legislative proposals to settle this question, it will be up to the [California] Supreme Court to decide which approach will prevail.” This Article seeks to weigh the two approaches and to find a workable solution.

But just as there are defendants who should rightfully win in SLAPP suits, there are also those defendants who do not deserve to win—and here, we move from the possible winners to the definite whiners. Another problem with section 425.16 is the way the statute handles bad-faith defendant-SLAPPees. Although generally it is SLAPP suit plaintiffs who receive the negative attention, when defendants have filed frivolous anti-SLAPP motions under section 425.16 they have been found to be wolves in sheep’s clothing as well—abusing the statute to cover what turns out to be an illegitimate use of the political process. In this scenario, the interference with constitutional petitioning rights is not direct, but indirect through the abuse of that particular First Amendment right. Currently, the standards for detecting such undesirable SLAPP defendants lack consistency. Section 425.16 directs a court to use standards outlined by section 128.5 of the California Code of Civil Procedure to determine whether a defendant-SLAPPee has filed a frivolous anti-SLAPP motion. The use of section 128.5, however, is problematic as that statute is no longer active within California’s civil procedure code, and its standards were not specifically tailored for use within the SLAPP context. Hence, this Article will also seek to address such concerns

27. Braun II, Anti-SLAPP Remedy, supra n. 26, at 765 (footnote omitted).
28. E.g., People ex rel. Lockyer v. Brar, 9 Cal. Rptr. 3d 844, 847 (Cal. App. 4th Dist. 2004) (where the Fourth District Court of Appeal affirmed the denial of a defendant’s frivolous anti-SLAPP motion as a “prevention of the abuse of the anti-SLAPP statute to buy time from the day of reckoning in the trial court”); Pring & Canan, Getting Sued, supra n. 3, at 11-12 (“SLAPPs may be a lopsided phenomenon but not one-sided. . . . Citizens’ constitutional right to political speech is not absolute; no constitutional right is. Other citizens also have constitutional rights: to sue, to go to trial, to have their plans and reputations protected.”).
29. § 425.16(c) (“If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.”).
and pose a more appropriate and SLAPP-specific mechanism for bringing balance and legitimacy to section 425.16.

In examining these two issues, this Article will demonstrate that, despite efforts to recognize SLAPPs and to safeguard our legal process from abuses, SLAPP suits and their underlying interference with the legitimate exercise of the right to petition can often engender new ways of creeping back onto the legal stage to wreak havoc on the private citizen—that the devious, shape-shifting Big Bad Wolf of First Amendment rights can return to reprise its role as the subversive villain and to trot unsuspecting litigants out to slaughter. After an introduction into the general world of SLAPPs and the specific history behind California’s section 425.16, this Article will introduce and evaluate the methods that courts have used in order to determine whether the defendant-SLAPPee is the prevailing defendant for attorney’s fees in voluntary dismissal cases. Then the Article will examine the flaws created by section 425.16’s reliance on section 128.5’s standard for determining bad-faith SLAPP defendants. From looking at both the good and the bad sides of SLAPP suit defendants, this Article will uncover the complexities in the forest of SLAPP litigation in California, where legitimate petitioning rights can often be sabotaged by both sides of the bar. Hopefully, these examinations will help shore up the gaps that have allowed the metaphorical wicked wolves lurking behind the guises of lawsuits to come back time after time, and ultimately make them go away with their tails tucked between their legs.

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These provisions provide standards and enforcement proceedings that are lax and are not SLAPP-specific."

Electronic copy available at: https://ssrn.com/abstract=2499861
II. HISTORICAL BACKGROUND: PULLING THE WOOL OVER THE UNSUSPECTING FLOCK

A. FROM ANTITRUST TO ANTI-SLAPP: THE NOERR-PENNINGTON DOCTRINE

The final protection the First Amendment to the U.S. Constitution affords is that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” 31 After listing the more contentious rights—religion, speech and expression, press, and assembly—it can seem as if the drafters of the Bill of Rights inserted protection of the petitioning right as an afterthought. 32 Now known as the Petition Clause, this last protection “was intended to correct evils experienced by the framers of the Constitution and the Bill of Rights that had been imposed by an overly authoritative sovereign.” 33 Over the years, “[i]ts shield has been expanded beyond its literal terms to protect any peaceful, lawful attempt to promote or discourage government action at all levels and branches of government, including the electorate.” 34

Last, however, is not least. Although embedded at the end, and not harboring a history as incendiary as the other protected First Amendment rights, the right to petition has had a venerable existence in the United States. 35 As the court in one infamous SLAPP case aptly

31. U.S. Const. amend. I.
32. In one of their seminal articles on SLAPPs, Pring and Canan recited a split among theorists as to why the right to petition has garnered lesser infamy:
   Indeed, the scholarship focusing on political participation in the United States suggests that (1) America has the lowest levels of voting participation in any industrialized multi-party democracy where voting is voluntary, that (2) political involvement other than voting is limited to approximately 10 percent of the adult population, and that (3) involvement is positively correlated with income, occupational prestige, and especially education, thus reinforcing, rather than politically altering, institutional inequality.
34. Pring, SLAPPs, supra n. 2, at 9 (footnote omitted).
35. E.g., Canan & Pring, Strategic Lawsuits, supra n. 2, at 515 (“And, despite constitutional protection, the right to participate in government is not exercised frequently or intensely by most Americans.”); Gregory A. Mark, The Vestigial
expressed, “[i]n a representative democracy government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental officials acting on their behalf.”36 The historical relationship between the constitutional right to petition and the rise of SLAPP suits is close and antithetical: If the right empowers citizens to “petition the government for a redress of grievances,”37 then the SLAPP suit is “a counter-attack against petition-clause-protected activity.”38 As Pring and Canan articulate, SLAPPs “actually appeared first in the political infighting of our young country shortly after the Revolution, when there were scattered cases of citizens being sued when they criticized corrupt government officials.”39 And, by “[t]aking deeper,” Pring and Canan “found what [SLAPPs] had in common: every case was triggered by defendants’ attempts to influence government action—the exact activity covered by the Petition Clause of the First Amendment.”40

Cases that Pring and Canan have cited as early SLAPP suits most often dealt with dissatisfied citizens who attempted to oust public officials from their offices.41 In fact, the earliest SLAPP suit discovered by Pring and Canan was Harris v. Huntington,42 a Supreme Court of Vermont case from 1802, where the plaintiff, Ebenezer Harris, sued five citizens of Vermont, for libel after they petitioned the state legislature not to re-elect Harris as Justice of the Peace.44 The Vermont Court sided with the defendants, sustaining

*Constitution: The History and Significance of the Right to Petition,* 66 Fordham L. Rev. 2153, 2157 (“Petitioning embodied both Revolutionary idealism and a lengthy domestic colonial practice, while reflecting a widespread understanding about both what the founders perceived to be the necessary and the best traditions of English constitutionalism, as well as newly-articulated domestic political aspirations embedded in the Constitution.”).

36 Protect Our Mt. Env. v. Dist. Ct., 677 P.2d 1361, 1364 (Colo. 1984) (en banc).
37 U.S. Const. amend. I.
38 Pring, SLAPPs, supra n. 2, at 12.
39 Pring & Canan, Getting Sued, supra n. 3, at 3; Braun I, Increasing SLAPP Protection, supra n. 18, 974-84. Braun provides a thoughtful study that traces the history of petitioning rights to the Anglo-Saxons and the *Magna Carta.*
40 Pring & Canan, Getting Sued, supra n. 3, at 3.
41 See id. at n. 24 (citing *Harris v. Huntington,* infra n. 43, as an example).
42 Id. at 17.
43 *Harris v. Huntington,* 2 Tyl. 129 (Vt. 1802).
44 Id. at ¶ 1.
their petitioning activity over Harris’ libel claim because “the right of petitioning with impunity is established both by the common law and our declaration of rights.” 45  Other early SLAPP cases followed suit. In Gray v. Pentland46 from the Supreme Court of Pennsylvania in 1815, Pentland, the “prothonotary of the Court of Common Pleas of Allegheny county,”47 sued Gray for making a deposition with a justice of the peace against the Pentland for “‘frequent intoxication’” 48 and being “‘unfit to perform the duties of his office with dignity and propriety.’” 49 The Court excused Gray’s statements based on the rule “that all allegations made in the ordinary course of judicial proceedings, are not to be considered as libels.” 50 In Larkin v. Noonan, 51 an 1865 Supreme Court of Wisconsin libel case, defendants were sued by the Milwaukee County sheriff for making complaints against him to the governor and for demanding his removal from office. 52 The Court found such accusations material and privileged because “[t]he policy of the law here steps in and controls the individual rights of redress.” 53 Finally, on a federal level, the United States Supreme Court decided White v. Nicholls 54 in 1864, another libel case that Pring and Canan have identified as an early SLAPP, where defendants were sued for writing letters of complaint to the President about a federal customs collector. 55 Although the Court remanded the case for a new trial below, it recognized that defendants’ letters were to be held privileged as petitions for redress of grievances if the trial court found that defendants made the accusations without actual malice. 56

Generally, as mentioned above, these early libel suits were

45. Id. at 55 [56].
48. Gray, 2 Serg. & Rawle at 29 (citing defendant’s deposition).
49. Id.
50. Id.
51. Larkin v. Noonan, 19 Wis. 82 (Wis. 1865).
52. Id. at 87.
53. Id.
54. White v. Nicholls, 44 U.S. 266 (1845).
55. See id. at 267-84.
56. See id. at 290-92.
resolved hermetically within the confines of defamation. Usually, such petitions were allowed based on a public figure exception similar to the rule articulated later in *New York Times v. Sullivan* 57 (which, though not focused on in this Article, is a case that has some influence in SLAPP history). 58 But the kind of resolution that would have specifically targeted these cases as invading the public’s right to petition would not come for over a century because, after these early cases, such libel suits “largely disappeared from the reported.” 59 Interestingly, as Pring and Canan observed, this was because “[t]he practice seems not to have caught on with the private sector” until 150 years later when “SLAPPs were ‘reborn’ in the political activism of the 1960s and 1970s.” 60 The Big Bad Wolf was merely taking a long winter’s nap.

In the 1960s and 1970s, the United States Supreme Court addressed challenges to the public’s right to petition in the realm of antitrust and effectively revived the discourse that eventually lead to SLAPP suit identification. The first case was *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 61 where Pennsylvania truck operators sued a railroad association for violations under *The Sherman Antitrust Act* 62 (*Sherman Act*) after the association’s publicity campaign allegedly influenced the Governor of Pennsylvania to veto a bill favoring the trucking industry. 63 Even though the trucking operations incurred harm from conduct that otherwise would have been held anticompetitive, 64 the Court recognized that “[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms [by passage of the Sherman Act].” 65 As a result, the Court held that “the Sherman Act does not apply to the activities of the railroads at least insofar as those

60. *Id.* at 3.
64. See *id.* at 142.
65. *Id.* at 138.
activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws."66 Despite the damage inflicted by the campaign on the trucking industry, the Court held that, since "n]o one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices,"67 the railroads' ability to conduct such a publicity campaign was otherwise "along lines normally accepted in our political system."68 As Braun notes, this decision "was of great importance, not only in establishing the trumping power of the right ofpetition, but also in extending the reach of the constitutional protection beyond direct petitioning to cover collateral actions aimed at influencing public opinion in aid of the petition."69 Of course, the Court was also not naïve about businesses using the right to petition as a pretext for inherently deceptive and anticompetitive practices: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."70 If that situation had occurred in Noerr, then "the application of the Sherman Act would be justified."71

Five years later, the Supreme Court revisited the Noerr case when it heard another challenge to the right to petition in United Mine Workers of America v. Pennington,72 a case that resulted from the collective efforts of a mine workers union and operators to influence the Secretary of Labor and Tennessee Valley Authority for a minimum wage increase to miners that eventually made it difficult for smaller operators to compete.73 Like the Pennsylvania truckers in Noerr, the smaller operators sued under the Sherman Act.74 Because "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent of purpose,"75 the Court held in Pennington that "[j]oint efforts to influence public officials do not

66. Id.
67. Id. at 144.
68. Id. at 145.
70. Noerr, 365 U.S. at 144.
71. Id.
73. Id. at 659-61.
74. Id. at 659.
75. Id. at 670.
violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.”76 As Pring and Canan note, when Pennington was reached, “the right to petition [ed] absolute.”77 The collective impact of Noerr and Pennington has since become recognized in legal discourse as the Noerr-Pennington doctrine.78

In 1972, the Supreme Court further examined what it had alluded to in Noerr as situations in which a business would use a campaign for governmental action as “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”79 In effect, the Court used California Motor Transport v. Trucking Unlimited80 to carve out the “sham exception” to the Noerr-Pennington doctrine. The plaintiffs, a group of trucking companies operating in California, sued another group of trucking companies operating in and out of California, claiming that defendant trucking companies had ran a conspiracy to monopolize the California highway common carriage business.81 Specifically, the plaintiffs claimed that the defendants accomplished this through “a jointly financed, widely publicized program of opposing, before [the California Public Utilities Commission, the Interstate Commerce Commission] and the courts, all applications by actual or potential competitors for the issuance, transfer, or registration of operating rights.”82 In addition, plaintiffs claimed that defendants used their efforts “to harass and deter [plaintiffs] in their use of administrative and judicial proceedings so as to deny them ‘free and unlimited access’ to those tribunals.”83 As Pring and Canan more colorfully illustrate, “every time the plaintiff trucking company tried to expand to a new state, the entrenched defendant truckers would flood the state licensing agency with frivolous objections to the license applications, not with

76. Id.
77. Pring & Canan, Getting Sued, supra n. 3, at 25.
78. E.g. Braun I, Increasing SLAPP Protection, supra n. 18, at 980-82.
81. Id. at 509.
any expectation of succeeding but simply in order to impose expense and delay."84 Though the Court reiterated the importance of the First Amendment right to petition by citing Noerr and Pennington,85 the Court here found that "First Amendment rights may not be used as the means or the pretext for achieving `substantive evils' . . . which the legislature has the power to control."86 The Court found that if defendants had combined "to harass and deter their competitors from having `free and unlimited access' to the agencies and courts, to defeat that right by massive, concerted, and purposeful activities of the group,"87 then "a violation of the antitrust laws has been established"88 despite the fact "that the means used in violation may be lawful."89 In this way, under the Noerr-Pennington doctrine, "petitioning would still be protected even if done with illegal intent or purpose, but not if the intent was simply to prevent someone else's ability to petition government."90

The Supreme Court delineated the "sham" exception even further in City of Columbia v. Omni Outdoor Advertising, Inc.,91 by asserting that " `intent to restrain trade as a result of the government action sought . . . does not foreclose protection [from the Petition Clause].' "92 Rather "the `sham' exception to Noerr encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."93 Omni involved a small billboard company who sued both a more established billboard company and the city of Columbia, South Carolina for allegedly colluding to prevent them from competing by enacting ordinances that restricted new billboard construction in Columbia.94 The Court opined that "`[a] `sham' situation involves a defendant whose activities are `not

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84. Pring & Canan, Getting Sued, supra n. 3, at 25.
86. Id. at 515 (quoting NAACP v. Button, 371 U.S. 415, 444 (1963)) (citation omitted).
87. Id.
88. Id.
89. Id.
90. Pring & Canan, Getting Sued, supra n. 3, at 25.
92. Id. at 381 (quoting Lawrence A. Sullivan, Developments in the Noerr Doctrine, 56 Antitrust L. J. 361, 362 (1987)).
93. Id. at 380.
94. Id. at 367-70.
genuinely aimed at procuring favorable government action’ at all.”95 As to protecting the constitutional right to petition, Pring and Canan have explained that the *Omni* case provides a test outlined as follows: “Genuine government petitioning is not deemed to be aimed at the opposition (although it may nonetheless have an impact on their interests); it is deemed rather to be aimed at the government with the intent to produce a desired outcome.”96

The *Noerr-Pennington* doctrine became more functional for protecting petitioning rights in general, and for helping the development of SLAPP recognition and protection in particular, when the Supreme Court applied *Noerr-Pennington* beyond the desert valleys of antitrust. A notable example is *NAACP v. Claiborne Hardware Co.*,97 where the Supreme Court applied *Noerr-Pennington* to a civil rights case that ensued after the NAACP had raised a boycott campaign of white merchants in Claiborne, Mississippi in an attempt to secure local antidiscrimination laws.98 The Court articulated that the *Noerr-Pennington* doctrine protected the kind of petitioning that took place within the NAACP’s boycotts of local businesses:

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners’ campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.99

95. *Id.* at 380 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n. 4 (1988)) (citations omitted).
98. *Id.* at 888-98.
99. *Id.* at 914 (footnote omitted).
Other courts have followed in extending Noerr-Pennington’s application in other civil arenas. In essence, the progression of these cases within the Noerr-Pennington doctrine shows that, although the substantive legal basis might often differ, the disposition of these cases has hinged upon how the specific petitioning activity of the parties was dealt with and the importance of reaffirming the First Amendment right to petition. This sentiment has been subsequently reflected in the way that “[s]ome states that have adopted anti-SLAPP laws have wisely incorporated that approach.” Accordingly, even though the case law had not yet evolved from antitrust to anti-SLAPP, these Supreme Court holdings show that an early mechanism for identifying and dealing with challenges to petitioning rights existed—though a method nascent and mostly confined within antitrust—from which the later hunt for the SLAPP species of lawsuit was possible.

B. TRAPPED AND DISSECTED: THE ANATOMY OF A SLAPP SUIT

In the 1980s, Pring and Canan began to study cases that challenged the right to petition as “more than an unaddressed legal phenomenon” after they encountered SLAPP suits in their own, separate professional lives. The professors “wanted to learn all [they] could about [SLAPPs’] legal aspects and their nonlegal aspects as well—their psychological, sociological, economic, and political ramifications.” Spurred by this objective, they “examined hundreds of cases and interviewed nearly a thousand participants—on all sides—to get a complete, balanced view.” They found people 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

100. Osborn & Thaler, supra n. 58, at 34 (“Federal and state courts now consistently apply the Noerr-Pennington doctrine to all types of claims, including state tort and statutory law claims implicating right to petition.” (footnote omitted)).
101. Pring & Canan, Getting Sued, supra n. 3, at 28, 28 n. 96. In the footnote accompanying the quoted text, Pring & Canan lists Rhode Island as an example.
102. Id. at x.
103. Id. at ix.
104. Id. at xi-xii.
105. Id. at xi; Pring, SLAPPs, supra n. 2, at 7 (noting that five years were spent on the study and 228 lawsuits were examined).
protests or appeals, being parties in law-reform lawsuits, and
engaging in peaceful boycotts and demonstrations. 106

The context of cases ranged from public protests against a California
landfill to parental complaints lodged against a teacher to a local school
district. 107 But what they essentially did was to tilt their point of view
of these different cases until they recognized the shape of the wolf
hidden in the sheep’s clothing—seeing these cases not for their causes
of action but for what prompted these suits to begin with: A private,
legal reaction to a public effort to petition. 108 From these case studies,
Pring and Canan found that what these lawsuits challenging the
constitutional right to petition had in common was that they were
comprised of four elements:

1. [A] civil complaint or counterclaim (for monetary damages
   and/or injunction),

2. filed against non-governmental individuals and/or groups,

3. because of their communications to a government body,
   official, or the electorate,

4. on an issue of some public interest or concern. 109

To paraphrase: A civil suit against private actors in retaliation for the
private actors’ exercise of the political process. The heart of the
SLAPP suit (what gets the plaintiff-SLAPPer’s litigious blood
pumping) is the third element—the basis for retaliation or
deterrence. 110 In reaction to what happens in element three, a suit gets
filed against the defendant-SLAPPer—the actor, whether an individual
or an organization, who was exercising the constitutional right to
petition.

