

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No.: BCD-CV-11-28

KAILE R. WARREN, JR.,	)
RENT-A-HUSBAND LLC,	)
RENT-A-HUSBAND ENTERPRISES,	)
LLC, and KW ENTERPRISES, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
PRETI, FLAHERTY, BELIVEAU &	)
PACHIOS, LLC, MARCUS, CLEGG &	)
MISTRETTA, P.A., and ACE	)
HARDWARE CORPORATION,	)
	)
Defendants	)
	)

**ORDER ON ACE HARDWARE CORPORATION'S  
SPECIAL MOTION TO DISMISS**

Ace Hardware Corporation (Ace) moves to dismiss Plaintiffs' claims for defamation (Count V) and false light (Count VI) pursuant to Maine's anti-SLAPP statute, 14 M.R.S. § 556 (2011). Plaintiffs oppose the motion on two grounds: first, the statements of ACE on which those claims are not protected under the anti-SLAPP statute; and second, Ace's statements had no "reasonable factual support or any arguable basis in law." 14 M.R.S. § 556. By agreement of the parties, the court did not hold oral argument on Ace's motion.

*FACTUAL BACKGROUND*

Viewed in the light most favorable to Ace as the moving party, the pleadings and affidavits reveal the following facts. *See Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶ 18, 772 A.2d 842. In 2009, in response to media inquiries regarding Rent-A-Husband, Ace issued a

media statement regarding its relationship with Plaintiffs.<sup>1</sup> (Boniface Aff. ¶ 3.) The media statement provided:

A handful of independently owned and operated Ace stores have or have had relationships with Rent-A-Husband, which is just one of a number of do-it-for-me service providers with whom select Ace stores across the country have partnered.

For six months in 2003, the Ace Hardware Corporation worked with Rent-A-Husband for it to provide certain services to customers of several Ace stores located in Maine and New Hampshire. Over the next several years, Ace had a series of informal discussions with Mr. Warren regarding a potential ownership stake in Rent-A-Husband, but no formal agreement or agreement in principle was ever reached. In early 2008, Ace discontinued these and other conversations with Mr. Warren for a number of business reasons.

Ace has no knowledge of Mr. Warren's conversations with his investors or lenders.

(Boniface Aff. Exh. 1.) On October 21, 2009, September 10, 2009, and September 4, 2009, three separate articles were published by three separate publications regarding Plaintiffs' business relationships with Ace. (Boniface Aff. ¶¶ 4-6; *see* Boniface Aff. Exhs. 2-4.)

On or about November 2, 2009, the Maine State Office of Securities served a subpoena for documents on Ace, commanding production of documents in Ace's possession pertaining to Ace's business relationship or prospective business relationship with Plaintiffs. (Bohl Aff. ¶ 3; *see* Bohl Aff. Exh. A at 3.) Ace produced the documents on November 19, 2009, and December 15, 2009. (Bohl Aff. ¶ 3.)

In December of 2009, Ace was advised that Plaintiff Warren had been indicted for criminal offenses by a grand jury in Maine in the matter of *State v. Kaile R. Warren, Jr.*, docket number CUM-CR-09-9716. (Bohl Aff. ¶ 4.) Following return of the indictment, the Office of Securities sought the testimony of five Ace employees: John Venhuizen, David Sonnen, Mark Riebe, Jay Huebner, and Dale Fennel. (Bohl Aff. ¶ 5.) The unsworn interviews were

---

<sup>1</sup> It is not clear when Ace issued the media statement, but the court presumes it occurred at or near the time of the criminal and civil investigations of Plaintiff Kaile R. Warren.

conducted via telephone on January 14, 2010, January 19, 2010, and January 22, 2010. (Bohl Aff. ¶ 5.) Four of these employees were designated as trial witnesses for the criminal case. (Bohl Aff. ¶ 6.) All contact between Ace and the Office of Securities was initiated by the state agency. (Bohl Aff. ¶¶ 7-8.)

