SUPREME JUDICIAL COURT OF MAINE
SITTING AS THE LAW COURT

MAINE DEMOCRATIC PARTY, et al.,	:	
Appellants,	:	
v.	:	No. Was-12-499
RALPH NADER, et al.,	:	
Appellees.	:	

APPELLEES' MOTION FOR RECONSIDERATION

Pursuant to Me. R. App. P. 14(b), Appellees Ralph Nader (the "Candidate"), Christopher Droznick, Nancy Oden and Rosemary Whittaker (the "Voters") respectfully move for reconsideration of this Court's May 23, 2013 *per curiam* opinion vacating the judgment of the Superior Court and remanding with instructions to dismiss this case under Maine's anti-SLAPP statute, 14 M.R.S. § 556 (the "Opinion"). As set forth below, reconsideration is necessary because the Court apparently misapprehended three points of law, and in each instance, the Opinion directly contradicts the prior reported decision the Court entered in this case only one year ago, when it vacated dismissal under the anti-SLAPP statute. *See Nader v. Maine Democratic Party ("Nader I")*, 41 A.3d 551 (Me. 2012). The Opinion is therefore irreconcilable with *Nader I*, and it should not be permitted to stand.

Reconsideration is especially needed because the Court announced a new evidentiary standard in *Nader I*, which now applies in all cases arising under the anti-SLAPP statute, but the Opinion applies an incompatible standard that *Nader I* explicitly rejects. If the Opinion remains undisturbed, this conflict will make it impossible for lower courts to maintain consistency with this Court's precedent construing the anti-SLAPP statute. Not only does the Opinion apply an

evidentiary standard that *Nader I* rejects, but also, it misconstrues the anti-SLAPP statute contrary to the plain meaning of its express terms, and overlooks the relevant allegations and evidence the Candidate and Voters presented in support of their claims. The Opinion thus raises the same constitutional concerns the Court resolved in *Nader I*. It should be vacated.

1. The Opinion Adopts a Novel Definition of 'Petitioning Activities' That Contradicts the Plain Meaning of the Anti-SLAPP Statute's Express Terms, Thus Raising the Same Constitutional Concerns the Court Resolved in *Nader I*.

Taken in the order in which they appear, the first error in the Opinion is its definition of "petitioning activities," which contradicts the plain meaning of the anti-SLAPP statute's express terms. Specifically, the Opinion asserts that MDP[1] engaged in only "three discrete petitioning activities" – the filing of the Melanson complaint, the Tucker complaint, and the Melanson appeal – and that "the individual grounds for challenging Nader's inclusion on the ballot are not themselves discrete petitioning activities because they are part of a single request for relief." Op. ¶ 17 (citing *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011)). The Opinion thus defines an exercise of the right of petition, for purposes of the anti-SLAPP statute, as an entire complaint or appeal, but not any individual claim or statement alleged therein. In reliance on this novel definition, the Opinion disregards the false and unsupported claims of fraud MDP asserted in each of its underlying complaints, which are the precise petitioning activities giving rise to, and forming the legal basis for, the Candidate and Voters' tort claims in this action. A75 (Comp. ¶ 56 (alleging that MDP "used the challenge process as a pretext for making false accusations of fraud against the Candidate and Voters")).

Under the anti-SLAPP statute, a "party's exercise of its right of petition" is defined to

1 MDP refers collectively to Appellants Maine Democratic Party, the Democratic National Committee, Kerry-Edwards 2004, Inc., Dorothy Melanson and Terry McAuliffe.

include "any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding." 14 M.R.S. § 556 (emphasis added). Nothing in this definition supports the conclusion that a statement is not a discrete petitioning activity if it is alleged in a complaint. On the contrary, the statutory text uniformly employs the term "statement," and never refers to the entire pleadings, publications, speeches or other materials in which individual statements might appear. *See id*. Thus, by defining "petitioning activities" to exclude the individual statements in MDP's complaints, the Opinion contradicts the express terms of the anti-SLAPP statute, and violates the cardinal rule of statutory construction, which requires that courts construe the unambiguous terms of a statute "to convey their plain and ordinary meaning." *Schelling v. Lindell*, 942 A.2d 1226, 1231 (Me. 2008) (citation omitted).