Pring and Canan also provide a more dramatic narrative to a

106. Pring, SLAPPs, supra n. 2, at 5 (footnote omitted).
108. Id. at 3 (“Looking deeper, we found what they had in common: every case was
   triggered by defendants’ attempts to influence government action—the exact activity
   covered by the Petition Clause of the First Amendment.”).
109. Pring, SLAPPs, supra n. 2, at 8.
110. Braun I, Increasing SLAPP Protection, supra n. 18, at 969 (“The third element
   is the key. The purpose of the proponents of the SLAPP suit . . . is almost always to
   intimidate or retaliate against those . . . who use traditional approaches to government
   to oppose the [SLAPP suit] filers’ plans or purposes.”) (footnote omitted).
hypothetical SLAPP suit by dividing the SLAPP suit into three escalating stages. In stage one, "aggrieved citizens speak out to some branch of government or the electorate on a public issue" and "publicly assert that some condition is offensive." By doing so, "they threaten other interests and make enemies," and consequently trigger the second stage, "when these enemies initiate private, legal actions or counterclaims. They file lawsuits whose targets are the petitioning citizens or groups and whose legal claims are common torts like defamation, interference with business advantage, and nuisance." The third and last stage occurs with "the disposition of the case" with the outcome depending upon defendant-SLAPPee "claiming the First Amendment as a defense outweighs the plaintiff-SLAPPer's claim of tortious injury." If a genuine infringement of petitioning rights occurred, then defendant-SLAPPee receives redress.

As with actually being slapped, where the emotional impact may be more significant than the physical pain, the sting of the SLAPP suit lies not in the substantive merits of the claim itself, but in the suit's ability to silence political activity: "The injury wrought by the SLAPP suit lies primarily in its being brought at all. The motive of SLAPP filers . . . is not to win, but rather to chill the defendants' activities of speech or protest and to discourage others from similar activities." Despite the context—the thickness of wool under which the SLAPP suit hides—and despite the fact that "statistics demonstrate that the suits routinely fail in court," SLAPP suits "tend to have devastating economic and chilling effects, allowing them to succeed in their underlying purpose—silencing concerned public citizens into submission." It is the use of the mechanics of the lawsuit—the expense, the time, the energy the SLAPPee is forced to expend—to

111. See Canan & Pring, Strategic Lawsuits, supra n. 2, at 508; see also Pring & Canan, Getting Sued, supra n. 3, at 10.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id. Invoking the Petition Clause often meant "that the judge ruled for the defendant-SLAPPee." Indeed, it actually "doubled defendant-SLAPPee's chances of ultimately winning." Id. at 514.
118. Tate, supra n. 14, at 803-04 (footnote omitted).
119. Arco, supra n. 33, at 591.
silence political activity and teach the SLAPPee and the public that it is not worth trying to change the status quo or challenge the powerful.120

C. ONLY IN CALIFORNIA: SECTION 425.16 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE

In 1992, the State of California crafted a solution in favor of defendant-SLAPPees who reach stage three.121 Instead of restricting the defendant-SLAPPee’s options to claiming a constitutional defense, the California legislature enacted section 425.16 within the state’s Code of Civil Procedure, allowing a defendant-SLAPPee to seek judicial review, and a strike-out, of the SLAPP claim before the dispute reaches the trial level.122 Under subsection (b)(1) of the statute:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.123

The state legislature made three painstaking attempts before finally passing the legislation and having then-Governor Pete Wilson (who had already vetoed a prior version of the statute a year before) sign it in 1992.124 Since then, the statute has been amended three times: First, in 1997, to squeal growing conflict amongst appellate courts regarding how broadly section 425.16 was to be construed (quite broadly),125 second, in 1999, to allow appeals from any lower court’s order to grant or deny a special motion to strike and to require filing of papers with the Judicial Council whenever a defendant-SLAPPee filed

120. See George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation” (“SLAPPs”): An Introduction for Bench, Bar and Bystanders, 12 Bridgeport L. Rev. 937, 941-42 (1992) [hereinafter Pring & Canan, SLAPPs: An Introduction].
121. Tate, supra n. 14, at 801.
122. Id. (“Section 425.16 permits a motion to strike in any SLAPP suit and freezes discovery. The statute is thus designed to prevent SLAPPs by ending them early and without great cost to the [defendant-SLAPPee].” (footnotes omitted)).
124. Braun v, Increasing SLAPP Protection, supra n. 18, at 1001-05.
125. See Tate, supra n. 14, at 807-08.
a motion to strike under section 425.15;\textsuperscript{126} and, most recently, in 2005, to overrule previous California Supreme Court decisions holding that an erroneous denial of a section 425.16 anti-SLAPP motion to strike warranted enough probable cause to file and maintain a SLAPP suit and to adjust the clerical process for scheduling a hearing on a section 425.16 anti-SLAPP motion to strike.\textsuperscript{127}

According to Braun, “[a]l the time it was enacted [section 425.16] was the most ambitious and far-reaching of all the state anti-SLAPP laws.”\textsuperscript{128} His reasoning was that section 425.16 “allows a defendant to move to strike a complaint or cause of action arising from protected speech or petitioning activity, without the need for further proceedings unless the plaintiff can show a reasonable probability of succeeding on the merits of the action.”\textsuperscript{129} This procedural shortcut for permitting a defendant-SLAPPpee to quickly strike out a SLAPP suit is in line with section 425.16’s preamble: “The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”\textsuperscript{130}

In practice, once a plaintiff-SLAPPee has filed suit against a defendant-SLAPPpee in retaliation for the defendant-SLAPPpee’s exercise of petitioning rights and that defendant-SLAPPpee has identified that “one of the causes of action . . . is based on an act of a person in furtherance of the person’s constitutional right of petition or free speech,” a defendant-SLAPPpee can then file a motion to strike under section 425.16.\textsuperscript{131} Implicit in that language is the ability to bifurcate causes of action in a suit so that if only one of the causes of action constitutes a SLAPP, then section 425.16 can still be employed to strike, but only as to that SLAPP cause of action.\textsuperscript{132} In addition, “so long as the act which underlies the cause of action is an ‘act in furtherance of a person’s right of petition or free speech . . . in

\textsuperscript{126} See id. at 808 (footnote omitted).


\textsuperscript{128} Braun II, Anti-SLAPP Remedy, supra n. 26, at 732.

\textsuperscript{129} Id.


\textsuperscript{131} Michael C. Denison & Fumiko Hachiya Wasserman, Action Guide: Making and Opposing Special Motions to Strike under the California Anti-SLAPP Statute 3 (Continuing Educ. of the Bar 2007) (citation omitted).

\textsuperscript{132} Id. (“The statutory scheme distinguishes between ‘actions’ or cases and ‘causes of action.’ ”)
connection with a public issue,” section 425.16 can apply not only to strike out a cause of action in a complaint that initiates a lawsuit but also a cause of action lurking within a counterclaim or cross-complaint. As one practitioner article notes:

In a nutshell, [public issue] includes (a) any statements made before, or in connection with, a legislative, judicial, or executive body or proceeding, regardless of whether the statement concerns a ‘public issue,’ (b) any statements made in a public forum concerning a matter of public interest, and (c) and [sic] any other “conduct” in furtherance of the right of petition or free speech concerning a matter of public interest.

There are some limits, nevertheless, to what section 425.16 will protect as a public issue. As restricted by section 425.17 of the California Code of Civil Procedure, litigants are prohibited from filing anti-SLAPP motions to strike in certain public interest and class actions. Incidentally, section 425.17 also restricts litigants from filing anti-SLAPP motions in certain actions targeting a business based on that business’s conduct or commercial statements. Otherwise, section 425.16 is broadly applicable provided the cause of action arises in retaliation to another’s exercise of petitioning or First Amendment rights.

The legal gesturing and posturing that takes place once a genuine SLAPP suit is filed and a section 425.16 retort is made looks, colloquially, like this: When the SLAPP suit is initiated, the plaintiff-SLAPPee is effectively coming after the defendant-SLAPPer to get even for some petitioning activity much like the Big Bad Wolf who pounds on the door of some small unsuspecting creature and threatens, “I’ll huff and I’ll puff and I’ll blow your house down!” In return, the

133. Hedenkamp, supra n. 21, at 46 (quoting Navellier v. Sletten, 124 Cal. Rptr. 2d 703, 708 (2002) (quoting § 425.16(b)(1))).
134. See Denison & Wasserman, supra n. 131, at 11.
135. Hedenkamp, supra n. 21, at 46.
136. § 425.17.
138. Braun II, Anti-SLAPP Remedy, supra n. 26, at 732 (“Broadly speaking, it allows a defendant to move to strike a complaint or cause of action arising from protected speech or petitioning activity, without the need for further proceedings unless the plaintiff can show a reasonable probability of succeeding on the merits of the action.” (footnote omitted)).
defendant-SLAPPee files a section 425.16 motion to strike out the suit, valiantly calling out the plaintiff-SLAPPer’s big, bad bluff. After the defendant-SLAPPee files the section 425.16 motion to strike, “the statute shifts the moment for judicial intervention back from the summary judgment stage to the motion to dismiss stage.” Other than certain papers that the defendant-SLAPPee must file with the Judicial Council, the motion itself simply consists of the kind of documents regularly submitted in motion practice: A notice, a memorandum of points and authorities, and accompanying exhibits, if any. Then come the statute’s required set of burdens: Defendant-SLAPPee prevails under the section 425.16 motion unless the plaintiff-SLAPPer has shown a probability of prevailing on the original suit. The way the court determines this, as section 425.16 explains, is by “consider[ing] the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”

Using this motion to strike early, before the initial phase of a case (other than affording the defendant-SLAPPee an ability to get rid of a suit in Pring and Canan’s stage three) amounts to an opportunity for the defendant-SLAPPee to dodge what makes SLAPP suits so chilling against First Amendment activities: “The statute also suspends discovery upon filing of the special motion to strike in order to forestall excessive discovery costs and the intimidating effect of ponderous pretrial discovery requests.” Additionally, “[t]he statute permits successful SLAPPees to recover litigation costs and attorney’s fees upon dismissal.” In fact, with this attorney’s fees provision, the statute reaches beyond reducing prohibitive costs for the defendant-SLAPPee and turns the tables on the plaintiff-SLAPPer by the imposition of all costs associated with prosecuting and defending the illegitimate attempt to suppress the defendant-SLAPPee’s exercise of First Amendment rights. In this instance, where the court grants the defendant-SLAPPee’s motion to strike, it is easy to tell that the

139. Tate, supra n. 14, at 811 (footnote omitted).
140. Denison & Wasserman, supra n. 131, at 26.
141. § 425.16(b)(1).
142. Id. at § 425.16(b)(2).
143. Tate, supra n. 14, at 811.
144. Id.; § 425.16(c) (providing that “a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs”).
145. See § 425.16(c).
defendant-SLAPPee is the prevailing party entitled to attorney’s fees. But as we will see later, the process of determining the prevailing party in a SLAPP suit becomes clouded when the SLAPP suit is dismissed between the time when the section 425.16 motion is filed and when a court’s finding on that motion is made.

All in all, commentators have noted that section 425.16, upon its enactment, was a progressive device to combat the use of ordinary common-law suits to interfere with First Amendment rights—to throw off the wolf’s disguise. Braun has noted that California’s legislative approach was, at the time of its enactment, the most ambitious and progressive in the nation.146 Tate’s view of the statute is similar: “California’s section 425.16 can provide full protection for the ordinary citizen and others who participate in government petitioning.”147 Although the statute has had its critics—such as those that prompted subsequent amendments—Pring and Canan consider that section 425.16 was “the most effective post-filing review [then] developed and sent a clear warning against SLAPPs.”148 Of course, best initial efforts are rarely final. If that dastardly wolf can shift disguises from one fable to another, so can clever litigants and their attorneys. Various methods have been found to circumvent the system and get right back to encroaching upon someone else’s right to petition. Despite the best intentions, section 425.16 has been prone to subversion. As discussed further below, at least two methods exist.

III. CRYING WOLF: WHO ARE THE PREVAILING DEFENDANTS WHEN PLAINTIFF-SLAPPERS VOLUNTARILY DISMISS?

One does not applaud the tenor for clearing his throat.

—La Marquise de Merteuil149

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146. *Braun II, Anti-SLAPP Remedy, supra n. 26, at 732.*
147. *Tate, supra n. 14, at 860.*
149. *Christopher Hampton, Les Liaisons Dangereuses act 1, sc. 7 (Samuel French, Inc. 1985). This play adaptation of the eighteenth-century French epistolary novel *Les Liaisons Dangereuses: Lettres recueillies dans une société, et publiées pour l'instruction de quelques autres* by Pierre Choderlos de Laclos has been the subject of numerous film adaptations, including a 1989 film featuring actors Glenn Close and John Malkovich. *Dangerous Liaisons* (Warner Bros. 1988) (motion picture).*
A. The Coltrain and Liu Continuum

There were several snafus with the statute post-enactment, despite the ambitious scope of the anti-SLAPP motion to strike, with its intent to deflect or strike out the SLAPP suit before it reached Pring and Canan’s stage three. Some of these struggles have been evenly discussed amongst previous commentaries on the statute. One weakness in the statute, however, that has often been discussed in passing but not given full treatment is what happens when the plaintiff-SLAPPeter, who is met with a defendant-SLAPPee’s section 425.16 motion voluntarily dismisses the SLAPP suit—essentially crying wolf and then running away when he is accused of being the Big Bad Wolf? Does the defendant-SLAPPee who is left hanging then automatically become the “prevailing defendant on a special motion to strike” under section 425.16(c), thereby entitled to recover attorney’s fees?150

The statute itself offers no obvious solution. Nowhere within section 425.16 is there a clear-cut, bright-line glimmer of hope from the Legislature to guide courts and parties when faced with this narrow circumstance. Nor is there any indication that the Legislature had even anticipated it.151 Braun has observed that “[o]ne situation which has received a lot of attention in the appellate courts is that where a SLAPP plaintiff, about to lose a motion to strike, voluntarily dismisses the action. Is the SLAPP defendant now a prevailing defendant, entitled to attorney fees under section 425.16(c), or not? The statute does not define ‘prevailing defendant.’”152 Practice guides often only advise on this issue in cursory ways.153 Courts have had to tackle this situation on their own, trying to read between the lines and devising presumptions or mechanisms based on a mixture of judicial common sense and interpretations of policy and legislative intent. As mentioned above, Braun predicts that “[a]s there are no prevailing legislative proposals to settle this question, it will be up to the Supreme Court [of California] to decide which approach will prevail.”154

This scenario was first addressed at the appellate level in 1997 by the Fourth District Court of Appeal, Division Two, in Coltrain v.

150. § 425.16(c).
151. See generally § 425.16.
152. Braun II, Anti-SLAPP Remedy, supra n. 26, at 764 (footnote omitted).
The case involved landlord-tenant law. The Coltrains owned an apartment building (aptly-named “Victory Apartments”) in Riverside, California that some of their tenants alleged was too dangerous to be habitable due to heavy gang, drug, and other criminal activities in and around the building. In a one year stretch, the police visited Victory Apartments on thirty-seven calls, with fourteen of these visits for offenses that were “relatively serious.” The court vividly recounts what happened to some of the tenants individually:

After defendant Theresa Skinner complained to police, she found her tires slashed. Defendant Kim Shewalter’s car was stolen, and her family’s dog was poisoned. One night, when the Shewalters were returning home from a trip to Magic Mountain, one resident of Victory Apartments trained the laser sight of a gun on each family member in turn, while he or his companions taunted them, saying, “[N]eighborhood watch, ha, ha.”

Complaints to the Arthur Coltrain, the building manager, were not answered and soon tenants took action in their own hands and founded a neighborhood watch group with its first meeting attended by a Riverside city council member, the mayor, a city attorney, and police officials.

At the meeting, the city attorney recommended to tenants that a viable way to goad their unwavering landlords was to file for nuisance abatement in small claims court. But the tenants held off and tried first to get the Coltrains to make several repairs to the apartment building. After the Coltrains refused to cooperate and after a gang member was shot to death in front of the apartment, the tenants decided it was time to resort to the legal process and file for nuisance abatement.