While the criminal matter was still pending the State of Maine filed a civil enforcement action against the Plaintiffs alleging securities violations. (Compl. ¶ 52.) On February 23, 2011, a consent judgment was entered into with the Plaintiffs, pursuant to which the criminal prosecution was dismissed with prejudice and Plaintiffs agreed to pay restitution to the State of Maine for the Rent-A-Husband investments of \$1,994,657.08 plus interest. (Compl. ¶¶ 54-55.)

Plaintiffs initiated this litigation in Cumberland County Superior Court on March 22, 2011, which included claims against Ace for defamation (Count V) and false light (Count VI) based on the foregoing statements to the media and the Office of Securities. Pursuant to this court's Order on Motion to Modify of Ace Hardware, dated November 29, 2011, the court allowed Ace to file a special motion to dismiss pursuant to 14 M.R.S. § 556.

#### *DISCUSSION*

Maine's anti-SLAPP statute (Strategic Lawsuit Against Public Participation), 14 M.R.S. § 556, "is designed to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of the defendant's First Amendment right to petition the government by threatening would-be activists with litigation." *Schelling v. Lindell*, 2008 ME 59, ¶ 6, 942 A.2d 1226. The statute provides for a special motion to dismiss when a claim asserted against the moving party is "based on the moving party's exercise of the moving

party's right to petition under the Constitution of the United States or the Constitution of Maine."<sup>2</sup> 14 M.R.S. § 556.

The defendant carries the initial burden of showing that the claims to which the anti-SLAPP motion is directed are based upon "petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities."<sup>3</sup> *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998). The "focus solely is on the conduct complained of, and, if the *only* conduct complained of is petitioning activity, then there can be no other substantial basis for the claim." *The Cadle Co. v. Schlichtmann*, 859 N.E.2d 858, 864 (Mass. 2007) (quotation marks omitted). If the moving party meets this burden, then "the party against whom the special motion is made" must show "that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law" and resulted in "actual injury" to the non-moving party. 14 M.R.S. § 556; *accord Schelling*, 2008 ME 59, ¶ 7, 942 A.2d 1226.

The court must first determine whether the Plaintiffs' claims at issue have as their only substantial basis petitioning activity by Ace that is protected by the statute.<sup>4</sup> Section 556 defines the exercise of the right to petition as follows:

any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental

---

<sup>2</sup> The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble, and to petition the government for a redress of grievances." Article I, section 15 of the Maine Constitution provides: "The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the common good, to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances."

<sup>3</sup> As the parties point out, Massachusetts's anti-SLAPP statute is nearly identical to Maine's, and the Law Court has relied upon Massachusetts cases in interpreting Maine's statute. *See Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶¶ 15, 17-20, 772 A.2d 842; *cf. Copp v. Liberty*, Mem-10-2 (Feb. 2, 2010).

<sup>4</sup> Because none of the parties has argued that the Attorney General's Office and the Office of Securities are not executive bodies, the court will assume that both are executive bodies for purposes of the anti-SLAPP statute.

proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S. § 556; *accord, Schelling*, 2008 ME 59, ¶ 11, 942 A.2d 1226 (characterizing the “right to petition” as defined “very broadly” under the anti-SLAPP statute).<sup>5</sup>

In subsequent cases, the “right to petition” protected by the statute has included administrative appeals by abutting landowners from decisions of planning boards and a state environmental agency, *see Morse Bros, Inc.*, 2001 ME 70, ¶¶ 3-6, 19, 772 A.2d 842, statements made by a citizen and his attorney to the press regarding a contractual dispute on a public construction project, *see Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶¶ 2-4, 847 A.2d 1169, and a letter to the editor of a state legislator regarding a bill recently considered by the Maine Legislature, *see Schelling*, 2008 ME 59, ¶¶ 13-14, 942 A.2d 1226.

Ace asserts that because all the statements made in the interviews were part of ongoing investigations, those statements fall within “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. Ace also asserts that the media statement falls within “any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body” because the statement was “reasonably likely to enlist public participation” and garner support for Ace’s position. *Id.*; *see also Maietta Constr., Inc.*, 2004 ME 53, ¶ 23, 847 A.2d 1169 (Calkins, J., dissenting).