The only authority the Opinion cites for its novel definition of "petitioning activities" is the decision of the Supreme Court of the United States in *Guarnieri*. Op. ¶ 17 (citing *Guarnieri*, 131 S. Ct. at 2495). *Guarnieri* does not even address the question of how to define a discrete petitioning activity, however, much less does it support the conclusion that an individual statement does not qualify if it is included in a complaint. Instead, *Guarnieri* expressly recognizes that whether a communication constitutes a 'petition' entitled to constitutional protection depends on "the content, form, and context of a given statement, as revealed by the whole record." *Guarnieri*, 131 S. Ct. at 2501 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (emphasis added) (brackets and substituted language removed)). In addition to contradicting the express terms of the anti-SLAPP statute, therefore, the Opinion's novel definition of petitioning activities appears to lack any basis in case law.

The Opinion's novel definition of "petitioning activities" also contradicts this Court's

express directive in *Nader I*, that this case "should be allowed to proceed" provided the Candidate and Voters present evidence that "any, rather than all" of MDP's petitioning activities were devoid of any reasonable factual support or arguable basis in law. *See Nader*, 41 A.3d at 563 (emphasis added). Directly contradicting that express directive, the Opinion concludes that the anti-SLAPP statute protects all of MDP's petitioning activities, and requires dismissal of this entire case, on the ground that one of MDP's claims identified a "technical defect" in the Candidate and Voters' nomination petitions, and another showed the nomination petitions "did not comply with the literal requirements" of a statute. Op. ¶¶ 21, 24, 25. Based on this rationale, the Opinion disregards the Candidate and Voters' allegations that MDP asserted several false claims of fraud without any factual or legal basis, A75-A76 (Comp. ¶¶ 56, 59-60), as well as the wealth of evidence they presented to support those allegations. *See infra* Part 2. In other words, the Opinion overlooks the very allegations and evidence in the record demonstrating that "any, rather than all" of MDP's petitioning activities were devoid of any reasonable factual support or arguable basis in law. *See Nader*, 41 A.3d at 563.

The Opinion's misconstruction of the anti-SLAPP statute thus raises, once again, the constitutional concerns the Court resolved in *Nader I*. *See Nader*, 41 A.3d at 558-60 (recognizing that anti-SLAPP statute could violate the Candidate and Voters' "right to petition, the right of access to the courts, and the right of access to the ballot"). "To avoid an unconstitutional application of the law," the Court concluded in *Nader I*, the anti-SLAPP statute "must be construed, consistent with usual motion-to-dismiss practice, to permit courts to infer that the allegations in a plaintiff's complaint and factual statements in any affidavits responding to a special motion to dismiss are true." *Id.* at 562. The Opinion, by contrast, construes the anti-

SLAPP statute to guarantee dismissal provided MDP shows just one of its claims was non-frivolous – no matter how many other false, defamatory, abusive, malicious or improper claims it also asserted. This result epitomizes the "unconstitutional application of the law" the Court sought to avoid in *Nader I*, by announcing the new evidentiary standard that now applies in cases arising under the anti-SLAPP statute. *See id.* at 562-63. The Opinion immunizes MDP's tortious conduct by insulating it from judicial review, in violation of the Candidate and Voters' right to petition and to access the courts. *See id.* at 558-60.

2. The Opinion Fails to Apply the *Prima Facie* Standard Announced in *Nader I* and Overlooks the Evidence the Candidate and Voters Submitted to Meet That Standard.