Procedurally, before filing the suit, the tenants had to demand payment from the Coltrains. Sixteen tenants sent form demand

156. See id. at 602.
157. Id.
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
163. Id. at 602-03.
letters to the Coltrains, but no responses were received.\textsuperscript{164} Then came the bad press. Shortly after the demand letters were sent, the Riverside Press-Enterprise ran an article discussing criminal activity in the vicinity of the Victory Apartments, reporting the killing of the gang member at the apartment building, and mentioning the environment of the apartment building itself.\textsuperscript{165} Tenants were directly quoted either describing the scenario at Victory Apartments or commenting to support the article.\textsuperscript{166} Shortly afterwards, nine tenants initiated separate and individual small-claims nuisance abatement suits under section 11570 of the California Health & Safety Code,\textsuperscript{167} claiming interference with the use and enjoyment of property, mental suffering, and loss of property value.\textsuperscript{168}

A month after the tenants filed suit in small claims court, the Coltrains responded.\textsuperscript{169} But instead of filing counterclaims against each tenant’s separate action in small claims court, the Coltrains sued all of the nine tenants in superior court for intentional and negligent emotional distress, defamation, and trade libel. And they sought 250,000 dollars in compensatory damages and 1,000,000 dollars in punitives.\textsuperscript{170} In particular, the Coltrains claimed the tenants’ acts that prompted their suit involved the sending of demand letters, any statements the tenants made to the Riverside Press-Enterprise and to the general public, and conspiring “to file unwarranted criminal complaints, unjustified complaints with the city government, and soliciting factually inaccurate newspaper articles.”\textsuperscript{171} The tenants’ separate small-claims cases were transferred to superior court at the Coltrains’ request.\textsuperscript{172} After brief settlement negotiations ended in failure, the tenants filed a special motion to strike under section 425.16. But rather than allow pre-trial review of the tenants’ anti-SLAPP motion, the Coltrains voluntarily dismissed their complaint without

\begin{itemize}
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id. at 603.
\item \textsuperscript{166} Id.; Dan Bernstein, The Boulevard Hanging in the Balance, Press-Enterprise B1 (Nov. 7, 1995).
\item \textsuperscript{167} Coltrain, 77 Cal. Rptr. 2d at 603.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. (internal quotation marks omitted).
\item \textsuperscript{172} Id.
\end{itemize}
prejudice ten days after the motion was filed.\textsuperscript{173} The tenants were still able to pursue their separate small-claims nuisance abatement suits as each of those individual claims were sent back to small claims court.\textsuperscript{174} As for as the Coltrains’ suit, however, all trial and pre-trial proceedings were discontinued.\textsuperscript{175}

One can only speculate that the Coltrains thought a voluntary dismissal would strategically avoid a process likely to tag their superior court suit as a SLAPP. Even so, their troubles were not over. Nearly two months after the Coltrains voluntarily dismissed their superior court claims against their nine tenants, the tenants filed a motion for attorney’s fees under section 425.16(c).\textsuperscript{176} The tenants demanded 75,273.53 dollars and the trial court, after a hearing, granted their motion with a 73,000 dollar award.\textsuperscript{177}

Faced with the issue of whether the tenants could still be considered “prevailing defendants on a special motion to strike” and receive attorney fees under section 425.16 when the anti-SLAPP motion had prompted voluntary dismissal of the alleged SLAPP suit, the trial court noted the absence of recommendations in the statute: “It doesn’t say in th[e] [SLAPP] statute that it must be that the defendant is successful in the hearing on the special motion to strike. . . . It just says they must be the prevailing defendant on a special motion to strike.”\textsuperscript{178} So the trial court imported the definition of “prevailing party” from section 1032 of the California Code of Civil Procedure, a default provision for attorney fees in torts cases, to determine whether tenants here were prevailing defendants under the anti-SLAPP statute,\textsuperscript{179} and found that tenants should recover their attorney’s fees.\textsuperscript{180} The Coltrains appealed.\textsuperscript{181} The tenants cross-appealed.\textsuperscript{182}

The Fourth District Court of Appeal, Division Two, deemed the

\textsuperscript{173} \textit{Id.} at 603-04.
\textsuperscript{174} \textit{Id.} at 604.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} (declining to award tenants their fees under Section 1021.5, but awarding fees under section 425.16(c)).
\textsuperscript{178} \textit{Id.} (quoting trial court record) (internal quotation marks omitted).
\textsuperscript{180} \textit{Coltrain,} 77 Cal. Rptr. 2d at 604.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
crux of the case as "primarily one of statutory interpretation."\textsuperscript{183} The court saw another layer of problems that expanded the quandary: "In cases where there has been a voluntary dismissal, 'prevailing party' has no settled technical meaning."\textsuperscript{184} To exemplify, the court listed several instances where California statutes inconsistently defined prevailing parties.\textsuperscript{185} Essentially the appellate court was unwinding the trial court's reasoning—interjecting a not-so-fast-there response to the trial court's application of section 1032's definition of prevailing parties into section 425.16 and ultimately rejecting it. Offering history as a solution, the court began delineating its method of defining prevailing defendants in voluntary dismissal situations by first examining the reasoning of the California Supreme Court's decision in \textit{International Industries, Inc. v. Olen}.\textsuperscript{186} According to the Court in \textit{Olen}, when the plaintiff voluntarily dismisses before trial,\textsuperscript{187} three possibilities exist: (1) Conferring attorney's fees automatically to the defendant; (2) applying equitable considerations to determine the merits of the dismissed actions to find the prevailing party; or (3) denying attorney's fees automatically.\textsuperscript{188}

\textit{Olen} was a case where the plaintiff-sublessor had sued defendant-sublessee for damages resulting from defendant's breach of the sublease agreement.\textsuperscript{189} After defendant answered the suit, plaintiff voluntarily dismissed, and the defendant subsequently moved for entry of judgment and sought costs and fees.\textsuperscript{180} Plaintiff challenged that motion, claiming that defendant was not the prevailing party and, thus, was not entitled to recover fees and costs.\textsuperscript{181} Because this breach case was compounded procedurally with the voluntary dismissal, the court refused to automatically award either side any attorney's fees, fearing that doing so would set a precedent to wrongly award a defendant if a plaintiff dismissed for reasons other than lack of merit, or would

\begin{itemize}
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textit{Id.} (quoting \textit{Santisas v. Goodin}, 951 P.2d 399, 405 (Cal. 1998)).
  \item \textsuperscript{185} \textit{See id.}
  \item \textsuperscript{186} \textit{Int'l Indus., Inc. v. Olen}, 577 P.2d 1031 (Cal. 1978), overruled on other grounds as recognized by \textit{Ferko's Enterprises v. RRNS Enterprises}, 5 Cal. Rptr. 2d 470, 472 (Cal. App. 5th Dist. 1992)).
  \item \textsuperscript{187} \textit{Id.} at 1032.
  \item \textsuperscript{188} \textit{Id.} at 1035.
  \item \textsuperscript{189} \textit{Id.} at 1032.
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.}
\end{itemize}
encourage abuse by a plaintiff against an insolvent defendant.192

In Coltrain, the Fourth District Court of Appeal honed in on the way the California Supreme Court in Olen rejected two of the above-listed options.193 The first option of awarding fees automatically to defendant was rejected since “‘although a plaintiff may voluntarily dismiss before trial because he learns that his action is without merit, obviously other reasons may exist causing him to terminate the action’”194—such as plaintiff obtaining all relief sought or discovering defendant’s insolvency.195 And since “‘permitting recovery of attorney fees by defendant in all cases of voluntary dismissal before trial would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for those fees.’”196 The Olen court rejected the second option of applying equitable considerations because doing so “‘would require the court to try the entire case.’”197 These two rejections left only one option remaining—automatically denying attorney’s fees—which is essentially what the Olen court chose.198

Applying Olen, the Coltrain court laid the foundation of what happens when a plaintiff-SLAPPer voluntarily dismisses his suit before adjudication of the defendant-SLAPPee’s anti-SLAPP motion to strike: The defendant-SLAPPee is not automatically awarded attorney’s fees. The Coltrain court, however, was not done with its history lesson. The court explained that subsequently in Santisas v. Goodin,199 “the [California] Supreme Court retreated from its position in Olen,”200 offering a less rigid approach than leaving defendants without recourse after being dismissed by their plaintiffs. Rather, the Santisas Court saw that “‘the practical difficulties associated with contractual attorney fee cost determinations in voluntary pretrial dismissal cases are not as great as suggested by the majority in Olen.’”201 Santisas involved the

192. Id. at 1034-35.
194. Id. (quoting Olen, 577 P.2d at 1034).
195. Id.
196. Id. (quoting Olen, 577 P.2d at 1035).
197. Id.
198. Id.
200. Coltrain, 77 Cal. Rptr. 2d at 605.
201. Id. (quoting Santisas, 951 P.2d at 413).
breach of a real estate sales agreement where the buyers sued the seller-broker for alleged defects in the home.\textsuperscript{202} The contract stated that in the event of litigation the prevailing party would obtain attorney’s fees.\textsuperscript{203} Accordingly, after the plaintiff’s voluntary dismissal with prejudice at the close of discovery, defendants sought attorney’s fees.\textsuperscript{204} The California Supreme Court awarded the defendant’s fees after holding that under the controlling statute, “Code of Civil Procedure section 1032 defines ‘prevailing party’ as including, among others, ‘a defendant in whose favor a dismissal is entered.’”\textsuperscript{205} And, that plaintiffs had not qualified to be prevailing parties since they did not obtain their litigation objectives when they dismissed their suit.\textsuperscript{206}

The \textit{Coltrain} court interpreted \textit{Santisas} as a revision of \textit{Olen}. So although “‘it seems inaccurate to characterize the defendant as the “prevailing party” if the plaintiff dismissed the action only after obtaining, by means of settlement or otherwise, all or most of the requested relief, or if the plaintiff dismissed for reasons, such as the defendant’s insolvency’ “,\textsuperscript{207} and although “‘scarcely judicial resources should not be used to try the merits of voluntarily dismissed actions merely to determine which party would or should have prevailed had the action not been dismissed’ “,\textsuperscript{208} \textit{Coltrain} regarded the \textit{Olen} holding as “‘an inflexible rule denying contractual attorney fees as costs in all voluntary pretrial dismissal cases.’”\textsuperscript{209} Instead, \textit{Coltrain} adopted the \textit{Santisas} approach, which held that “‘a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise.’”\textsuperscript{210} In this way, the \textit{Coltrain} court synthesized the \textit{Olen} and \textit{Santisas} opinions to fashion a rule: In a case where the plaintiff-SLAPPer has voluntarily dismissed its suit against a defendant-SLAPPee who has filed a motion to strike, the defendant-SLAPPee does not automatically get attorney’s fees but the defendant-SLAPPee

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\textsuperscript{202} Santisas, 951 P.2d at 401-02.
\textsuperscript{203} Id.
\textsuperscript{204} Id. at 402.
\textsuperscript{205} Id. at 403 (citation omitted).
\textsuperscript{206} Id. at 405-06.
\textsuperscript{207} Coltrain, 77 Cal. Rptr. 2d at 606 (quoting Santisas, 951 P.2d at 414).
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Id. (quoting Santisas, 951 P.2d at 414).
\end{flushleft}
may recover fees under a “pragmatic definition” of prevailing defendant based on whether the parties had obtained their litigation objectives.

In *Santisas*, the Court exemplified this pragmatic approach:

Plaintiffs’ objective in bringing this litigation was to obtain the relief requested in the complaint. The objective of the seller defendants in this litigation was to prevent plaintiffs from obtaining that relief. Because the litigation terminated in voluntary dismissal without prejudice, plaintiffs did not obtain by judgment any of the relief they requested, nor does it appear that plaintiffs obtained this relief by another means, such as settlement. Therefore, plaintiffs failed in their litigation objective and the seller defendants succeeded in theirs. 211

How did the *Coltrain* court use this rule to apply to the tenants and their quest for attorney’s fees? The *Coltrain* court found that “when the plaintiff dismisses the complaint, it voluntarily cedes to the defendant all the relief that trial court could have granted if the matter had been pressed to a ruling” 212 and SLAPP policies did not “call for any different result.” 213 The court’s feeling was that “[a]t that point, the plaintiff would have accomplished all the wrongdoing that triggers the defendant’s eligibility for attorney’s fees, but the defendant would be cheated of redress.” 214

But *Coltrain* also contended that the policies behind SLAPP legislation “likewise do not support defendants’ contention that a voluntary dismissal while a special motion to strike is pending should automatically entitle a defendant to attorney’s fees.” 215 Hence, the *Coltrain* court held “that where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under [section 425.16(c)].” 216 A court determining this should consider that “the critical issue is which party realized its objectives in the litigation.” 217

211. *Santisas*, 951 P.2d at 405.
212. *Coltrain*, 77 Cal. Rptr. 2d at 608.
213. Id.
214. Id.
215. Id.
216. Id.
217. Id.
The *Coltrain* court concluded by defining the criterion:

> Since the defendant’s goal is to make the plaintiff go away with its
tail between its legs, ordinarily the prevailing party will be the
defendant. The plaintiff, however, may try to show it actually
dismissed because it had substantially achieved its goals through a
settlement or other means, because the defendant was insolvent, or
for other reasons unrelated to the probability of success on the
merits.\(^\text{218}\)

In this way, the *Coltrain* court resolved what it had identified as a
“statutory interpretation” problem within section 425.16 by untangling
the trial court’s application of the section 1032 standard and replacing
it with a judicial solution developed by the California Supreme Court
in a relatively similar procedural context.

By adopting the California Supreme Court’s “pragmatic” test, the
*Coltrain* court mandated a presumption that the defendant is the
prevailing party when the plaintiff voluntarily dismisses its cause of
action after defendant has filed a motion to strike under section 425.16.
The plaintiff can rebut by showing it dismissed because it had
substantially achieved its litigation goals. So what did this mean for
the Coltrains and their tenants at Victory Apartments? The court found
that “[u]pon the Coltrains’ voluntary dismissal, a presumption arose
that [tenants] were the prevailing parties.”\(^\text{219}\) The court found no proof
to counter this presumption:

> The Coltrains claim they dismissed because they had run out of
money. However, they introduce no evidence to support this
claim. In any event, this reason, if proved, would only confirm
that defendants were the prevailing parties on the motion to strike.
The Coltrains are essentially admitting they filed an action they
could not afford to win. Indeed, this arguably proves it was a pure
SLAPP suit.\(^\text{220}\)

In effect, the landlords were liable to tenants for attorney’s fees
because the court of appeal found no reason to believe the landlords
reached their litigation objectives when they dismissed their suit.

\(^{218}\) Id.
\(^{219}\) Id.
\(^{220}\) Id.
To the tenants, Victory Apartments must now have seemed presciently named. One tenant expressed that “[i]t was never about the money.” With that, the court of appeal sent the Coltrains away with their tails between their legs. On its face, the Coltrain approach utilized basic judicial techniques to create a mechanism in a situation not anticipated by statute: The court looked to outside definitions of “prevailing party” in other voluntary dismissal cases for advice, analogy, and import. The definition the Coltrain court used was seemingly authoritative as it came from two California Supreme Court cases which had extensively examined the general principles behind prevailing party determinations. But as we shall see, such apparently well-founded judicial footwork was not as firmly grounded as it seemed.

The Coltrain court’s “pragmatic” or “prevailing party” approach was only settled for a year when another California appellate court, the Second District, Division Three, revisited the Coltrain scenario in Moore v. Liu and offered a different judicial solution. Originally, the dispute in Liu was merely a personal injury case initiated against Liu by a patient who had sought treatment at Liu’s alternative medical facility, Master Hong Alternative Healing. The dispute grew more complex once Liu, as the defendant, submitted a third-party cross-complaint “against Moore for breach of fiduciary duty, intentional and negligent interference with prospective economic advantage, apportionment of fault, indemnity, and declaratory relief.” Moore, who had worked as a processor of bills for a medical practice that shared office space with Liu’s facility, claimed she was dragged into the suit by Liu because, while working in the same facility, she had reported Liu to governmental agencies for, among other things, “holding himself out as a medical doctor when he was not licensed as such.” Amid such contentions, Moore moved to strike under section 425.16. Rather than opposing Moore’s motion, however, Liu

223. Id. at 809-10.
224. Id. at 810.
225. Id.
226. Id.
227. Id.
voluntarily dismissed his cross-complaint against her voluntarily without prejudice. Like the tenants in Coltrain, Moore moved for attorney’s fees and costs under section 425.16(c). But this time, the result was different. Unlike the outcome of Coltrain at the trial court level, the trial court here denied Moore’s request for attorney’s fees and costs, reasoning that Liu’s dismissal extinguished the viability of Moore’s motion to strike and so Moore did not prevail on that motion. Instead, the trial court felt that “if Moore wanted attorney’s fees, she should have made a motion for them under section 128.7,” which is a statute protecting against frivolous litigation tactics. This time it was the defendant-SLAPPpee Moore who appealed.

In its opinion, the Second District Court of Appeal opened by disagreeing with the trial court’s view that section 128.7 would have been an appropriate way for Moore to get her attorney’s fees and costs for several reasons. First, Liu had impunity under the statute for having dismissed Moore from the suit within section 128.7’s safe harbor provisions so section 128.7 would not have allowed Moore to get her fees. Second, “section 425.16 requires the court to award fees and costs to a defendant who prevails on a motion to strike” whereas section 128.7 merely “gives the court discretion as to what, if any, sanction it will impose on a litigant.” The court of appeal found that by forcing Moore to use section 128.7, the trial court had “work[ed] a nullification of an important provision of section 425.16.” As a result, the appellate court fashioned another remedy, providing “that a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs under subdivision (c) of that section.”

228. Id.
229. Id.
230. Id.
231. Id. (footnote omitted); see also Cal. Code Civ. Proc. Ann. § 128.7 (West 2006).
232. Id.
233. Id. at 811.
234. Id.
235. Id.
236. Id.
237. Id.
238. Id.
At first, this holding seems to echo the Coltrai court’s determination that after a plaintiff-SLAPPer has voluntarily dismissed, the trial court has discretion to find that the defendant-SLAPPee had prevailed for purposes of awarding fees. But the parallels end there. Liu acknowledged that the Coltrai court held that “the critical issue” in making a prevailing defendant determination is finding “which party realized its objectives in the litigation.” But Liu criticized this reasoning because “if the plaintiff in a SLAPP suit ‘substantially achieved its goals through a settlement or other means,’ then the plaintiff succeeded in ‘chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances’ . . . since that is the purpose of a SLAPP suit.” In other words, a plaintiff-SLAPPer’s reason for engaging in a SLAPP suit will always be to inhibit or punish another for the exercises of First Amendment activity, so if a plaintiff-SLAPPer voluntarily dismisses the SLAPP suit having chilled, deterred, or even punished the other side, his litigation goals may well have been achieved.

Also, Liu found irrelevant the notion in Coltrai that the plaintiff in an alleged SLAPP suit might have voluntarily dismissed legitimately because he found his defendant was insolvent since “in a SLAPP, it is quite possible that the plaintiff is not worried the defendant might be insolvent, since the focus of the SLAPP is to chill speech and/or the petitioning of government, not necessarily to line the plaintiff’s pockets with the defendant’s money.” In this way, Liu framed its reasoning within the context of the parties’ goals within a SLAPP suit and not based on generalized litigation goals. Keeping a narrower focus on the context at issue, the Liu court set out its own solution by honing in on the fee provisions of section 425.16 precisely, noting that “section 425.16 specifically provides for attorney’s fees and costs (1) to a defendant, if the defendant prevails on the motion to strike, and (2) to a plaintiff, if it can be said that the defendant’s motion to strike ‘is

239. Coltrai, 77 Cal. Rptr. 2d 600, 608 (Cal. App. 4th Dist. Div. 2 1998) (“We conclude that where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under Code of Civil Procedure section 425.16, subdivision (c).”).