---

<sup>5</sup> The Massachusetts Supreme Judicial Court has stated that the right to petition may include: “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 protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.” *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998) (quotation marks omitted).

Plaintiffs counter that Ace was not engaged in petitioning activity at all because Ace was not seeking redress for grievances of its own. Plaintiffs characterize Ace's interview statements as those of witnesses responding to questions, not activists initiating a discussion, and Ace's media statement as being aimed at dissociating Ace from the Plaintiffs. Plaintiffs suggest that at no time was Ace "petitioning" a governmental body to take action. Plaintiffs rely upon a series of Massachusetts Supreme Judicial Court cases in which the Massachusetts high court has limited the scope of the Massachusetts anti-SLAPP statute.

In *Kobrin v. Gastfriend*, 821 N.E.2d 60 (Mass. 2005), the court held that an expert witness hired by an administrative board to provide an expert report and testimony could not claim the protection of the anti-SLAPP statute for statements made before the board because he was not exercising his own right to petition or seek redress from the administrative board. *Id.* at 64-65. Relying on the language of the statute, the court explained that "[t]he statute explicitly extends protection to a party based on 'said party's exercise of *its* right of petition,'" *see id.* at 64 (quoting MASS. ANN. LAWS ch. 231, § 59H (LEXIS through 2011 Legis. Sess.)) (emphasis in case); accord 14 M.R.S. § 556 ("moving party's exercise of the moving party's right to petition"; "a party's exercise of *its* right of petition" (emphasis added)), and the right of petition protected is that guaranteed by the federal and state constitutions, *see* 821 N.E.2d at 65.<sup>6</sup> The expert "was not exercising *his* right to petition or seek any redress from the board (a government body), but rather was acting solely on behalf of the board as an expert investigator

---

<sup>6</sup> The Massachusetts Constitution provides, in relevant part:

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Mass. Const. pt. 1, art. XIX.

and witness.” *Kobrin*, 821 N.E.2d at 65. Thus, the court held that the anti-SLAPP statute did not apply to the expert because he was not petitioning on his own behalf. *Id.* at 69.

Likewise, in *Fustolo v. Hollander*, 920 N.E.2d 837 (Mass. 2010), a reporter wrote a series of articles for a neighborhood paper in which she was critical of a developer’s proposed projects. *Id.* at 839. The reporter was also a resident of the neighborhood in question and an active member of a community organization similarly critical of neighborhood development projects, but she did not disclose her membership in the organization in her articles and always wrote in an objective manner. *Id.* at 839, 842. When the developer sued for defamation, the reporter filed an anti-SLAPP motion, arguing that the articles “gave expression to her personal interests as a member of the community keenly interested in its development and protection” and that the reporting “played an essential role in facilitating the petitioning activity of [the community organization] and other members of the community.” *Id.* at 840. The Massachusetts Supreme Judicial Court held, consistent with *Kobrin*, that the reporter’s articles were not petitioning activity because they “did not contain statements seeking to redress a grievance or to petition for relief *of her own*.” *Id.* at 842.

Finally, in *The Cadle Co. v. Schlichtmann*, 859 N.E.2d 858 (Mass. 2007), the court addressed a website published by an attorney regarding the practices of a debt collection company; the attorney was also suing that company on behalf of four clients. *Id.* at 860-61. When the debt collection company sued for defamation and other various claims, the attorney responded with an anti-SLAPP motion that asserted the lawsuit was filed in retaliation for the attorney’s petitioning activities. *Id.* at 862. On appeal, the court held that the website was not petitioning activities by an injured member of the public, but was, at least in part, commercial activity “as an attorney advertising his legal services” and attempting “to attract clients to his law practice.” *Id.* at 864-65. Although the debt collection company’s practices had generated