The second error in the Opinion is that it fails, by every relevant criterion, to apply the *prima facie* evidentiary standard the Court announced in *Nader I*. *See Nader*, 41 A.3d at 562-63. As a threshold matter, the Opinion conspicuously fails to define the *prima facie* standard, or to identify its requirements, or to explain how or why the evidence submitted by the Candidate and Voters is insufficient to meet that standard. Had the Opinion addressed these points, it could not have concluded the Candidate and Voters fail to carry their burden under the anti-SLAPP statute.

In *Nader I*, the Court clearly defined the *prima facie* standard and set forth its requirements. The *prima facie* standard imposes "the preliminary burden of production of evidence," the Court stated, and "it requires proof only of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Id.* at 562 (citation omitted). "Thus, *prima facie* proof is a low standard that does not depend on the reliability or credibility of the evidence, all of which may be considered at some later time in the process." *Id.* Instead, the anti-SLAPP statute "must be construed, consistent with usual motion-to-dismiss practice, to permit courts to

infer that the allegations in a plaintiff's complaint and factual statements in any affidavits responding to a special motion to dismiss are true." *Id.* This was the rationale behind the Court's directive that this case "be allowed to proceed" provided the Candidate and Voters present "some evidence" that "any, rather than all" of MDP's petitioning activities "were devoid of any reasonable factual support or arguable basis in law." *Id.* at 562-63.

On remand, the Superior Court ably followed that directive. A13-A27. It found the Candidate and Voters carried their burden under the *prima facie* standard, and supported this finding by citing "some evidence" that "any, rather than all," of MDP's claims were devoid of reasonable factual support or arguable basis in law. A17-18 (citing "paragraphs 5, 8 and 59-66 of the complaint," as well as the "supporting affidavits of Mr. Nader and Ms. Amato"). As set forth in the Candidate and Voters' opening brief (at 15-17), they submitted a great deal more evidence that supports the Superior Court's finding, including several affidavits documenting the lack of factual or legal basis for MDP's false claims of fraud, exhibits of the actual false and unsupported claims MDP asserted in its formal pleadings, excerpts from the hearing officer's report finding such claims to be unsupported by evidence, excerpts from the Superior Court decision affirming the hearing officer's findings, and more than a dozen total affidavits, each with evidentiary exhibits attached, comprising 276 pages of evidence demonstrating that MDP's false and unsupported claims in Maine were typical of the false and unsupported claims MDP simultaneously asserted against the Candidate and Voters in multiple jurisdictions across the country, in furtherance of MDP's concerted nationwide effort to "drain," "distract" and "neutralize" the Candidate's campaign "by forcing him to defend these things." A124 (Amato Aff. ¶¶ 15-17 (quoting MDP's admissions during 2004 election)); A127-A128, A139-A153,

A154-A189. Based on this voluminous evidentiary record – all of which was submitted at the pleading stage, without the benefit of discovery – the Superior Court's finding that the Candidate and Voters carried their burden under the anti-SLAPP statute should have been affirmed, because there is "competent evidence" in the record to support it. *See Key Equip. Finance Corp. v. Hawkins*, 985 A.2d 1139, 1144-45 (Me. 2009).

The Opinion nevertheless overrules the Superior Court's finding, without even addressing the Candidate and Voters' allegations that MDP asserted several false and baseless claims of fraud. A75-A76 (Comp. ¶¶ 56, 59-60). The Opinion thus fails to support its conclusion that the foregoing evidence is insufficient to enable a fact-finder to infer the truth of such allegations, as the Superior Court properly did under the "low standard" of *prima facie* proof. *See Nader*, 41 A.3d at 562. Instead, the Opinion faults the Candidate and Voters for submitting excerpts of the materials on which they rely, rather than the entire record of the underlying proceedings. Op. ¶¶ 20 & n.10, 22. Because the Candidate and Voters did not submit "the Tucker complaint itself, a transcript of the proceedings before the hearing officer, the complete hearing officer's report or affidavit, or the Secretary of State's decision," the Opinion concludes, the evidence they did submit is insufficient to "establish that there was no evidence of *any* kind presented to support" MDP's false claims of fraud. Op. ¶¶ 20, 22 (emphasis original). This conclusion is clear error, because it once again contradicts the plain terms of the anti-SLAPP statute, as well as the *prima facie* evidentiary standard the Court announced in *Nader I*.