240. Liu, 81 Cal.Rptr. 2d at 812 (quoting Coltrai, 77 Rptr. 2d at 608).

241. Id.

242. Id. (quoting Cal. Civ. Code Ann. § 425.16(a) (West 2004)).

243. Id.
frivolous or is solely intended to cause unnecessary delay.' "244 With that said, Liu held that "[u]nder the terms of subdivision (c), the critical issue is the merits of the defendant’s motion to strike."245 Amusingly, the Liu court chose to phrase its own key criteria for determining a prevailing SLAPP defendant in voluntary dismissal situations by mirroring Coltrain’s use of the phrase, “the critical issue,” and then, like a gavel, punctuating its rejection of Coltrain with weight and finality by declaring that “[t]his is as it should be."246 Consequently, where a plaintiff in an alleged SLAPP suit voluntarily dismisses his complaint against SLAPPpec defendant after a section 425.16 special motion to strike has been filed, “[a]n adjudication in favor of the defendant on the merits of the defendant’s motion to strike provides both financial relief in the form of fees and costs, as well as a vindication of society’s constitutional interests.”247 This is, of course, so long as the defendant has moved for attorney’s fees under the statute.248 Unlike Coltrain, where the determination would hinge on which party substantially achieved its litigation objectives, Liu urges that “[a]n award of these expenses under section 425.16 is only justified when a defendant demonstrates that plaintiff’s action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success.”249 The Liu court clearly states that “[u]ntil a court determines that these circumstances exist, a moving defendant is not entitled to its fees and costs under section 425.16."250 Thus the court must decide whether a SLAPP suit had been filed by asking the same questions the court would have asked had the plaintiff-SLAPPer never dismissed and the anti-SLAPP motion had gone to adjudication.

Though the Liu court never actually determined whether Liu had hit Moore with a SLAPP suit so that Moore could be granted her

244. Id. (quoting § 425.16(c)).
245. Id.
246. Id.
247. Id.
248. Id. ("the trial court’s adjudication of the merits of a defendant’s motion to strike is an essential predicate to ruling on the defendant’s request for an award of fees and costs.").
249. Id. (referencing Church of Scientology v. Wollersheim, 49 Cal. Rptr. 2d 620, 635-36 (Cal. App. 2d Dist. Div. 3 1996), overruled on other grounds, Equilion Enterprises v. Consumer Cause, Inc., 52 P.3d 685, 688 (Cal. 2002)).
250. Id.
motion for her attorney’s fees and costs, the lower courts were directed to follow the Liu guidelines for evaluating the prevailing defendant question in like circumstances. For as the court urged:

If such a judicial determination were not first required, and a fair procedural opportunity to obtain it allowed, then a plaintiff’s voluntary dismissal of the action could have the effect of (1) depriving a true SLAPP defendant of statutorily authorized fees or (2) entitling a defendant to such relief in a non-SLAPP action which was dismissed by the plaintiff for entirely legitimate reasons.

Based on that, the Court of Appeal reversed the judgment below denying Moore her attorney’s fees and remanded the case “for further proceedings consistent with the views expressed herein.”

Since the Coltrain and Liu decisions, the voluntary dismissal scenarios in SLAPP suits have come back to haunt courts in variations on a theme. But these variations have focused less on the standard used to determine prevailing defendants for awarding attorney’s fees: Coltrain’s prevailing-party approach or Liu’s more merit-based method. Rather, both published and unpublished cases have usually pressed heavily upon the effect of voluntary dismissals and whether courts can take up fee determinations under section 425.16. Among the most prominent of these cases is S.B. Beach Properties v. Berti, where the California Supreme Court decided that—unlike a Coltrain or Liu situation where the defendant filed a section 425.16 motion to strike before plaintiff voluntarily dismissed the complaint—a defendant

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251. See id at 813-14.
252. Id. at 812.
253. Id. at 813-14. Incidentally, the Court of Appeal also awarded Moore attorney’s fees incurred for taking her plight on appeal in case she won on remand: “Costs on appeal to Moore.” Id. at 814. The court had also discussed Moore’s possible entitlement to attorney’s fees by noting:

Section 425.16 does not prohibit an award of appellate attorney’s fees. However, it specifically states that a defendant is only entitled to attorney’s fees if he or she prevails on a motion to strike the complaint. Therefore, if Moore prevails on her motion to strike, upon our remand of this case for hearing on that motion, the trial court shall award reasonable attorney’s fees to her for her trial court efforts (both before and after this appeal), and her efforts in this appeal.

Id. at 813.
cannot file a section 425.16 motion to strike and expect to be a “prevailing defendant” for attorney’s fees after the plaintiff has voluntarily dismissed his or her complaint. The reasoning was simply based on civil procedure principles: A court does not have jurisdiction to strike a complaint after the plaintiff has already preemptively dismissed it. Other cases have dealt with similar technicalities surrounding voluntary dismissals in SLAPP suits after a section 425.16 motion has been filed. For instance, in Kyle v. Carmon, the Court of Appeal, Third District reasoned that after an anti-SLAPP motion has been filed, a plaintiff-SLAPPPer can still voluntarily dismiss his SLAPP suit even if the trial court has already conducted the anti-SLAPP motion hearing, so long as the trial court has not yet rendered its finding. The Court of Appeal, Fourth District, in a 2003 unpublished opinion, Picco v. Marmor concluded that after the voluntary dismissal of an alleged SLAPP suit, the defendant who filed an anti-SLAPP motion must request attorney’s fees under section 425.16 in order to guarantee a trial court review of the merits of the anti-SLAPP motion for a fee award.

Cases have also dealt with the types of dismissals that qualify for fee hearings. In Pfeiffer Venice Properties v. Bernard the Second District Court of Appeal held that a defendant-SLAPPee who had filed an anti-SLAPP motion to strike could still get a fee hearing under section 425.16 even though the alleged SLAPP suit was dismissed involuntarily. The Fourth District Court of Appeal, Division One held in Wilkerson v. Sullivan that the SLAPP defendant was still entitled to a fee hearing even though the SLAPP plaintiff voluntarily dismissed his suit when the suit was pending on appeal.

255. Id. at 718.
256. Id. at 716 (“Once plaintiffs dismissed their action no lawsuit existed for defendants to move against pursuant to section 425.16, subdivision (c).”)
258. Id. at 308.
260. Id. at *9.
262. Id. at 650.
264. Id. at 279. The court noted that voluntary dismissal of an appeal from a trial
have also been moments of baffling conundrums, such as when Division Four of the First District Court of Appeal, in *Ampex Corp. v. Bettini*,265 was faced with a situation where the defendant filed the section 425.16 motion on the same day that the plaintiff voluntarily dismissed the complaint and no clear indication existed to show which one preceded the other.266 In that case, the defendant filed for attorney’s fees under section 425.16.267 But because *S.B. Beach Properties* had held that the defendant was only entitled to a fee determination if the anti-SLAPP motion was filed after dismissal, and absent a clear indication of the timing, the *Ampex* court was faced with a simultaneous file-dismissal or dismissal-file situation (not unlike those confounded mailbox rule problems faced by 1L contracts students).268 Luckily, on appeal, the court was able to avoid this
court’s finding of a SLAPP suit

[S]uits on different footing than the voluntary dismissal of an action with an anti-SLAPP motion pending. . . . The dismissal of an appeal from the trial court’s determination leaves intact the judicial finding that the action was a SLAPP suit . . . which in turn entitled the defendant to recover fees under section 425.16.


266. *Id.* at *1*. The court further illustrates the confusion in footnote 5 of the opinion. *See id.* at *1* n. 3.

267. *Id.* at *2* (footnote omitted).

268. *Id.* at *6* ("Ampex claims that a court may only consider the merits of a special motion to strike where the dismissal was filed while the motion to strike was pending, and that the motion here cannot be considered as ‘pending’ where the motion to strike was filed on the same day as the dismissal, and only after Ampex had announced its intention to dismiss the case.").

As for revisiting those mailbox rule problems in Contracts, here’s an amusing example by Professors David Epstein, Bruce Markell, and Lawrence Ponoroff from their casebook:

Suppose that, on Day 1, Epstein sends Markell an offer by mail. The offer does not contain any specification relating to manner of acceptance. On Day 2, Epstein changes his mind and mails a revocation of the offer. On Day 3, Markell receives the offer and immediately mails an acceptance. On Day 5, the revocation arrives and on Day 6 the acceptance arrives.

(a) Has a contract been formed? If so, when?

(b) Does it change your answer if, on Day 2, right after dropping his letter in the mail, Epstein clutches his chest and dies right there at the mailbox?

(c) How about if Epstein dies on Day 3? Is there anything else you want to
conundrum by not awarding fees since the trial court already denied attorney’s fees to the defendant because it found that plaintiff would have prevailed in its suit despite dismissal. 269

Courts in these dismissal cases have rarely ventured into the discussion of how to determine a “prevailing defendant on a special motion to strike” after the filing of the section 425.16 motion and dismissal of the alleged SLAPP suit—the discourse at the core of both Coltrain and Liu. Some cases dodge the opportunity to address the issue by happenstance. Wilkerson, for instance, avoided it because the case was really a more straightforward use of the statute, involving a defendant’s ability to get attorney’s fees when the plaintiff dismissed the suit on appeal after a trial court had already rendered its finding for the existence of a SLAPP suit. 270 Going back to S.B. Beach Properties, the California Supreme Court dodged a similar opportunity because the scenario of that case involved a voluntary dismissal of plaintiff’s complaint before the defendant filed an anti-SLAPP motion to strike; thus, the Court was only required to recognize the trial court’s jurisdiction post-dismissal and whether a section 425.16 motion hearing could even occur. 271 The court in Picco was limited to determining only whether the trial court had erred when it failed to automatically rule on the merits of defendants’ anti-SLAPP motion after plaintiffs voluntarily dismissed the complaint. 272 In Cho v. Chung, 273 Division Two of the Second District Court of Appeal was faced with the question of whether a defendant who was dismissed

know?

(d) How does it affect your answer if, before Epstein dies on Day 3, Markell mails a rejection and then changes his mind and mails an acceptance?

(e) Assume the same facts as part (d), except that Epstein doesn’t die at all.

In analyzing whether a contract is formed, does it matter which communication arrives first?

David G. Epstein, Bruce A. Markell, & Lawrence Ponoroff, Making and Doing Deals: Contracts in Context 127 (LexisNexis 2002) (citation omitted).

269. Id. ("We need not venture into the question of whether a motion to strike can be said to be pending in these circumstances, because we conclude that, in any case, the trial court correctly concluded Ampex has raised a probability of success on the merits for purposes of section 425.16.").


from a suit after filing an anti-SLAPP motion could recover attorney’s fees when, prior to the dismissal, the trial court had already granted attorney’s fees to a co-defendant based on their anti-SLAPP motion.\textsuperscript{274} The answer in that case was yes.\textsuperscript{275}

Other cases simply ignore the opportunity to address the issue. A blatant example of this occurred in \textit{Kyle}, where the Court of Appeal, Third District decided that a plaintiff could still voluntarily dismiss his suit after a hearing on defendant’s anti-SLAPP motion was held but before a ruling was made.\textsuperscript{276} The trial court had granted defendant’s anti-SLAPP motion to strike and for fees despite plaintiff’s dismissal.\textsuperscript{277} On appeal, the court reversed the lower decision based on the technicality, but awarded defendant the attorney’s fees it had sought under section 425.16.\textsuperscript{278} This was apparently done because, at that point, the case technically became one like \textit{Coltrain} or \textit{Liu}, where a defendant files an anti-SLAPP motion and the plaintiff then voluntarily dismisses his suit, allowing defendant to request attorney’s fees if a trial court subsequently found that defendant was a “prevailing defendant on a special motion to strike.” This is suggested in part IV of the opinion where the court “shall now consider and affirm the trial court’s award of attorney’s fees and costs to defendant.”\textsuperscript{279} The court discussed at length both \textit{Coltrain} and \textit{Liu}’s approaches to this scenario, citing both \textit{Coltrain}’s prevailing parties standard and \textit{Liu}’s merit-based approach.\textsuperscript{280} But instead of evaluating the virtues of either approach, the court quickly proclaimed that it was awarding attorney’s fees to defendant because “the trial court conducted a hearing and adjudicated the merits of the section 425.16 motion. . . . On appeal, plaintiff does not propose any conceivable circumstance that would justify denial of a fee and costs award to defendant.”\textsuperscript{281} The court merely adopted the trial court’s finding because “[t]he court order reflects [that the trial] court determined the complaint arose from the exercise of free speech

\begin{footnotesize}
\begin{itemize}
\item 274. See id. at **3-4.
\item 275. Id.
\item 277. Id. at 305-06.
\item 278. Id. at 305.
\item 279. Id. at 313.
\item 280. See id. at 313-14.
\item 281. Id.
\end{itemize}
\end{footnotesize}
rights and it was not probable that plaintiff would prevail.”

The Court of Appeals did not overtly indicate its preference for either *Liu* or *Coltrain*, but a preference for *Liu* can be gleaned based on its reliance on the trial court's finding of a SLAPP and listing of the shifting burdens that are part of *Liu*'s merit-based approach. Otherwise, the court did not address the pros and cons of either method nor find an obligation to do so. In fact, after discussing how the *Coltrain* court reached its decision to award attorney’s fees under section 425.16 based on litigation objectives, the *Kyle* court expressed in an accompanying footnote that it had “no need to express [its] opinion on this point.”

When cases dealing with voluntary dismissal move past the technicalities of the dismissal and delve into the approach to decide “prevailing defendant on a special motion to strike,” most cases have followed *Liu*. *Pfeiffer Venice Properties* offers one good example. After finding that an involuntary dismissal can also allow a trial court to determine defendant’s previously filed anti-SLAPP motion to strike, the court weighed the approaches of both *Coltrain* and *Liu*:

*Liu* disagreed with *Coltrain* on the extent to which a plaintiff’s reasons for voluntarily dismissing the action bear of the issue of attorney fees. The *Liu* court pointed out that, because the purpose of a SLAPP suit is not to succeed on the merits but to silence the defendants, settlement of such an action would, in some instances, merely mean that the plaintiff had succeeded in chilling the exercise of constitutional rights.

Moreover, the court observed that under *Liu* “'[a]n award of these expenses under section 425.16 is only justified when a defendant demonstrates that plaintiff’s action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success.’” Accordingly, as the *Pfeiffer Venice Properties* court “read the *Liu* decision, because a defendant who has been sued in violation of his or her free speech rights is entitled to an award of attorney fees, the trial court must, upon defendant’s motion

282. *Id.*
283. *Id.* at 314 n. 3.
285. *Id.* (quoting *Liu*, at 81 Cal. Rptr. 2d at 812).
for a fee award, rule on the merits of the SLAPP motion even if the matter has been dismissed prior to the hearing on that motion."286 As a result, Pfeiffer Venice Properties held that, in order to award attorney’s fees under section 425.16, a court’s determination “is wholly dependent upon a determination of the merits of the SLAPP motion.”287 The court apparently used the inclusive word wholly to create broad uniformity in applying the standards under section 425.16—that a merit-based approach to determining prevailing defendant on an anti-SLAPP motion should be used in all situations, even ones not anticipated by section 425.16, such as where a complaint has been dismissed following an attack via a section 425.16 special motion to strike.

The Pfeiffer Venice court explicitly rejected Coltrain by adopting Liu’s merit-based approach:

[T]he statement in Coltrain v. Shevalter . . . that “the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under Code of Civil Procedure section 425.16, subdivision (c),” is not accurate. Rather, the trial court is required to rule on the merits of the motion, and to award attorney fees “when a defendant demonstrates that plaintiff’s action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success.”288

Pfeiffer Venice Properties alluded to Liu’s exegetical adherence to the black letter of section 425.16 when it added: “As the Liu court stated, any other rule would deprive the true SLAPP defendant of statutorily authorized fees, frustrating the purpose of the statute’s remedial provisions.”289 In no less clear a way could the court in Pfeiffer Venice Properties have shown its approval of Moore v. Liu.

Though the opinion was unpublished, the Court of Appeal, First District in Ampex Corp. v. Bettini was no less fervent in also siding

286. Id.
287. Id.
289. Id. at 653 (citing Liu, 81 Cal. Rptr. 2d at 812).
with Liu. The Ampex court proceeded to investigate the approaches to determining prevailing defendants when it discussed the ramifications of a SLAPP suit dismissal in response to plaintiff Ampex’s contention that the trial court had lacked jurisdiction to make a prevailing defendant determination in a section 425.16 motion to strike once Ampex’s complaint had been dismissed. The court offered case law consensus for rejecting Ampex’s argument that trial courts do not have jurisdiction to determine an anti-SLAPP motion once the suit has been dismissed—that case after case showed that a determination of attorney’s fees to prevailing defendants was one way trial courts retained some jurisdiction over the suit. In a seemingly natural transition, the Ampex court then moved on to discussing the approaches trial courts could take in determining prevailing defendants on an anti-SLAPP motion after the alleged SLAPP suit was dismissed, starting with Coltrain:

> While there is no dispute that courts retain jurisdiction to address defendants’ requests for attorney fees after the action has been dismissed, courts have differed as to the proper standard to apply in deciding whether to award attorney fees. In Coltrain, the court applied the “prevailing party” test: “In making [the] determination [whether the defendant is the prevailing party for purposes of attorney fees under section 425.16, subdivision (c)], the critical issue is which party realized its objectives in the litigation. Since the defendant’s goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits.”

Then it was quick to note contrary cases, including Liu and Pfeiffer Venice Properties:

Subsequent cases, however, have avoided the difficult task of

291. Id. ("Courts have consistently concluded, however, that even after a voluntary dismissal, a court may award attorney’s fees under section 425.16.").
292. Id. (quoting Coltrain, 77 Cal. Rptr. 2d at 608 (emphasis supplied by Ampex)).
trying to ascertain the plaintiff’s reasons for dismissing the action, and have focused, instead, on whether the defendant has demonstrated that its section 425.16 motion is meritorious. In *Liu*, . . . the court concluded it was the trial court’s duty to adjudicate the merits of the motion to strike, describing that the determination as “an essential predicate to ruling on the defendant’s request for an award of fees and costs. An award of these expenses under section 425.16 is only justified when a defendant demonstrates that plaintiff’s action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success. . . . Unless a court determines that these circumstances exist, a moving defendant is not entitled to its fees and costs under section 425.16.” The court in *Pfeiffer Venice Properties* followed *Liu*.

Finally, after much pondering and discussion, the First District Court of Appeal, Division Four pronounced its own take on the approaches:

> We agree that even after an action is dismissed, a trial court may award attorney fees under section 425.16. Such an award is based not on a ‘prevailing party’ analysis, but on a determination that the defendant’s motion under section 425.16, subdivision (b) should be granted, i.e., that the defendant has shown the complaint is within the purview of section 425.16, and the plaintiff has failed to meet his or her burden to show a probability of success in the action.”

As with *Pfeiffer Venice Properties*, the *Ampec* court stayed in line with *Liu* by applying an approach that incorporates the statutorily-mandated burdens.

Although the courts favor *Liu*—both as to whether the obligation to review a pending anti-SLAPP motion after dismissal of the alleged SLAPP suit is discretionary or mandatory, and as to whether the *Coltrain* or *Liu* approach should be taken—no definitive resolution of the split between the two cases has occurred. The California Supreme Court has not yet considered the problem, as mentioned above, because it has only been faced with the near-miss scenario in *S.B. Beach Properties* which did not require the Court to weigh *Coltrain* against

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293. *Id.* at *6* (quoting *Liu*, 81 Cal. Rptr. 2d at 812) (citations omitted).