public and governmental interest, the court also noted: “[t]hat a statement concerns a topic that has attracted governmental attention, in itself, does not give that statement the [petitioning] character contemplated by the [anti-SLAPP] statute.” *Id.* at 866-67 (quoting *Global NAPs, Inc. v. Verizon New Eng., Inc.*, 828 N.E.2d 529, 533 (Mass. App. Ct. 2005)) (third alteration added). Because the court concluded that the website did not constitute petitioning activities, the trial court’s denial of the anti-SLAPP motions were affirmed. *Id.* at 867; *see also id.* at 864 (“if the *only* conduct complained of is petitioning activity, then there can be no other substantial basis for the claim” (quotation marks omitted)).

The Law Court has not addressed the scope of petitioning activities under Maine’s anti-SLAPP statute in the same depth as have the Massachusetts courts. *But see Schelling*, 2008 ME 59, ¶ 11, 942 A.2d 1226 (indicating the right to petition protected by the anti-SLAPP statutes is very broad). Nevertheless, in light of the substantial similarity between the Maine and Massachusetts Constitutions and the Maine a Massachusetts anti-SLAPP statutes and, the court finds the reasoning of the Massachusetts cases persuasive.

First, the rights protected by the Massachusetts and Maine anti-SLAPP statutes are the same: the exercise of the rights of petition under the federal and state constitutions. *See* 14 M.R.S. § 556 (protecting the exercise of the “right of petition under the Constitution of the United States or the Constitution of Maine”); *cf.* MASS. ANN. LAWS ch. 231, § 59H (protecting the exercise of the “right of petition under the constitution of the United States or of the commonwealth”). Second, the Maine and Massachusetts Constitutions’ respective guarantees of the right to petition contain nearly identical language. *Compare* Me. Const. art. I, § 15, *with* Mass. Const. pt. 1, art. XIX. Finally, both anti-SLAPP statutes expressly state that the right of petition protected is the constitutional right to petition of the party attempting to secure protection of the anti-SLAPP statute. *See* 14 M.R.S. § 556 (“*moving party’s* exercise of the *moving*



*party's* right to petition”; “a party’s exercise of *its* right of petition” (emphasis added)); MASS. ANN. LAWS ch. 231, § 59H (“said party are based on *said party's exercise of its* right of petition”; “a party’s exercise of *its* right of petition” (emphasis added)).

Based on these similarities, the court concludes that the Law Court would limit the protection afforded by the Maine anti-SLAPP statute to statements or activities made in the moving party’s exercise of its *own* right to petition. *See Fustolo*, 920 N.E.2d at 842; *Kobrin*, 821 N.E.2d at 65.

Plaintiffs allege that the media statement and the interviews were defamatory in nature and argue that Ace is not protected by section 566 because Ace was not seeking a redress of grievances or petitioning on its own behalf by issuing a media statement and cooperating with the Office of Securities’ and Attorney General’s respective investigations into Plaintiffs.<sup>7</sup> *See Fustolo*, 920 N.E.2d at 842; *Kobrin*, 821 N.E.2d at 69.

Ace asserts that its motive for what it claims to be petitioning activity is irrelevant. Motivation for petitioning activity is indeed irrelevant in an anti-SLAPP analysis, *see Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 (Mass. 2002), but Ace must still establish that it was in fact exercising its own right of petition by engaging in petitioning activity, *see* 14 M.R.S. § 556. Nothing in the record suggests that Ace’s purpose in issuing the media statement was to influence any governmental body, enlist public participation, or “expand public consideration” on any matter relating to the media statement. *See id.* ¶ 13, 942 A.2d 1226.

Still, Ace’s media statement arguably can be analogized to the letter to the editor in *Schelling*. Were the media statement “the *only* conduct complained of” by Plaintiffs, *see The Cadle Co.*, 859 N.E.2d at 864, the *Schelling* decision could support granting Ace’s special motion

---

<sup>7</sup> Ace attempts to distinguish *Kobrin* on the ground that the expert was a government contractor, but the decision in *Fustolo* makes clear that the essential holding of *Kobrin* is not about the expert’s status as a government contractor but his failure to engage in any activity seeking a redress of his own grievances to a government body.

to dismiss.<sup>8</sup> Plaintiffs' claims, however, not only assert defamation in the media statement, but also assert that Ace employees provided defamatory information in the course of the interviews with the Maine Office of Securities.