To determine whether a non-moving party carries its burden, the anti-SLAPP statute requires that a court "consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based." 14 M.R.S. § 556. The statute does <u>not</u> require

that a party submit the entire evidentiary record from an underlying proceeding, or evidence otherwise sufficient to "establish" with certainty that there was "no evidence of *any* kind" to support the underlying petitioning activities. Op. ¶ 22. Rather, as *Nader I* makes clear, to carry their burden under the *prima facie* standard, the Candidate and Voters only needed to present "some evidence," through "the pleading and … affidavits," that would "allow the fact-trier to infer the fact at issue and rule in [their] favor." *Nader*, 41 A.3d at 562 (citations omitted). The evidence in this case clearly exceeds that standard – even though the Candidate and Voters have never been permitted to take discovery. By requiring that they present still more evidence, sufficient to preclude the speculative possibility that MDP had a factual or legal basis for its false claims, when MDP itself has failed to identify any such basis, the Opinion exceeds the requirements of the *prima facie* standard, and contradicts the Court's decision in *Nader I*.

3. The Opinion Improperly Applies the Summary Judgment Standard the Court Explicitly Rejected in *Nader I*.

The third error in the Opinion is the most problematic from the perspective of a lower court endeavoring to maintain fidelity with this Court's precedent construing the anti-SLAPP statute. Specifically, the Opinion applies a summary judgment evidentiary standard, which the Court explicitly rejected in *Nader I*. *Compare* Op. ¶ 19 ("As is true in the summary judgment context, a party cannot satisfy its burden to produce *prima facie* evidence with averments made "on information and belief") *with Nader*, 41 A.3d at 562 (rejecting the "converse summary-judgment-like standard" the Court applied in previous cases, because "it is this standard, not section 556, which burdens the constitutional rights at issue"). If the Opinion is permitted to stand, therefore, the Court's precedent construing the anti-SLAPP statute will be contradictory with regard to which evidentiary standard properly applies.

In *Nader I*, the Court explained that the converse summary-judgment-like standard required that evidence be viewed "in the light most favorable to the moving party" – here, MDP. *Nader*, 41 A.3d at 561. Consequently, when the parties "present conflicting facts, the nonmoving party" – here, the Candidate and Voters – "will always lose." *Id.* This is the unconstitutional result the Court intended to rectify when it rejected the converse summary-judgment-like standard and announced the new *prima facie* standard. *See id.* at 554 ("We conclude that the Maine anti-SLAPP statute may not be invoked to achieve dismissal of claims alleging abuses of process without giving the plaintiff the opportunity to establish a *prima facie* case to support the claims").

The *prima facie* standard promulgated in *Nader I* remedies the constitutional infirmity of the anti-SLAPP statute, as previously construed, by requiring that courts "infer that the allegations in a plaintiff's complaint and factual statements in any affidavits responding to a special motion to dismiss are true." *Id.* at 562. Remarkably, the Opinion expressly declines to adhere to this standard, and instead resolves factual issues against the Candidate and Voters. Thus, yet again, the Opinion directly contradicts the Court's decision in *Nader I*.