294. *Id.*
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Liu. The California State Legislature has made no concerted attempt to amend section 425.16 to offer a solution.

Without authoritative guidance uncertainty remains. Lower courts are left to decide which path to take when faced with dismissal of a complaint that leaves an anti-SLAPP motion hanging. Conceivably, a court could resolve the issue with a completely new approach, or fashion a hybrid method by combining Coltrain and Liu with statutory interpretation and ingenuity. These possibilities leave an undesirable malleability within California’s attempt to protect the constitutional right to petition. As Edward Coke, who defended the right to petition, so famously opined, “the knowe certaintie of the law is the safetie of all.” A cry is out there in the forest among wolves and sheep, beckoning for some sort of sharp, obsidian clarity. We should endeavor to answer that cry.

B. NOT OUT OF THE WOODS YET: CRITICAL RECEPTION OF COLTRAIN AND LIU

Among commentators and scholars, disfavor with Coltrain mirrors the judicial blacklisting of that opinion by subsequent California appeal court decisions, published and unpublished. The fifth edition of Witkin’s California Procedure, for instance, notes harshly that “[t]he reasoning in Coltrain is flawed. If a SLAPP plaintiff ‘substantially achieved its goals through a settlement or other means,’ then the plaintiff succeeded in ‘chill[ing] the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances’ under [section] 425.16(a), because that is the purpose of a SLAPP suit.” This sentiment echoes that of Liu. In fact, Witkin relies heavily on Liu in the relevant article section and the summary adopts Liu’s rationale for a merit-based approach to defining prevailing

296. The California Anti-SLAPP Project tracks the history and notes current pending initiatives within California’s anti-SLAPP legislation. Currently, the group has not identified any pending movement regarding section 425.16 in this particular matter. See Cal. Anti-SLAPP Project, Cal. Statutes, supra n. 20.
299. Id. at §§ 1042(1)-(2), (4).
defendant in dismissal cases:

Under the terms of [section] 425.16(c), the critical issue is the merits of the defendant’s motion to strike. 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. An adjudication in favor of the defendant on the merits of the motion to strike provides both financial relief and a vindication of society’s constitutional interests. If a judicial determination of the merits of the motion were not first required, a plaintiff’s voluntary dismissal of the action could have the effect of (1) depriving a true SLAPP defendant of statutorily authorized fees, or (2) entitling a defendant to that relief in a non-SLAPP action that was dismissed by the plaintiff for entirely legitimate reasons. In both situations, the statute’s remedial purposes would be frustrated.\footnote{300}

Tate takes on the issue by sticking with Liu when it comes to whether trial courts have discretion, or a mandatory obligation, to determine the prevailing defendant on an anti-SLAPP motion when a voluntary dismissal occurs:

A SLAPPer can be considered the prevailing party and entitled to attorney’s fees even where a SLAPPer voluntarily dismissed the claims before the hearing on the SLAPPer’s motion to strike. However, a SLAPPer’s voluntary dismissal after the filing of a section 425.16 motion neither automatically mandates an award of attorney’s fees, nor automatically precludes it. There must be a hearing to determine who is the prevailing party.\footnote{301}

The critical consensus seems to sharply side with Liu.

Likewise, Denison and Judge Wasserman, authors of a current practice guide for practitioners dealing with California anti-SLAPP procedures, similarly endorse Liu, advising that “[i]f plaintiff dismisses the challenged cause of action after the [anti-SLAPP motion] has been filed, but before it has been heard or a ruling has been made, defendant . . . [¶] a. May still file a motion for attorney fees; and [¶] b. Is entitled

\footnote{300.  Id. at § 1042(1)(c) (referencing Moore v. Liu, 81 Cal. Rptr. 2d 807, 812 (Cal. App. 2d Dist. Div. 3 1999)).}

\footnote{301.  Tate, supra n. 14, at 844 (citation omitted).}
to a ruling on that motion."  Although the practice guide does not cite Moore v. Liu explicitly, it does apply the essential holding of Liu, which had used that same word, "entitled," to recognize the trial court’s mandatory obligation to review a defendant-SLAPPee’s anti-SLAPP motion when plaintiff’s suit was voluntarily dismissed and the defendant-SLAPPee had requested a fee award: “We hold that a defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant’s motion for attorney’s fees and costs under [section 425.16(c)].”  Coltrain, on the other hand, had not conferred any entitlement upon a dismissed defendant but held that “where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under [section 425.16(c)].”  The guide’s treatment favors Liu at this point as it only cites to Liu and not Coltrain.  But

302. Denison & Wasserman, supra n. 131, at 53 (citations omitted).
303. Liu, 81 Cal. Rptr. 2d at 811 (emphasis added).
306. Id. at § 7:1120-22. (citing Liu, 81 Cal. Rptr. 2d at 812 (“we do agree with the Coltrain court’s conclusion that a plaintiff’s voluntary dismissal of a suit, after a section 425.16 motion to strike has been filed, neither automatically precludes a court from awarding a defendant attorney’s fees and costs under that section, nor automatically requires such an award.”) (emphasis added)); accord Coltrain, 77 Cal. Rptr. 2d at 608 (“Certainly these policies do not support the Coltrains’ contention that a voluntary dismissal should automatically preclude an award of attorney’s fees to the defendant. . . . [*] On the other hand, these policies likewise do not support defendants’ contention that a voluntary dismissal while a special motion to strike is pending should automatically entitle a defendant to attorney’s fees.”) (emphasis added)).
then the guide observes more neutrally, citing to Kyle, that “[r]ather, defendant is entitled to its fees and costs if plaintiff’s case is shown to be a ‘pure SLAPP suit.’”307 The Rutter guide’s use of the word “entitled” differs from the word’s usage in Liu and in the Denison guide. In Liu and Denison, “entitled” is used in the context of a defendant’s right to have his or her anti-SLAPP motion heard for a fee award when the alleged SLAPP suit has been dismissed. In the Rutter guide, however, the word “entitled” is used to describe defendant’s right—not exactly to a hearing—but to “fees and costs if plaintiff’s case is shown to be a ‘pure SLAPP suit.’”308 In effect, the Rutter guide carefully evades choosing sides on the split between Coltrain and Liu on whether the obligation for a trial court to entertain a defendant’s fee hearing under section 425.16 is discretionary (Coltrain) or mandatory (Liu).

The Rutter guide actually addresses the split between Coltrain and Liu on a court’s approach to determining prevailing defendant on an anti-SLAPP motion in dismissal cases—whether to use the prevailing party method (Coltrain) or merit-based approach (Liu)—also in a very balanced way. First, the guide introduces Liu’s approach: “One case holds that the trial court must adjudicate the merits on the motion to strike before it may rule on defendant’s request for fees and costs.”309 Then in an equally objective way, the guide mentions the Coltrain approach: “But another case holds that the voluntary dismissal creates a presumption that defendants ‘prevailed’; plaintiffs may show they dismissed because they substantially achieved their goals through settlement or other means, or for other reasons unrelated to a probability of success on the merits.”310 Afterwards, the Rutter guide does list a comment for Coltrain, but neither as an endorsement nor criticism; rather, it is simply an observation that the Coltrain approach “effectively shifts the customary burden of proof” under section 425.16(c).311

In sum, despite one practice guide’s more even-handed treatment of the Coltrain-Liu split, most other commentaries, whether directly or

307. Id. at § 7:1122 (quoting Kyle v. Carmon, 84 Cal. Rptr. 2d 303, 314 (Cal. App. 3d Dist 1999)).
308. Id. (emphaisis added).
309. Id. at § 7:1123 (citing Liu, 81 Cal. Rptr. 2d at 812).
310. Id. (citing Coltrain, 77 Cal. Rptr. 2d at 608).
311. Id. (citation omitted).
indirectly, reject Coltrane’s approach in voluntary SLAPP dismissal cases, citing its reliance on litigation objectives as a flaw within the context of SLAPP suits. The reasons why most commentaries seem to favor Liu’s merit-based method are pondered below.

C. WHY LIU PREVAILS IN THE “PREVAILING DEFENDANT” DEBATE

Perhaps the most convincing reason why courts and commentators are more comfortable with Liu than with Coltrane is that the Liu decision is closer to the policies behind section 425.16—and by extension, the policies behind SLAPP protection. As the Legislature wrote in the statute’s preamble, “it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”312 With this in mind, the statute’s mechanism of review is defined:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. 313

Faced with the undefined situation of voluntary dismissal of the alleged SLAPP before determination of the pending section 425.16 motion to strike, the Liu court looked reflexively to section 425.16 in a way reminiscent of Hamlet: “Suit the action to the word, the word to the action, with this special observance: that you o’erstep not the modesty of nature.”314 The modesty of nature here being section 425.16, a special kind of animal with its particular limitations and goals geared to protecting First Amendment rights. The Liu court referred

313. Id. at § 425.16(b)(1).
314. William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, in The Norton Shakespeare 3.2.3 (Stephen Greenblatt et al. eds., W.W. Norton & Co. 1997). This advice appears in the scene prior to the famous Player King sequence. Here, Hamlet advises a troupe of actors on how to portray the scene before the court of Claudius, the king. The entire Player King sequence is devised by Hamlet as an indirect accusation that Claudius murdered Hamlet’s father. Although that accusation is not an exercise of petitioning, it is at least an expression of speech.
back to the statute and gleaned that even in a voluntary dismissal situation, nothing should change the parties' showing that "[u]nder the terms of [section 425.16(c)], the critical issue is the merits of the defendant’s motion to strike. This is as it should be." Accordingly, the Liu court dictated that adherence to the statutory burden of proof should not be undermined: "An award of [attorney’s fees] under section 425.16 is only justified when a defendant demonstrates that a plaintiff’s action falls within the provisions of subdivision (b) and the plaintiff is unable to establish a reasonable probability of success." The Liu court added:

If such a judicial determination were not first required, and a fair procedural opportunity to obtain it allowed, then a plaintiff’s voluntary dismissal of the action could have the effect of (1) depriving a true SLAPP defendant of statutorily authorized fees or (2) entitling a defendant to such relief in a non-SLAPP action which was dismissed by plaintiff of entirely legitimate reasons. In both situations the purpose of the statute’s remedial provisions would be frustrated."

Liu might have been trying to avoid a gap within section 425.16 that more cunning plaintiff-SLAPPers could use to subvert the statute’s protection of defendant-SLAPPee’s petitioning activity by demanding strict adherence back to the same burdens section 425.16 dictated, even when a case is strategically dismissed. A closer examination of the Liu merit-based approach supports this analysis. Compared to Coltrain, Liu keeps the inquiry within the signature of section 425.16. In doing so, the Liu court patches a loophole that could have allowed plaintiff-SLAPPers an easy way out of defending an anti-SLAPP motion to strike. Without the Liu approach, the plaintiff-SLAPPer would have been allowed, at relatively little expense: (1) To file a SLAPP suit in retaliation for the target’s exercise of some form of petitioning right; and, (2) to voluntarily dismiss the alleged SLAPP suit once the defendant-SLAPPee had put forth the time, energy, and money to defend. The ability of the Liu court to subject plaintiff-SLAPPers to a fee hearing pursuant to section 425.16 after dismissal at the defendant-

317. Id.
SLAPPee’s choosing and to apply the same burdens found in section 425.16(b) in review, demonstrates the Second District Court of Appeal’s foresight to not allow plaintiff-SLAPPers to use dismissals as a way to continue hindering and punishing petitioning rights. The court appeared to understand the kind of spiteful, unrelenting, shape-shifting beasts that SLAPP suits are and why the Legislature had to enact section 425.16 to give unfortunate defendant-SLAPPee’s an ability to minimize the risk of an unpopular but legitimate instance of petitioning. As Liu diplomatically puts it: “An adjudication in favor of the defendant on the merits of the defendant’s motion to strike provides both financial relief in the form of fees and costs, as well as a vindication of society’s constitutional interests.”\footnote{318} One can read into that mentioning of vindicating society’s constitutional interests an awareness of free speech and petitioning rights consistent with what the Legislature, when enacting section 425.16, pronounced was “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”\footnote{319} Three years later the \textit{Pfeiffer Venice Properties} decision, taking Liu’s lead, also recognized the necessity of the staying true to the policy underlying the statute.\footnote{320}

In this manner, by not taking for granted the adjective, “special,” in the subdivisions of section 425.16’s “special motion to strike,”\footnote{321} the Court of Appeal, Second District in Liu \textit{v. Moore} was following well-known and customary doctrines of statutory interpretation that placed the specific before the general\footnote{322}—keeping its interpretation within the particular context of the section 425.16 motion and not

\footnote{318} \textit{Id.}
\footnote{320} \textit{Pfeiffer Venice Props. v. Bernard}, 123 Cal. Rptr. 2d 647, 653 (Cal. App. 2d Dist. Div. 5 2002) (“As the Liu court stated, any other rule would deprive the true SLAPP defendant of statutorily authorized fees, frustrating the purpose of the statute’s remedial provisions.” (citation omitted)).
\footnote{321} §§ 425.16(b)(1), (c), (f), (i), (j)(l).
\footnote{322} \textit{E.g.} Norman J. Singer & J.D. Shambie Singer, \textit{Sutherland Statutes and Statutory Construction} Part V, subpart (A)(51), § 51.5 (West, 7th ed. 2008) (“Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict the latter (more specialized) will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling.” (footnotes omitted)); \textit{Boyd v. Huntington}, 11 P.2d 383, 386 (Cal. 1932).
injecting general principles that may have created deviations inconsistent with the Legislature’s intended use and function for the statute. Instead, the Liu court stuck to the black letter and spirit of section 425.16, making its approach superior to Coltrain’s prevailing party method.

Indeed, courts have been hesitant to follow Coltrain because of the distance between Coltrain’s test and the nature of section 425.16. Coltrain was grounded in extensive case law analysis regarding the determination of a prevailing party in dismissal cases generally—despite reconciling two California Supreme Court cases, Olen and Santisas. But the Coltrain court’s aim at the danger disguised beneath the plaintiff-SLAPPers’ ordinary causes of action seemed to miss the court’s intended purpose (if the Coltrain court could even see the Big Bad Wolf within the SLAPP suit at all). Unlike in Liu, the Coltrain court focused less on the fact that section 425.16 was a particularized remedy designed to combat a special way of infringing on First Amendment constitutional interests. For instance, after astutely identifying that the issue was “primarily one of statutory interpretation,” and that section 425.16 “does not otherwise define ‘prevailing’ ” for a dismissed defendant, the court dashed immediately into a heavy survey lasting several pages of “prevailing party” definitions under other circumstances within California statutory and Supreme Court case law. The court only recognized “the policies behind the SLAPP statute” in two paragraphs toward the end of the opinion.

Moreover, the court’s mentioning of section 425.16 policies at that point reads like an afterthought, especially as it tried to graft a general rubric for determining a prevailing party gathered from a consensus of non-SLAPP cases onto the SLAPP-interested policies of section 425.16: “We do not believe the policies behind the SLAPP statute call for any different result.” The Coltrain court missed seeing the specific for the general and, as a result, came up with a solution that gave trial court discretion to review a defendant’s request

324. Id.
325. Id.; see generally § 425.16.
326. Coltrain, 77 Cal. Rptr. 2d at 604-08.
327. Id. at 608.
for fees under section 425.16 and added a judicially-created presumption not advocated by the statute—the prevailing party method. According to the Rutter guide, this ends up “effectively shift[ing] the customary burden of proof” set up in section 425.16. 328 Instead of abiding by the Legislature’s two-prong burden for examining the merits of the defendant’s anti-SLAPP motion, the court found that,

In making that determination, the critical issue is which party realized its objectives in the litigation. Since the defendant’s goal is to make the plaintiff go away with its tail between its legs, ordinarily the prevailing party will be the defendant. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the probability of success on the merits. 329

As an examination of section 425.16(b)(1) shows, however, the statute mandates its burdens differently:

A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. 330

Side-by-side, the discrepancies between the burdens set up by Coltrain and section 425.16 are stark. In fact, the Coltrain court adopts an approach where the defendant does not have to show he or she had been SLAPPed; rather, the filing of the anti-SLAPP motion and the plaintiff’s dismissal presumes that a SLAPP had occurred. 331 Whereas section 425.16 requires review of the defendant’s motion to strike to

328. Weil, Brown & Rylaarsdam, supra n. 305, at § 7:1123 (citation omitted); accord Coltrain, 77 Cal. Rptr. 2d at 608 (“We conclude that where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under [section 425.16(e)].”).
329. Coltrain, 77 Cal. Rptr. 2d at 608.
330. § 425.16(b)(1).
331. Coltrain, 77 Cal. Rptr. 2d at 608.
establish that defendant had been SLAPPed.\textsuperscript{332} Next, \textit{Coltrain} allows plaintiff to rebut the presumption by showing it dismissed the alleged SLAPP suit because it had substantially achieved its litigation objectives through means including, but not limited to, settlement, defendant’s insolvency, or any other reasons “unrelated to the probability of success on the merits.”\textsuperscript{333} In contrast, the second prong of section 425.16’s burden of proof, after the defendant has established the SLAPP, allows plaintiff to avoid dismissal \textit{only} by specifically showing “that there is a probability that the plaintiff will prevail on the claim.”\textsuperscript{334}

Discrepancies can be harmless, so long as the end result would be the same. But \textit{Coltrain}’s reliance on litigation objectives as the determinant of which party prevailed for attorney’s fees in a dismissal scenario imposes a result not intended by section 425.16 and creates a divergence that is harmful to the policies of California anti-SLAPP legislation. This observation was incidentally demonstrated by the unpublished decision in \textit{Ampex Corp. v. Bettini}\textsuperscript{335} (mentioned in passing above). The Ampex Corporation had sued Bettini, an Arizona citizen, in California for defamation after Bettini posted a cryptic message on Yahoo! message boards with an ominous subject line, “Ampex to go bankrupt.” The text of the message indicated he would not disclose the reason, but “will only e-mail a select few to warn them.”\textsuperscript{336} The trial court denied Bettini’s anti-SLAPP motion in part (despite the simultaneous file-dismissal-or-dismissal-file situation previously discussed) by concluding “that Bettini was not the prevailing party for purposes of section 425.16 because he had not achieved his litigation objectives.”\textsuperscript{337} A key fact led to this holding: After voluntarily dismissing its case against Bettini in California, “Ampex and its chairman had filed an action in Arizona against Bettini asserting numerous allegedly defamatory statements.”\textsuperscript{338} In essence, the trial court used a litigation objectives approach—not unlike

\textsuperscript{332} § 425.16(b)(1); \textit{accord Moore v. Liu}, 81 Cal. Rptr. 2d 807, 812 (Cal. App. 2d Dist. Div. 3 1999).

\textsuperscript{333} \textit{Coltrain}, 77 Cal. Rptr. 2d at 608.