The record does not support Ace's argument that its interview responses reflected "petitioning" activity on its own behalf. Ace has not identified any grievance it had for which it was seeking redress, any interest of its own it was pursuing in the course of responding to questions in the interviews, or any issue under consideration it was attempting to influence or upon which it was attempting to enlist public participation to effect such consideration. It is undisputed that Ace did not initiate communications with the Office of Securities and that the Office of Securities initiated all communication with Ace. Moreover, Ace did not bring the alleged security violations to the attention of the Office of Securities; had it done so, this analysis might have had a different outcome. Ace was simply responding to inquiries in the context of a government investigation of third parties.<sup>10</sup>

The court has not located any authority, at least in Maine, for the proposition that statements *responding* to information requests, as opposed to statements initiating a discussion or a complaint, in the course of a civil or criminal prosecution of a third party from a law enforcement agency or an executive, legislative, or judicial body are protected under the anti-SLAPP statute.<sup>11</sup> This is not to say that the protection of the anti-SLAPP statute can

---

<sup>8</sup> That *Schelling* would compel a ruling for Ace were the Plaintiffs' claims for defamation and false light limited to the media statement is not clear. The *Schelling* case reflects a *very* broad application—perhaps defining the outer limits—of the anti-SLAPP statute.

<sup>10</sup> Pertinent anti-SLAPP cases indicate that protected petitioning activity can include reports made to a law enforcement agency when the moving party *initiated* the report. See *Benoit v. Frederickson*, 908 N.E.2d 714, 719 (Mass. 2009) (concluding a teenager's report of rape to the police was petitioning activity protected by the anti-SLAPP statute); *McLarnon v. Jokisch*, 727 N.E.2d 813, 816-18 (Mass. 2000) (holding that the protection of the anti-SLAPP statute "is broad enough to include filing for abuse protection orders and supporting affidavits").

<sup>11</sup> The court distinguishes between Ace's voluntary responses to activity at issue here and sworn testimony before an executive, legislative, or judicial body, which can be compelled by the governmental body.

never extend to statements made in response to a government inquiry, but only to say that statements initiating by the moving party can more clearly be considered petitioning activity.

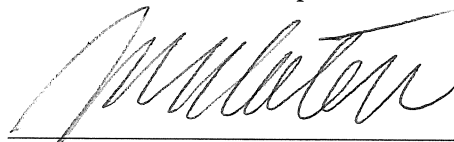
*CONCLUSION*

In *Kobrin*, the Massachusetts high court said that in analyzing the merits of an anti-SLAPP motion to dismiss, “our only concern, as required by the statute, is that the person be truly ‘petitioning’ the government in the constitutional sense.” 861 N.E.2d at 68 n.14. Ace has not established that the conduct on which Plaintiffs’ claims for defamation (Count V) and false light (Count VI) are based consisted of Ace’s own protected petitioning activity. Ace therefore has not made the initial showing required before the burden is shifted to the Plaintiffs, and it is unnecessary to proceed to that step of the analysis. *See* 14 M.R.S. § 556; *Duracraft Corp.*, 691 N.E.2d at 943.

On the other hand, the court is satisfied that Ace had ample basis for the motion—based on the Ace media statement, which is one of the bases for Plaintiffs’ claims, arguably being protected—and therefore that the Plaintiffs’ request for sanctions under M.R. Civ. P. 11 is uncalled for, and it is denied.

Based on the foregoing, Defendant Ace Hardware Corporation’s special motion to dismiss is DENIED. Pursuant to M.R. Civ. P. 79, the clerk shall incorporate this order into the docket by reference.

Dated 12 March 2012



A. M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 3.13.12  
Copies sent via Mail  Electronically