Among the most important factual issues decided against the Candidate and Voters is whether "it was MDP who engaged in petitioning activity through the Tucker complaint." Op. ¶ 19. As an initial matter, the Opinion erroneously faults the Candidate and Voters for making that allegation "on information and belief" alone, Op. ¶ 19, when in fact, the Candidate and Voters allege several additional facts to support the allegation. Specifically, they allege that the so-called "Tucker complaint" incorporates, as Exhibit K, a letter from a California elections official to one of the attorneys who filed the Defendants' Pennsylvania challenge, A75-A76 (Comp. ¶ 58);

further, that Defendant Moffett's organization, The Ballot Project, paid this attorney's firm $6,000 for costs associated with that challenge, A75-A76 (Comp. ¶¶ 58); and that the DNC retained the other law firm that filed the challenge. A96 (Comp. ¶¶ 58, 120-21). Contrary to the Opinion's conclusion, therefore, the record contains sufficient facts to support a finding that MDP not only helped coordinate the Tucker complaint, but also that MDP materially supported that complaint. The Court apparently overlooked these facts, however, because the Opinion fails to address them.

Because the foregoing facts are undisputed, the Opinion's conclusion that the Candidate and Voters "produced insufficient evidence" to support the allegation that MDP engaged in petitioning activity through the Tucker complaint would be erroneous even if the Opinion properly relied on a summary judgment standard. Op. ¶ 19. Under the *prima facie* standard, moreover, that conclusion is clear error, because the allegations in the Candidate and Voters' Complaint and supporting affidavits must be taken as true. *See Nader*, 41 A.3d at 562. By disregarding the relevant allegations, and resolving an undisputed issue of fact against the Candidate and Voters, the Opinion violates that requirement. *See id.*

* * *

May It Please the Court, a Note From Plaintiff Ralph Nader:

While a student at Harvard Law School, I read THE NATURE OF THE JUDICIAL PROCESS by that wise jurist Benjamin Cardozo. The book was not required in any course, but it impressed me as a mix of moderate realism with the necessary judiciousness he thought was required of our third branch of government.

Our litigation in this case, in numerous venues since 2007, has never been given a chance

to have its day in court on the merits of our claims. Procedural obstacles have been the inventory of the defendants to block us from having a chance to prove our claims in a court of law.

Procedural obstacles well beyond the historic norm have been a spreading phenomenon in both federal and state courts. This serious hurdle to litigating on the merits was the subject of a major, important law review article by the eminent procedural specialist, Professor Arthur Miller. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286 (2013). Professor Miller is no doubt known to every jurist in the nation as the co-author of Federal Practice and Procedure (West Group 4th ed., 2001). I commend his scholarly research and evaluation to anyone concerned with the direction of our courts.

Maine is our last attempt to reach a trial on the merits, which Superior Court Justice Kevin M. Cuddy and this Court's decision one year ago had finally provided us. How ironic that a statute intended to prevent the abuse of judicial processes would be invoked at the eleventh hour, to prevent a trial in this case seeking redress for such abuses. Running for elective office is the consummate expression of the First Amendment – speech, petition and assembly. To ensure those rights are protected, the Court's May 23, 2013 opinion should be vacated. In any event, our long, arduous effort within the judicial process in various jurisdictions will offer valuable lessons to all members of our profession.

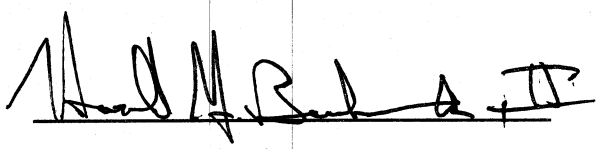
Thank you.

CONCLUSION

For the foregoing reasons, the Law Court's Decision entered May 23, 2013 should be vacated, and the Superior Court's Order entered September 20, 2012 should be affirmed insofar as it denied Appellants' special motions to dismiss under 14 M.R.S. § 556. This case should be remanded to the Superior Court for further proceedings.

Dated: May 30, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of June, 2013, a copy of the foregoing was served by First Class U.S. Mail on:

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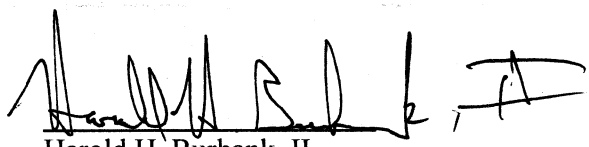

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