\textsuperscript{334} § 425.16(b)(1).


\textsuperscript{336} \textit{Id.} at *1 (internal quotation marks omitted).

\textsuperscript{337} \textit{Id.} at *2.

\textsuperscript{338} \textit{Id.}
Coltrain’s prevailing party method—to determine the prevailing defendant on the special motion to strike. The result of applying that standard revealed that, because Bettini was from Arizona, a state that at the time lacked an anti-SLAPP statute, Ampex could dismiss its suit against Bettini in California and pursue him in Arizona intentionally to avoid the threat of an anti-SLAPP motion to strike. Ampex’s ability to forum shop led the trial court to find that Bettini could not prevail under his section 425.16 motion—that is, Bettini had not achieved the goals of his litigation after Ampex’s voluntary dismissal because he would still be sued in Arizona for that same Yahoo! message.

Although section 425.16 does not prevent plaintiff-SLAPPers from forum shopping in this way, the use of litigation goals or objectives in the burden of proof to determine prevailing defendant on a section 425.16 motion, instead of the statutorily mandated burden of proof, certainly made that tactic more easily accessible in Ampex. Division Four of the First District Court of Appeal followed Liu and rejected Coltrain by finding that “even after an action is dismissed, a trial court may award attorney fees under section 425.16” and that “[s]uch an award is based not on a ‘prevailing party’ analysis, but on a determination that the defendant’s motion under section 425.16, subdivision (b) should be granted.” Thus, the trial court’s obtaining litigation objectives standard was overturned. But, interestingly, the Court of Appeal did not overturn the trial court’s ruling to deny Bettini’s motion to strike because “the trial court correctly concluded Ampex has raised a probability of success on the merits for the purposes of section 425.16.” In other words, applying the correct standard, Ampex would have won anyway because it could have met the elements of defamation. But what if Ampex’s defamation case was less meritorious and more characteristic of a SLAPP suit? Clearly, by applying the “prevailing party” approach, Ampex might have been able to substantially achieve its litigation objectives despite failing to meet the defamation elements. After all, by the time it dismissed its

341. Id.
342. Id.
343. Id. at **6-10.
suit, Ampex would have dragged Bettini from Arizona to California and back again, causing him to expend time, money, and effort. The chill on the rights of Bettini and other potential critics is unmistakable. In this way, the trial court’s use of the components of Coltrain’s burdens of proof in Ampex demonstrated the problem it might pose for SLAPP protection.

All is not lost, however, for Coltrain’s approach. That is to say, by itself, the “prevailing party” approach could be viable for determining prevailing defendants outside of the anti-SLAPP forest, i.e., for other kinds of litigation. Ironically, the Coltrain approach was later adopted by the same Second District Court of Appeal that had criticized and rejected it in Moore v. Liu. The court in Castro v. Superior Court 344 adopted the Coltrain “prevailing party” approach for use in a lis pendens situation, where the court had to define “prevailing party” under section 405.38 of the California Code of Civil Procedure. 345 The issue of defining “prevailing party” arose after the Castros were denied their attorney’s fee award in their attempt to claim victory on a motion to expunge a lis pendens that had been “withdrawn [prior to] a ruling on that motion.” 346 Referring to Coltrain’s method as “the practical approach,” the Castro court examined the approach at length and finally sufficiently distinguished the lis pendens situation from the Liu anti-SLAPP scenario to wipe its hands clean and adopt Coltrain:

   By contrast, a motion to expunge does not end the litigation [as voluntary dismissal did for an alleged SLAPP suit] but simply removes the encumbrance on the property as the underlying litigation moves forward. Nevertheless, the withdrawal of an improperly recorded lis pendens, while a motion to expunge is pending, achieves the litigation objectives of the moving party by removing the cloud on the title and permitting the property’s transfer. The moving party thus has obtained the relief that the trial court would have granted had it ruled on the motion. 347

As the Castro court noted, a trial court must still determine the merits of the moving party’s pending fee motion: “We believe [the

345. Id. at 866.
346. Id. at 866, 869.
347. Id. at 873-74.
Coltrain] approach is consistent with the stated legislative purpose behind the mandatory attorney fees provision in section 405.38." 348  The same court of appeal that had once rejected Coltrain for anti-SLAPP motion review now embraced it for a fee determination in a lis pendens scenario, holding that “a trial court must determine whether the moving party is the prevailing party under section 405.38 by analyzing the extent to which each party has realized its litigation objectives.” 349  With that, the endorsement of Coltrain for the lis pendens situation seemed quite emphatic.

Looking back at Liu and Coltrain, the two approaches really stem from how far the Second and Fourth District Courts of Appeal fenced in their inquiries. The Coltrain court was correct in noting that its job in developing an approach to determining the prevailing defendant in a dismissal situation was really a problem of statutory interpretation. 350  But here is the point in the yellow wood where its path diverges from the court in Liu. 351  It seems that the two courts differed in setting the parameters of their interpretation. Perhaps the Coltrain court read section 425.16(c) and understood its role as merely to define the phrase “prevailing defendant,” while the Liu court read the same provision and broadened its inquiry to defining “prevailing defendant on a special motion to strike.” This supposition may explain why the Coltrain court headed toward endorsing a generalized definition of prevailing parties—stringing together two California Supreme Court cases that had no close relationship to SLAPP litigation—while the Liu court kept its resolution tethered to the mystery and manners within a special motion to strike under section 425.16. By narrowly cutting off its inquiry to just two words, “prevailing defendant,” the Coltrain court

348. Id. at 873.
349. Id. at 874 (emphasis added).
351. This reference to “yellow wood” is a nod to Robert Frost:

Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth[.]

ironically broadened its search beyond section 425.16. Conversely, by noting the qualifier, "on a special motion to strike," in section 425.16(c), the Liu court tailored its approach within the boundaries of California anti-SLAPPs.

The cases following Coltrain and Liu disproportionately favor the Liu approach. It is therefore reasonable to presume that any Supreme Court resolution of this matter will tip in Liu’s direction. Of course, the Coltrain opinion relied heavily on California Supreme Court cases and an argument could be made that in this way Coltrain may have a "home-court" advantage. Alternatively, the Legislature might choose to amend section 425.16. Legislative sensitivity to the weight of existing case law would put Coltrain at a disadvantage because, as the Rutter guide puts it, the Coltrain approach “shifts the customary burden of proof” in voluntary dismissal cases. Using Liu would be less disruptive because the Liu approach is aligned with the existing mechanisms of the statute. Liu avoids shifting the burdens of proof because the parties still have to utilize the same prove-up standards for fees, even where a dismissal occurs before a ruling on the merits of an anti-SLAPP motion. In this way, section 425.16 would be better served if the Legislature used Liu in any subsequent amendment to resolve the Coltrain-Liu split.

To make any amendments even more seamless, the Legislature could use Liu to amend section 425.16 not by adding any new operational text or provisions but simply by placing a definition within the statute. Because Liu does not create any new mechanism to determine “prevailing defendant on a special motion to strike” in SLAPP dismissal cases, but only extends the existing two-prong mechanism available in conventional SLAPP situations, the Legislature can merely codify Liu by inserting a "prevailing defendant" definition. Such a definition should expressly list: (1) What burden of proof is needed for a defendant-SLAPPee to win a typical anti-SLAPP motion, and (2) a caveat that the burden of proof extends to fee hearings when the SLAPP suit is dismissed before a trial court rules on the merits of a defendant-SLAPPee’s anti-SLAPP motion. The definition might read as follows:

As used in this section, “prevailing defendant on a special motion to strike” refers to a defendant whose special motion to strike

prevails under the standards set forth in subdivision (b)(1). Where
the cause of action against a defendant, as set forth in subdivision
(b)(1), is dismissed prior to the court’s determination of the
defendant’s special motion to strike, the standard for “prevailing
defendant on a special motion to strike” applies to dismissed
defendants for the purposes of awarding attorney’s fees and cost
pursuant to subdivision (c).

The Legislature would then fit this definition behind the statute’s main
provisions. No existing provisions would be touched; no words
changed or clauses deleted. The result would be clarity without too
much disruption.

To conclude, this quandary of determining prevailing defendants
in voluntarily dismissal cases arose from a gap between policy and
definition in section 425.16. The policy of California SLAPP
legislation embodied in section 425.16 is to protect petitioning rights
and this demands a resolution more closely exegetical to the special
needs of anti-SLAPP motions. In other words, the wolf cannot be
given a gap—a veritable loophole in the fence of SLAPP protection—
through which to poke its meddling claws. Liu offers the better-suited
solution and any legislative changes made to section 425.16 could be
seamlessly incorporated by codifying Liu within a definition of
“prevailing defendant on a special motion to strike.”

IV. WHEN SHEEP ATTACK: BAD-FAITH DEFENDANTS IN
SLAPP PROTECTION

The ability of SLAPP suits to hide and burrow within our legal
system, undermining First Amendment rights, is not limited by how
easily they lurk behind the shapes of more commonplace lawsuits. In
the same way that the figure of the Big Bad Wolf reincarnates from
cautious tale to cautionary tale, the big bad SLAPP suit harbors other
ways to interfere with the right to petition: In a defendant’s abuse of
the anti-SLAPP motion to strike. Such an encroachment is not as
direct as the filing of a SLAPP action. Instead, the interference is
subtle and indirect when an anti-SLAPP motion is used to justify a
defendant’s meritless exercise of political process while knocking out a
plaintiff’s genuine cause of action. This abuse can be successful in
voluntary dismissal cases when a not-so-victimized defendant-
SLAPPpee tries to claim a “prevailing defendant” victory after the
underlying SLAPP suit has been dismissed.
Both Coltrin and Liu tried to define the “prevailing defendant” in a straightforward SLAPP suit dismissal scenario—in which good and bad parties readily revealed themselves. Neither case offered any insight into what happens when the facts are shaken up and the SLAPPeC is actually the party filing an anti-SLAPP motion in bad faith. This is a second problem with section 425.16 that we will seek to address: When an anti-SLAPP motion is misused as a weapon to inhibit the legal process. For although a defendant-SLAPPee deserves protection under SLAPP legislation to preserve unconstrained exercise of petitioning rights, this protection should not be abused by defendants frivolously claiming petitioning right protection who use the special motion to strike to evade suits and obtain fees.

Such scenarios were anticipated by section 425.16, but as we will see, the method employed by section 425.16 may not be so satisfactory. First, though, let us use recent case law to illustrate what a bad-faith SLAPP filing may look like. The Fourth District Court of Appeal recently encountered such a less than squeaky-clean filing when it reviewed an appeal arisen from an alleged SLAPP suit that had been voluntarily dismissed. Although the Fourth District never had the opportunity to determine whether the defendant in this case filed a bad-faith anti-SLAPP motion, the merits of the motion lends itself reasonably to a good demonstration of what a bad-faith motion could look like. By sheer coincidence, the facts specific to Gunther v. United Communications Group, Inc.353 could have externalized that old adage that the squeaky wheel gets the grease.354 In 2005, plaintiff Gunther, who was wheelchair-bound, entered “a cell phone store operated by United Communications Group” [hereinafter “UCG”].355 Because the sales counter was too high to permit Gunther to use it for signing the sales receipt, he signed the receipt across his lap.356

354. Incidentally, the adage that “the squeaky wheel gets the grease” is associated with a poem attributed, whether accurately or not, to the nineteenth-century American humorist, Josh Billings (1818-1885), titled The Kicker:

I hate to be a kicker, I always long for peace,

But the wheel that does the squeaking is the one that gets the grease.

356. Id.
he left, Gunther snapped two photographs of the sales counter “[i]n anticipation of future litigation.”357 One month later, Gunther sued the cell phone store for violations of the Americans with Disabilities Act358 guidelines incorporated under California’s Unruh Civil Rights Act.359

The SLAPP component of this lawsuit came after UCG responded to Gunther’s complaint with a cross-complaint for abuse of process and malicious prosecution, which prompted Gunther to spin back with an anti-SLAPP motion to strike UCG’s cross-complaint under section 425.16.360 But there was a good reason why UCG had filed a cross-complaint. As the opinion dramatically revealed, “there was something that Gunther left out of his complaint: Right next to the sales counter was a desk that could have accommodated someone using a wheelchair like him.”361 Whether Gunther’s picture-taking was perhaps just a moment of happenstance or an event more deliberate, this determination is something that we will just not know. But as the local press in Orange County, California, where Gunther resides, has reported, Gunther is well-known for repeatedly suing small businesses as a self-proclaimed “handicapped rights advocate.”362 According to one Orange County periodical, “[s]ince 2003, Gunther has [filed lawsuits against] 300 business owners,”363 with many of these suits sharing the same degree of rotation: in most of these suits, Gunther sought action against small, local businesses for technical infringements of state and federal laws enacted to further wheelchair accessibility and went away with monetary compensation from each business owner.364 Gunther is able to accomplish this because in California “[t]he laws are simple in one respect: If a disabled person finds an accessibility barrier—for example, no designated handicapped parking, a heavy bathroom door or a toilet paper dispenser mounted out of easy reach for

357. Id.
361. Id.
363. Id.
364. Id.
someone in a wheelchair—that person is entitled to sue and collect $4,000 per violation from the business. According to one report, “[l]awyers familiar with Gunther’s activities estimate he’s taken more than $400,000 in [a three year period from 2003 to 2006], mostly from mom-and-pop shops in Garden Grove, Anaheim, Fountain Valley, Orange, Tustin, Buena Park, Stanton, Seal Beach, Santa Ana, Dana Point, Huntington Beach and Los Angeles.” Gunther “calls it ‘civil rights’ work on behalf of the wheelchair-bound; his victims call it a ‘shakedown,’ ‘con game’ and ‘extortion plot.’” If the local presses are correct about such dissingenuity, then look who’s the Big Bad Wolf now.

At first, the intricacies of California civil procedure hindered Gunther’s attempts to use section 425.16. UCG’s cross-complaint forced re-classification of the entire suit from limited civil to unlimited civil. As a result, the case was sent to a new location and transferred to two different judges, delaying the hearing of Gunther’s section 425.16 motion for more than six months. Finally, a trial court denied the anti-SLAPP motion “solely because of the delay.” Gunther then appealed that denial and obtained a reversal. But while civil procedure proceeded against Gunther, so did the merits of his original complaint against UCG. As the appeal court was debating the delay issue, Gunther’s suit went to trial below and “[b]ecause of that desk, Gunther lost.” This decision triggered a domino effect


366. Id.


369. Id.

370. Id.

371. Id.

372. Id.
as—in a move reminiscent of Coltrain, Liu, and many of the other cases discussed above—UCG voluntarily dismissed its cross-complaint against Gunther.373 Gunther then sought his attorney’s fees and costs under section 425.16 “based on the theory that his obtaining of a reversal of the order denying his earlier anti-SLAPP motion and having the matter remanded for a hearing was a win on that motion.”374 This resembled the presumption in favor of dismissed defendants from the first prong of the Coltrain prevailing party approach. Unfortunately for Gunther, the trial court denied him his fees which prompted him to appeal for a second time.375

For better or worse, the Division Three Fourth District Court of Appeal framed its issue, following Coltrain, by holding “that where the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under [section 425.16(c)].”376 Specifically, the appellate court pondered “whether the trial court’s exercise of discretion not to grant Gunther his fees and costs in this case was within the bounds of the court’s discretion.”377 Based on commonsense the court answered yes, since “[t]he salient fact that makes the trial court’s reasoning here eminently reasonable is that Gunther lost on the merits of his ADA-Unruh suit because he omitted the accommodation the store had already made for people in wheelchairs.”378 In this way, Gunther was cut off at the threshold from getting a determination—whether based on Coltrain’s “prevailing party” approach or Liu’s merit-based method—of his entitlement to attorney’s fees and costs. We will never know which approach the Fourth District Court of Appeal would otherwise have recommended the trial court to use in Gunther.

Had the court adopted Liu regarding a voluntary dismissal’s effect upon a pending anti-SLAPP motion and remanded to the trial court for determination, whether the Fourth District Court of Appeal would have

373. Id.
374. Id.
375. Id.
376. Id. at *2 (quoting Coltrain v. Shewalter, 77 Cal. Rptr. 2d 600, 608 (Cal. App. 4th Dist. Div. 2 1998)).
377. Id. at *3.
378. Id.
then provided instructions based on Coltrin, Liu, or some other rubric, is speculative. Applying Coltrin, Gunther would have been presumed the winner, but then UCG would have been able to show that it dismissed its cross-complaint against Gunther because prevailing in the Unruh suit accomplished its litigation objectives. 379 In fact, the court alluded to this reason as the one that supported the trial court’s decision not to proceed to a fee hearing: “Indeed, it would have been anomalous in the extreme for the trial court to have granted fees to the losing party based on a reversal of a denial of an earlier anti-SLAPP motion that was itself solely procedural, and solely the fault of the trial court itself.” 380

Applying Liu, on the other hand, the decision would have adhered to section 425.16’s procedures and burdens but likely would not have been as judicially economical. First, Gunther would have had to show that he had been SLAPPed, i.e., that he had been sued because he was exercising his right to petition. Then UCG would have had to show probability of success. Based on the facts it is arguable that Gunther would have met the first prong. He was, after all, suing as a wheelchair-bound person under the Unruh Civil Rights Act in order to effect change in how small retail establishments handled accommodations, such as UCG’s cell phone store. But the facts of the Fourth District’s opinion reveal that his exercise of petitioning was not altogether genuine; there were those two pictures, his litigious background (though this kind of character evidence may or may not have been readily admissible or relevant), and the accommodating desk itself. Yet even if Gunther would have proved this prong, when the burden shifted to UCG, UCG likely would have been able to show probability of success of its abuse of process and malicious prosecution claims because, by then, it had won against Gunther and it would have had the verdict as a basis for its lawsuit. Though expressed cryptically, Liu had acknowledged bad-faith defendants as another reason to bolster its use of a merit-based approach:

This result is in keeping with the stated purpose of section 425.16. That is, it is entirely possible that a plaintiff who is served with a section 425.16 motion to strike actually filed a legitimate suit, not a SLAPP. Permitting the defendant in such a suit to

379. See id. at *1.
380. Id. at *3.
recover attorney’s fees under section 1032 merely because the plaintiff dismissed the action would not further the Legislature’s intent of discouraging true SLAPP plaintiffs.\footnote{Moore \textit{v.} Liu, 81 Cal. Rptr. 2d 807, 813 (Cal. App. 2d Dist. Div. 3 1999).}

In this respect, the \textit{Liu} court recognized the possibility of bad-faith SLAPP
filing.\footnote{Pring \& Canan, \textit{Getting Sued}, supra n. 3, at 8.}

Still, why allow the proceedings to stretch so long when one of the goals of California SLAPP legislation was to cut off litigation costs and time? Had the Fourth District Court of Appeal remanded and allowed a trial court to decide, applying \textit{Liu}, UCG would have been in litigation for more than the three years it actually took to get the case resolved. Pring and Canan have identified defendants of SLAPPs who hold otherwise meritless defenses. They mention the probability that there are “‘good’ people who file SLAPPs without intending to harm constitutional rights, and ‘bad’ people who get SLAPPed yet still merit constitutional protection.”\footnote{Id. at 215.} In their research, the professors found that bad-faith SLAPP defendant scenarios are not uncommon: “SLAPPs are not simply cases of unsympathetic ‘black hats’ suing sympathetic ‘white hats,’ again as many appear to think. Although the majority of targets tend to be ‘do-gooders,’ working sympathetic causes, a significant minority are out for obvious self-gain or blatant revenge.”\footnote{Id. at 11.} In fact Pring and Canan have urged that a balance needs to be reached when viewing SLAPP suits: “‘There are two sides to every question,’ Protagoras teaches us, and that has presented our greater set of challenges. ‘Doesn’t the First Amendment’s Petition Clause apply to the filer’s lawsuit as well?’ we are asked.”\footnote{Situation such as \textit{Gunther}, where a SLAPP defendant’s contentions are suspect, will arise: Citizens’ constitutional right to political speech is not absolute; no constitutional right is. Other citizens also have constitutional rights: to sue, to go to trial, to have their plans and reputations protected. But neither are those rights absolute. When two sides each have fundamental constitutional rights, they must be balanced, must somehow be qualified or limited so that each does}
Pring and Canan intended that statement to have an even broader reach because they were also concerned with sympathetic plaintiff-SLAPPers filing SLAPPs against unsympathetic defendant-SLAPPees, who did not exercise their First Amendment rights in bad faith, but were simply using the political process to further an unpopular point of view. But certainly the balance in petitioning rights protection called for by Pring and Canan applies to prevent those litigants in that “significant minority” whom they described as abusers of petitioning rights. In the face of protecting petition rights for defendant-SLAPPee’s, the professors seem to be preaching a bit of Zen.

In order to keep a balance in protecting and facilitating the right to petition, perhaps some mechanism is needed to identify bad-faith defendants sooner rather than later. Currently, the only safeguard that section 425.16 offers as a counterbalance against unsavory, bad faith defendants who file not-so-genuine anti-SLAPP motions is to disallow such a litigant from obtaining fees “[i]f the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay.” If those circumstances arise, “the court shall award costs and reasonable attorney’s fees to a plaintiff prevailing on the motion, pursuant to section 128.5.”

Unfortunately, working in conjunction with the other section 425.16 provisions, a determination of a bad-faith SLAPPee can only be made at a hearing for a section 425.16 anti-SLAPP motion for fees. One could read, in pari materia, that because the provision in subdivision (c) that awards fees to plaintiffs in a SLAPP suit comes after the sentence regarding prevailing defendants on a special motion to strike, a finding that the motion was frivolous would come in the same motion determination that would find whether there was a SLAPP suit at all. Yet read in context—that the provision to award fees to a prevailing plaintiff appears within subdivision (c) of section 425.16, which is the statute’s fee award provision addressing the remunerative aspects of winning or losing a section 425.16 special motion to strike—the better view is that a trial court would decide whether a defendant had filed a frivolous anti-SLAPP motion under section 425.16 not during the determination of the merits of the motion,

385. Id. at 11-12.
386. See id. at 12-13.
388. Id.
but *afterwards*—at the fee award hearing. Borrowing from the scenario in *Gunther*, where the alleged defendant-SLAPPee was readily able to drag the proceedings on for years, a plaintiff met with a frivolous section 425.16 motion to strike is placed in a far more disadvantaged position if permitted redress only after having been hauled through the undergrowth of the judicial forest by a bad-faith SLAPP litigant.

The possible justification for this disparity hinges upon two observations about SLAPPs in general. First, California’s SLAPP statute is predominately concerned with preventing SLAPP suits from being filed. As the preamble to section 425.16 states, “[t]he Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” 389 Thus, to effectuate section 425.16’s purpose, safeguards must be in place against proponents of SLAPP suits and it may be necessary to delay alleged plaintiff-SLAPPers from making objections to frivolous anti-SLAPP motions to strike until the fee hearing. The second observation, which follows naturally, is that the protections against bad-faith SLAPPees is subordinated because of the policies stated in the section 425.16(a) and because bad-faith SLAPPees are only the “significant minority,” not the primary party of concern in SLAPP suits. Litigants with *meritless* anti-SLAPP motions do exist, but not in the same volume as litigants like the Coltrains or Liu. Protection against SLAPP litigants *anti-SLAPP motions like the one filed in Gunther* is important, but not to the extent that such protection will gum up the mechanisms to which section 425.16 is predominately devoted. In that respect, the Legislature appropriately delayed the determination of bad-faith SLAPP defendants to the hearing for fees instead of the motion for determining the merits of the anti-SLAPP motion to strike.

Still, that leaves what the Legislature intended plaintiffs to show at the fee hearing, which is itself puzzling. At the fee hearing, the touchstone that a trial court uses to find a bad-faith defendant is based on whether or not the section 425.16 special motion to strike was “frivolous or is solely intended to cause unnecessary delay.” 390 To discern what such particularized terms mean, the section directs a trial

389. *Id.* at § 425.16(a).
390. *Id.* at § 425.16(c).
court to now repealed section 128.5 of the California Code of Civil Procedure, which gave a general definition of frivolous litigation. It is imperative to note that “[s]ubstantively, section 128.5 does not replace section 425.16. The import of section 425.16 is that ‘a court must use the procedures and apply the substantive standards of section 128.5 in deciding whether to award attorney fees under the anti-SLAPP statute.’” Under section 128.5, “[e]very trial court may order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” Pursuant to case law, “[a] determination of frivolousness [under section 128.5] requires a finding that the motion is “totally and completely without merit,” that is, “any reasonable attorney would agree such motion is totally devoid of merit.” In this way:

“[T]o impose sanctions under section 128.5, there must be a showing that the action or tactic was meritless or frivolous and that it was pursued in bad faith, and whether the action is taken in bad faith must be judged by a subjective standard. While the trial court may infer subjective bad faith from the pursuit of a frivolous tactic, ‘it is within a court’s discretion not to draw that inference if convinced the party was acting in the good faith belief the action was meritorious.’”

To wade through these steps to determine frivolousness is tedious, but the process becomes far more convoluted within the framework of SLAPP suits.

391. §128.5 (repealed 2008).
392. Id.
Two main criticisms can be made here about the import of section 128.5 as a directive for detecting a frivolous anti-SLAPP motion to strike. First, by utilizing section 128.5, section 425.16 is using procedures based on a generalized definition and not a definition crafted specifically to further SLAPP protection, prevention, and anti-SLAPP abuse. Originally, “[t]he Legislature passed Sec. 128.5 in 1981 to permit sanctioning lawyers or litigants for frivolous motions or delay tactics.”

Pring and Canan (although SLAPP suits had existed, despite their guises, since the early nineteenth century) did not embark on their initial studies, leading to the current surge of SLAPP awareness and protection, until the mid-1980s.

And section 425.16 was not enacted until 1992. In fact, in the California bill that lead to the original passing of section 128.5, the Legislature indicated that “[i]t is the intent of this legislation to broaden the powers of trial courts to manage their calendars and provide for the expeditious processing of civil actions by authorizing monetary sanctions now not present [sic] authorized by the interpretation of the law in Bauguess v. Paine.”

Bauguess v. Paine was a case where the California Supreme Court delineated the limits on trial courts when imposing sanctions against parties by holding that courts must rely on their contempt powers to punish and that “[i]t would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute.”

Thus, by enacting section 128.5 in 1981, the Legislature intended to expand the availability of sanctions for frivolous litigation beyond what had previously been authorized by statute. But this could not have included bad-faith or frivolous anti-

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398. Pring & Canan, Getting Sued, supra n. 3, at x.
402. Id. at 948-49.
SLAPP motions since those situations had not yet been contemplated. The Legislature’s 1981 purpose was broadly stated and actually designed to “improve the cooperation between attorneys and reduce useless acts that interfere with the orderly and efficient administration of justice.” But regardless of the Legislature’s good intentions in enacting section 128.5, when applied to the SLAPP context it “provide[s] standards and enforcement proceedings that are lax and not SLAPP-specific.”

Secondly, in addition to lacking specificity, the bad-faith determination afforded by section 128.5 is subject to changes that have no bearing on the SLAPP context. A clear example of this is the fact that although section 425.16 relies on section 128.5 for determining bad-faith defendants in frivolous litigation, the validity of section 128.5 has been curtailed. First, in 1995, when the Legislature enacted section 128.7 of California Code of Civil Procedure “that suspends the operation of § 128.5 until January 1, 1999, substituting in its place, for a four-year trial period, a provision modeled on Rule 11 of the Federal Rules of Civil Procedure.” And then in 2008, when the First District Court of Appeal implicitly repealed section 128.5 in Clark v. Optical Coating Laboratory, Inc. “Section 128.5, which authorizes the imposition of monetary expense sanctions, including attorney fees, for bad faith ‘actions or tactics,’ was superseded for actions filed on or after January 1, 1995, by section 128.7. The latter statute provides a

Div. I 2008) (“Although it is true that the Legislature enacted section 128.5 to broaden the power of trial courts to award monetary sanctions in response to Baughess, the statute only superseded Baughess and supplied legislative authorization for the type of fee award invalidated in the Baughess case for cases filed within the limited time window during which it was in effect, i.e., between 1982 and 1994. Rather than undermining Baughess, the adoption of section 128.5 shows the Legislature’s acceptance of its core holding that trial courts may not award attorney fees as a sanction for misconduct absent statutory authority.” (referencing O’Meara v. Arthur J. Gallagher, Co., 86 P.3d 354, 356-57 (Cal. 2004)) (citations omitted)).


405. Barker, supra n. 30, at 416.

406. § 128.7 (West 2006).

407. Miller, supra n. 403, at 584, n. 253.

408. Clark, 80 Cal. Rptr. 3d 812.
more limited authorization for the imposition of fees as sanctions for the filing of improper signed pleadings.”

Notwithstanding the reasoning behind the legislative and judicial changes to section 128.5’s operation, the problem posed by such actions as it relates to section 425.16’s reliance on the statute is an alarming one. By linking another wholly-separate statute with section 425.16 for the purpose of determining frivolous tactics, the Legislature has subjected section 425.16 to the winds of change endured by section 128.5 which may or may not be compatible to section 425.16’s underlying policies. With the Legislature’s 1995 four-year suspension of section 128.5’s application, Tate noticed that “[t]he phrase [in section 425.16] ‘pursuant to Section 128.5’ may cause problems, as the referenced provision applies only to cases filed before 1995.” With Clark v. Optical, the implicit repealing of section 128.5 reaffirms the Legislature’s 1995 suspension: “Although the Legislature later enacted Code of Civil Procedure Sec. 128.5, which broadened the courts’ power to award monetary sanctions in response to Bauguess, [the court] explained Sec. 128.5 is inapplicable to cases filed after 1995 because it was superseded by Sec. 128.7, which applies solely to attorney misconduct in the filing or advocacy of groundless claims made in signed pleadings.” If “pursuant to Section 128.5” in subdivision (c) of section 425.16 means pursuant to the applicability of section 128.5, then both the legislative and the judicial changes made to section 128.5 mean that suits filed after 1995 may not rely on section 128.5 for detecting a frivolous anti-SLAPP motion.

The problems, actual and potential, posed by section 425.16’s reliance on section 128.5 are rather disquieting. The Legislature would have better served section 425.16 by creating its own scheme for deterring frivolous and bad faith tactics within a SLAPP suit.

409. Id. at 827 (referencing § 128.5(a) (repealed 2008)).
410. Tate, supra n. 14, at 843 n. 222 (referencing § 128.5(b)(1) (citation omitted). As Tate further notes: “It is unclear whether the legislature intended section 425.16(c) to apply by reference only to cases filed before 1995, or whether it meant that ‘frivolous’ and ‘unnecessary delay’ in section 425.16(c) should be interpreted the same way as in section 128.5.”
412. § 425.16(c).
B. *THE NOERR-PENNINGTON DOCTRINE TO THE RESCUE*

Just as the *Noerr-Pennington* doctrine with its goal to protect petitioning activity was pivotal in the development of SLAPP concepts, legislation, and policies, Noerr-Pennington can be revisited to offer California a solution for deterring litigants from submitting bad-faith and frivolous section 425.16 anti-SLAPP motions. In fact, one component of the *Noerr-Pennington* doctrine that seems suitable for determining frivolous and bad faith tactics, and thus serves as a competent method to replace section 425.16’s dependence on the standards and operations set forth by section 128.5, is the sham exception that the doctrine uses to weed out from protection certain petitioning activity in which businesses engage, not as genuine attempts to influence governmental action, but as “attempt[s] to interfere directly with the business relationships of a competitor.” As discussed below, the parallels between the *Noerr-Pennington* doctrine and anti-SLAPP legislation make the doctrine’s sham exception an appropriate and relevant mechanism to use in section 425.16 to curb abuses by bad faith defendants and ultimately increase the legitimacy of the process of SLAPP protection in California.

A recap from the prior introduction of the *Noerr-Pennington* doctrine is appropriate: Decades before the recent recognition of, and efforts to prevent, SLAPP suits, the *Noerr-Pennington* doctrine existed as a way for courts to protect the petitioning activities of a business (or a group of businesses) that could otherwise be subject to anticompetitive liability. The doctrine evolved from a line of United States Supreme Court cases in which business litigants responded to petitioning activities of their competitors which had harmed them or placed them at a disadvantage. For example, in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, a group of railroad company presidents conducted a publicity campaign to influence passage of laws that injured competitors in the trucking industry.

413. See Pring & Canan, *Getting Sued*, supra n. 3, at 28.
415. See Osborn & Thaler, supra n. 58, at 33-34.
416. See id.
418. *Id.* at 130-31 (“In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws
and in *United Mine Workers of America v. Pennington*, large coal operators and a coal workers union jointly lobbied the Secretary of Labor to establish minimum wage rules that made it harder for small companies to compete. The United States Supreme Court declined to label these activities as anticompetitive, though they were detrimental to some players in commerce, and declined to affix liability because they involved some modicum of petitioning, which the Court saw as more important to protect. Hence the *Noerr-Pennington* doctrine was born and, under its protection, business activity that genuinely and legitimately necessitated action and influence through the political process is permissible even despite anticompetitive intent and effects. The parallels between the *Noerr-Pennington* doctrine and anti-SLAPP legislation are closely exhibited in the way both try to protect petitioning from becoming conduct for which a district or state trial court will award damages. While applying the *Noerr-Pennington* doctrine a court is unlikely to find a defendant’s legitimate petitioning activity anticompetitive, and a court addressing SLAPP protection is also unlikely to award damages to a plaintiff-SLAPPee for defendant-SLAPPee’s exercise of constitutional petitioning rights. The fundamental similarity is that both *Noerr-Pennington* and SLAPP protection effectively nullify a litigant’s challenge to another’s exercise of petitioning rights, refusing to award the litigant any compensation whether for anticompetitive conduct or for some common-law cause of action.

relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers.” *Id.* at 131.).


420. *Id.* at 660 (“The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the [Walsh-Healey Act] of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market.” *Id.* (citation omitted)).

421. *Id.* at 669-70; *Noerr*, 365 U.S. at 532-33.

422. See Osborn & Thaler, *supra* n. 58, at 33-34.

Of course, the United States Supreme Court was not blind to potential abuses of the *Noerr-Pennington* doctrine by businesses using petitioning activity *illegitimately* to injure rivals. The *Noerr-Pennington* protection was not so absolute. As indicated in the *Noerr* decision, the Supreme Court kept one nugget that would protect against bad-faith abusers of the doctrine—the sham exception: “There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.”

Though brief length and unspecific about what constituted a “mere sham,” this passage in *Noerr* has prevailed as more than a crumb of hope. Since *Noerr*, this passage has been revisited, shaped, and interpreted repeatedly. As a result, an applicable judicial mechanism has evolved to define what the Supreme Court meant by “mere sham.”

In *California Motor Transport v. Trucking Unlimited*, plaintiffs, in-state trucking companies in California, sued defendants, competing trucking companies operating outside and within California, for antitrust violations after defendants had allegedly “institut[ed] state and federal proceedings to resist and defeat applications by [plaintiffs] to acquire operating rights or to transfer or register those rights.”

The United States Supreme Court concluded:

> [I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests [vis-à-vis] their competitors.

But the Court proceeded to the heart of the case, stating “that there may be instances where the alleged conspiracy ‘is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the

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426. *Id.* at 509.
427. *Id.* at 510-11.
Sherman Act would be justified. Alas, the Court was about to call the defendants’ bluff, pronouncing that “First Amendment rights may not be used as the means or the pretext for achieving substantive evils’ . . . which the legislature has power to control.” Slightly deconstructive, the Court was elaborating on that “pretext” or “sham” by articulating that *Noerr-Pennington* and the protection of First Amendment rights was not a means for businesses to shut out or harm their competitors.

The Court added to this thought in *City of Columbia v. Omni Outdoor Advertising, Inc.*, where a billboard company with more than ninety-five percent of the market in a local South Carolina town was sued under the *Sherman Act* by an out-of-state billboard company for allegedly influencing the local city government to change zoning ordinances and restrictions on billboards in favor of the local company. The Supreme Court restricted *Noerr-Pennington* protection by reasoning that “[i]nsofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.” Then the Court mentioned that “Noerr recognized, however, what has come to be known as the ‘sham’ exception to its rule[].” Particularly, “[t]he ‘sham’ exception to *Noerr* encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.” Even further, “[a] ‘sham’ situation involves a defendant whose activities are ‘not genuinely aimed at procuring favorable government action’ at all, . . . not one ‘who genuinely seeks to achieve his governmental result, but does so through improper means.’” Having defined “mere sham” more concretely, the Court found the local billboard company not liable for anticompetitive conduct because, although anticompetitive, the local billboard company’s denial to its out-of-state rival “of ‘meaningful

428. *Id.* at 511 (quoting *Noerr*, 365 U.S. at 144).
429. *Id.* at 515 (referencing *NAACP v. Button*, 371 U.S. 415, 444 (1963)).
432. *Id.* at 367-69.
433. *Id.* at 379 (quoting *Noerr*, 365 U.S. at 140).
434. *Id.* at 380.
435. *Id.*
436. *Id.* (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, n. 4, 10 (1988)).
access to the appropriate city administrative and legislative fora’ was achieved by [the local billboard company] in the course of an attempt to influence governmental action that, far from being a ‘sham,’ was if anything more in earnest than it should have been.”437 In other words, the local billboard company cutting off its out-of-state rival’s access to government was merely incidental in its attempt to influence city government action for its own market concerns—not a means to effect an anticompetitive purpose. As the Court mentioned: “ ‘If Noerr teaches anything it is that an intent to restrain trade as a result of the governmental action sought . . . does not foreclose protection.’”438

Perhaps the more helpful decision in defining the Noerr-Pennington sham exception is Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,439 where a group of major film studios sued operators of a Palm Springs hotel resort for copyright and antitrust violations after the hotel tried to develop a market to rent “videodiscs” of over 200 movies to its hotel guests and tried to develop a market to sell disc players to other nearby hotels that wished to offer similar in-room movie viewing services.440 The hotel resort countered that the movie studios’ “copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.”441 By the time of the Professional Real Estate decision, decades had passed since the California Motors and Noerr cases442 and as the Court noted, “[t]he courts of appeal have defined ‘sham’ in inconsistent and contradictory ways.”443 Additionally, the hotel resort had argued that a studio’s “‘copyright infringement lawsuit [was] a sham because [it] did not honestly believe that the infringement claim was meritorious’”—effectively injecting a subjective analysis into the

437. Id. at 382 (quoting Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc., 891 F.2d 1127, 1139 (4th Cir. 1989)).
438. Id. at 381 (quoting Lawrence A. Sullivan, Developments in the Noerr Doctrine, 56 Antitrust L.J. 361, 362 (1987)).
440. Id. at 51-52.
441. Id. at 52.
443. Prof. Real Est. Investors, Inc., 508 U.S. at 55 n. 3.
444. Id. at 54 (quoting Columbia Pictures Indus., Inc. v. Prof. Real Est. Investors, Inc., 944 F.2d 1525, 1530 (9th Cir. 1991)).
sham exception, and presumptively settling a debate that the Supreme Court had itself "left unresolved."445 In response, the Court set out to reconcile the appellate authority split.

The Court affirmatively pronounced that the sham exception must be defined objectively. In a careful catalogue of examples, the Court paraded what did and did not fall within the sham exception: Legal proceedings lacking probable cause were a sham if the proceedings denied rivals meaningful access to the political process;446 so was initiating a repetition of "insubstantial claims";447 as well as suits not legitimately aimed at obtaining favorable action by the government.448 Conversely, a "successful 'effort to influence governmental action . . .
certainly cannot be characterized as a sham,'"449 Moreover, the Court discounted the weight of anticompetitive intent: "Whether applying Noerr as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham."450 Rather, what the Court weighed more heavily in a sham exception determination was whether the petitioning activity itself had no legitimate basis: "Indeed, by analogy to Noerr's sham exception, we held that even an 'improperly motivated' lawsuit may not be enjoined . . . as an unfair labor practice unless such litigation is 'baseless.'"451

Ultimately, the Court bolstered its observation by revealing the point of having examined what was and was not a sham under Noerr-Pennington: "Our decisions therefore establish that the legality of objectively reasonable petitioning 'directed toward obtaining governmental action' is 'not at all affected by any anticompetitive purpose [the actor] may have had.'"452 The pronouncement enabled the Court to further state that "[o]ur most recent applications of Noerr immunity further demonstrate that neither Noerr immunity nor its sham

445. Id. at 57.
446. Id. at 58 (citation omitted).
447. Id. (citation omitted).
448. Id. (citation omitted).
449. Id. (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502 (1988)).
450. Id. at 59 (citations omitted).
451. Id. (citation omitted).
exception turns on subjective intent alone.\textsuperscript{453} This directive to keep the sham exception analysis objective, and not to allow examination of a party’s subjective intent in initiating petitioning conduct that arguably falls within \textit{Noerr-Pennington} protection, is consistent with how earlier sham cases would have applied the exception when the means of a business (e.g., using the political process) is relied upon directly to achieve its ends (e.g., anticompetitive intent). As the Court had held in \textit{Omni}, under \textit{Noerr-Pennington}, the fact that “a private party’s political motives are selfish is irrelevant”\textsuperscript{454} and that the sham exception was concerned with “situations in which persons use the governmental \textit{process}—as opposed to the \textit{outcome} of that process—as an anticompetitive weapon.”\textsuperscript{455} Petitioning rights trump anticompetitive conduct and \textit{Noerr-Pennington} is concerned with protecting those who rely on the result of their legitimate political influence, even if it furthers anticompetitive results. In both situations the actor will have an anticompetitive intent, so the Court turned to \textit{how} the actor uses the political process—as merely a direct weapon to drive out competition or as a genuine means to influence a governmental result that will keep business rivals away.

In \textit{Professional Real Estate Investors} the Court delineated a two-prong analysis to define a sham litigation tactic:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under \textit{Noerr}, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere \textit{directly} with the business relationships of a competitor” . . . through the “use [of] the governmental \textit{process}—as opposed to the outcome of that process—as an anticompetitive weapon.”\textsuperscript{456}

\textsuperscript{453} Id.


\textsuperscript{455} Id.

Finally, two decades after Noerr, what was initially a “mere sham” measured by differing interpretations in the various courts now had a more fleshed-out, element-driven definition.

The second prong of the Court’s sham exception test requires an analysis in the commercial context. As a result, the helpfulness of the Court’s two-prong rule in the California SLAPP arena might be limited as it could leave a gaping hole in a parallel two-prong rule used to determine the frivolousness of an anti-SLAPP motion. In that way, the translation of this sham exception test from antitrust to anti-SLAPP may not be so seamless, as some other determination relevant to the SLAPP scenario must replace what the “baseless lawsuit” is concealing. But this concern may be slight, as there have been cases in the SLAPP arena that have tried to extend the Noerr-Pennington sham exception and have crafted decisions balancing the framework of the sham exception with the substantive concerns of SLAPP protection. One famous case, identified by Pring and Canan as an early SLAPP, does just that. An examination of its development of a sham exception within SLAPP protection offers insight into changes that could be made to section 425.16(c) that will provide a better fit than a direct application of Omni.

In Protect Our Mountain Environment v. District Court (POME), the Colorado Supreme Court had the opportunity to consider the “mere sham” definition in a situation that arose after a land developer sued a grassroots organization with the curiously-literal name “Protect Our Mountain Environment” (POME) for alleged abuse of legal process, citing POME’s previous but unsuccessful lawsuit against the developer which had exponentially delayed the developer’s abilities to construct a commercial space on a 507 acre parcel in Colorado. POME moved to dismiss based on petitioning rights but the District Court found the prior suit against the developer was a sham and denied the motion. POME then initiated a prohibitory relief action before the Colorado Supreme Court. The Court came up with its own test for finding a mere sham after walking through a recitation

457. Pring & Canan, Getting Sued, supra n. 3, at 5-6, 43-44.
459. Id. at 1362-64.
460. Id. at 1364.
461. Id.
of Noerr-Pennington based on the lineage of United States Supreme Court cases discussed above. The Colorado Supreme Court Court then launched into a discussion of the limitations of Noerr-Pennington and the right to petition, pronouncing that “[t]he First Amendment does not grant a license to use the courts for improper purposes.” This interpretation led to a deconstruction of the sham exception case law where the Colorado high court noted:

Recognizing that the Sherman Act could not be applied to genuine efforts to influence legislation or law enforcement practices, the United States Supreme Court nevertheless indicated that antitrust liability could attach to petitioning activity which constituted “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.”

In this deconstruction, the court discovered that the sham exception cases seem to suggest that a finding of sham litigation required: (1) Proof of baseless litigation, (2) a showing that the petitioning was done merely to harass or for some other improper purpose, and (3) a demonstration that this prior petitioning activity could have adversely affected some legal interest of the claimant. From this analysis, the Court easily fashioned its three-prong approach:

That standard requires that when, as here, a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant’s petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant’s administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary

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462. Id. at 1364-66.
463. Id. at 1366.
465. Id. (citation omitted).
466. Id. at 1367 (citations omitted).
467. Id. at 1368 (citations omitted).
The purpose of the defendant's petitioning activity was to harass the plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.468

The first two prongs—showings of a baseless litigation and that the litigation was for some improper purpose—are consistent with Noerr-Pennington's concern that for a sham to exist, the litigant's political activity was used not in a legitimate way but rather as a "weapon" against a commercial rival. As Pring notes, "[t]his imaginative approach blends the best of, and is consistent with, the United States Supreme Court's handling of SLAPP cases."469 The third prong is more personal to the party who endured such meritless litigation and who is trying to prove its opponent's frivolous tactic by requiring that party to show a cognizable injury; and yet the prong keeps the burden of proof within a litigation context by confining that party to showing its injury in a legal capacity.

From our little excursion away from the forest of SLAPPs into the desert of antitrust, we now need to examine how POME's three-prong test can assist in making California's section 425.16 special motion to strike more effective at identifying bad-faith SLAPP defendants (ones like Gunther) regardless of whether these defendants were dismissed. If successful, perhaps the balance in SLAPP protection that Pring and Canan preached can be obtained. One of the advantages the POME test may have over section 128.5 is that the POME test is SLAPP-specific. Though the POME case just barely predates the emergent recognition of SLAPP suits and codification of SLAPP protection, Pring and Canan have noted that POME "has become a model followed by other defense attorneys, judges, even legislatures,"470 in part because "it mandates early detection and identification of SLAPPs and sets up reasonably balanced but firm standards for prompt disposition of appropriate cases."471 These attributes makes POME's applicability to California's section 425.16 more salient since its test was developed to focus on the protection of petitioning rights. In addition, the POME test for frivolous litigation tactics resulted in an application of the

468. Id. at 1369.
469. Pring, SLAPPs, supra n. 2, at 19. Among the cases that Pring lists in footnote 55, accompanying that observation in his article, is Noerr. See id at 19 n. 55.
470. Pring & Canan, Getting Sued, supra n. 3, at 43.
471. Pring, SLAPPs, supra n. 2, at 19.
Court’s extension of the Noerr-Pennington doctrine, which has influenced SLAPP protection consistently by providing a model mechanism for courts to deal with cases outside of antitrust that have had to protect petitioning rights. The law is analogy: “[T]he kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.”\textsuperscript{472} In the transition from Noerr-Pennington to SLAPP protection, the leap has been facilitated by the shared commonality that SLAPPs and Noerr-Pennington cases all deal with the immense challenge to petitioning rights posed by the filing of commonplace causes of action.

Indeed, in mulling over the idea of modeling state SLAPP protection after the Noerr-Pennington doctrine, commentators have shared approval of the applicability of the Noerr-Pennington doctrine to SLAPP legislation. For instance, one commentator, in assessing Washington state’s SLAPP legislation, noted in general that “the Noerr/Pennington ‘sham’ doctrine has proven to be an effective framework for courts confronted with SLAPP litigation,”\textsuperscript{473} to some extent because the POME “[C]ourt, relying partly on the Noerr Motor Freight, Inc. and Pennington line of cases, noted the conflicting issues of the chilling effect on the petition rights of persons sued for their use of administrative or judicial forums and the potential for damage caused by baseless actions masquerading as protected petitioning activity.”\textsuperscript{474} Commentators in California have also observed the applicability of Noerr-Pennington to SLAPP legislation in the Golden State. One observer, in critiquing the Legislature’s attempts to pass SLAPP legislation prior to passage of section 425.16, noted that “[o]n balance, Noerr-Pennington, applied with some discretion and not overbroadly, can help eliminate SLAPP suits. While Noerr-Pennington is costly to plaintiffs, in this limited context the costs are acceptable, because of the nature of the suits, the constitutional issues

\textsuperscript{472} Edward H. Levi, \textit{An Introduction to Legal Reasoning} 3-4 (Univ. of Chi. Press 1949).


\textsuperscript{474} \textit{Id.} at 275 (footnote omitted).
involved, and the costs imposed on potential participants in the political process." That same commentator also found the sham exception specifically applicable:

Noerr-Pennington is applied in a procedural manner consistent with the goal of protecting free speech. The plaintiff must plead a sham exception with specificity; with those specific facts the court, rather than the jury, can determine whether there was improper use of procedures in the underlying petition, and if not, award summary judgment. For SLAPP defendants who may make false claims in the heat of political debate, the Noerr-Pennington protections are preferable.

Similarly, another commentator, critiquing section 425.16 just after it had been passed in 1993, approved of using Noerr-Pennington by indicating that “[w]hat an anti-SLAPP statute should really address is not whether the defendant’s petitioning concerns a public issue, but whether it is in good faith.” In this way, “[a]lthough the Noerr/Pennington doctrine already protects against bad-faith or sham petitioning, California’s newly enacted statute could sensibly add this qualification of threshold petitioning activity.” Accordingly, “the Noerr/Pennington sham exception to the right to petition should be codified in the anti-SLAPP statute, which should cover only good faith petitioning.” But the POME test—a test basically forged from Noerr-Pennington—would be less problematic if applied to section 425.16. Henceforth, the POME test for finding frivolous litigation tactics offers a viable and even exegetical method for deterring bad-faith defendants in SLAPP suits.

By replacing the prove-up standards currently used by section 425.16 with the POME three-prong test, plaintiffs seeking to recover fees when faced with a frivolous anti-SLAPP motion to strike would be given a clearer and more SLAPP-specific method for obtaining a fair outcome. As a result, the mechanisms of section 425.16 would be better balanced as the statute strives to protect private citizens from

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476. Id. at 1015.
478. Id. (footnote omitted).
479. Id. at 454.
SLAPP suits that appear commonplace but are gnawing at First Amendment petitioning rights.

In the Gunther context, a POME-like test would likely have offered UCG a more SLAPP-aligned method of obtaining some review and recourse had UCG gone after Gunther for the bad-faith filing of a section 425.16 anti-SLAPP motion. Instead of having to deal with the operations of section 128.5 and a standard divorced from the SLAPP arena—with case law and policies not quite on point controlling the investigation of a meritless litigation tactic that the statute was not drafted to find—UCG could have had a more appropriate standard tailored to SLAPP suits. In a general anti-SLAPP context, because POME offers a standard better suited than section 425.16’s existing reliance on section 128.5, not only is the POME test a more appropriate way for keeping bad-faith defendants at bay, it can also be valuable in helping section 425.16 achieve better balance as it strives to distinguish challenges to the right to petition from common-law torts and the frivolous filing of anti-SLAPP motions from legitimate actions to strike SLAPPs. If the Legislature ever reconsiders section 425.16’s reliance on section 128.5 and decides an amendment is justified, one can hope that the POME test, or some variation, will be the prime candidate. The POME test would make section 425.16 better able to do its job of discerning what exactly is what in California courtroom dockets—in separating the wolves from the sheep.

V. CONCLUSION

The trick for seeing the nature of SLAPP suits is to revisit Aesop and keep in mind how the wolf from fabled wolf ensnared the young and innocent little lamb for a meal. Instead of a direct and violent assault, the wolf “sought a reasonable complaint to justify his hatred.”480 To a landfill company whose operations were reported by private citizens to local city officials for contaminating ground water, a trade libel suit might seem a reasonable complaint. To the owner of a noisy and dilapidated bar whose next-door neighbors protested the renewal of the liquor license, a business interference suit might seem reasonable. To a major developer whose approved residential building plans were opposed by a local civic association’s declaratory relief suit, a malicious prosecution action might seem reasonable. Though the

480. Aesop, supra n. 1, at 68.
original intent of Aesop’s ancient fable was probably not to raise awareness of SLAPP lawsuits, the underlying idea—that truth, reason, and justice can be subverted to justify selfish gain—serves to illustrate how SLAPP suits function in our modern legal systems to assail the political process and how methods to combat them try to counter that subversion. Thank goodness, then, for hermeneutics and the elasticity of metaphor.

California’s attempt to counter that subversion—to “strike” such suits before their unsuspecting targets are slapped—has been a foundational legislative device to cleanse court dockets while trying to efficiently delineate legitimate lawsuits from the use of the legal process to inhibit petitioning rights. In this process, the suits that attempt to ensnarl private citizens into spending time, money, and energy defending their genuine exercise of First Amendment rights are eliminated before trial—the wolves are separated from the sheep and then fenced off before trial. But the wolves are a smart and persistent bunch. They find loopholes and dig paths beneath the roots of protection to reach back for their prey. Like many laws that have experimental beginnings, more than a decade and a half since its inception, California’s anti-SLAPP legislation requires maintenance. This article examined and proposed improvements in two areas within the boundary of section 425.16’s protection that can be strengthened in order to maintain the statute’s integrity, constitution, and well-intended purposes.

Some have viewed protection against SLAPP suits as a cause beyond state capacity, better addressed by the federal government. In 1995, the organizers behind several First Amendment rights groups, including those within the California Anti-SLAPP Project, drafted proposed federal anti-SLAPP legislation based on a model anti-SLAPP statute that Pring and Canan had previously devised as a summary judgment motion. That effort, however, was not successful. Meanwhile, the Society of Professional Journalists has drafted a uniform model act against SLAPPs that utilizes a motion to strike

similar to California’s section 425.16. As of early 2009, another proposal for federal anti-SLAPP legislation is under development, again by supporters behind the California Anti-SLAPP Project and the Federal Anti-SLAPP Project (though a draft of the proposed legislation was not yet available as of this writing). On the Federal Anti-SLAPP Project’s pending website, the claims for such a proposal state that “because the use of SLAPPs to silence critics and opposition happens with disturbing frequency, it is time for Congress to pass SLAPP protection” and that this new legislation “provides procedural mechanisms for dismissing SLAPPs quickly and feeshifting for prevailing SLAPP defendants.” So far, that statement sounds very much like an allusion to section 425.16’s special motion to strike, but the chances for a procedure that is more explicitly a summary judgment motion cannot be entirely ruled out. Moreover, the Federal Anti-SLAPP Project’s aim with “[t]he proposed law is ambitious—it seeks to create both deep and broad protection for acts in furtherance of First Amendment rights.” The website’s rhetoric and tone is ostensibly grand and pressing as it urges that any SLAPP defense “should be as strong as possible.” Whether this federal proposal will succeed is unclear, but it appears that the proponents of SLAPP protection are a persistent group as well.

For now, however, SLAPP protection is still left to the states. The Legislature, in its effort to maintain effective and responsible SLAPP protection, should define a clear and just balance between legitimate lawsuits and the legitimate exercise of constitutional rights. Lawmakers should fortify the law to ensure that those who file SLAPPs are not let off the hook by purposely dismissing their suits before adjudication and that those who file frivolous anti-SLAPP motions to complicate the judicial process are identified and sanctioned. Any solutions must keep in mind the subservience of

486. Id. at [¶ 4].
487. Id.
488. Id.
such suits in the first place and the sensibilities of the American legal landscape. As Professor Canan has pointed out, “[i]t is the sovereignty of the individual that the petition clause is all about; it is this feature of American democracy that is emulated around the world.”

By enacting SLAPP protection in California in 1992, the Legislature demonstrated this sentiment, whether or not its members were conscious of it at the time. Section 425.16 has armed private litigants in case they run across big bad wolves, but maintaining First Amendment protections requires vigilance and agility as defenses have never been absolute and are subject always to clever diminishment.

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