COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 05-2711-BLS

North American Expositions Company Limited Partnership, Joseph B. O'Neal, Mary E. O'Neal, Kathleen A. McAlpine, Brenda J. Stafford, and Christine M. Forcier, as they are General Partners of North American Expositions Company, LP,
Plaintiffs,

v.

Joseph J. Corcoran, Jr, Hub Expo Management, LLC, Bayside Associates Limited Partnership, Bayside Expo Center, Inc., in its corporate capacity and as it is General Partner of Bayside Associates LP and Corcoran, Mullins, Jennison, Inc.
Defendants.

MEMORANDUM OF LAW SUPPORTING DEFENDANTS' SPECIAL MOTION TO DISMISS UNDER G.L. c. 231, § 59H

I. Introduction

Under the guise of a declaratory judgment action, plaintiffs (collectively, "North American") have brought this SLAPP suit as retribution for defendants (collectively, "Bayside") speaking out on a highly charged political issue for which both parties have undertaken significant lobbying efforts. The hot button issue concerns whether North American can skirt the gate show ban at the new Boston Convention & Exhibition Center pursuant to its enabling act, St. 1997 c. 152, an issue recently editorialized in the Boston Globe and the subject of several bills before the Legislature. North American's claims are grounded solely on Bayside's protected petitioning activities under the anti-SLAPP statute, G.L. c. 231, § 59H. The petitioning

activities complained of are (1) Bayside's advocating its legal position on the political issue to a legislatively created community foundation, including elected officials who are on its board, and (2) its alleged threat to sue if North American attempts to skirt the enabling act. These petitioning activities are fundamental and constitutional rights of free speech and, as such, are fully protected under the anti-SLAPP law. Because this suit infringes on its petitioning activities, Bayside has filed a special motion to dismiss under the anti-SLAPP statute. North American cannot sustain its burden of overcoming the special motion to dismiss where this Court has ruled that Bayside's interpretation of the political and statutory issue – whether the gate show prohibition applies to North American's proposed show at the BCEC sponsored by the South Boston Community Development Foundation – is entirely meritorious. Accordingly, North American's suit must be deemed a SLAPP, dismissed with prejudice, and the defendants awarded their attorneys' fees and costs.

II. Statement Of The Facts[1]

The Parties

Bayside is the owner of the Bayside Expo Center ("Bayside Expo"), an exhibition facility containing a total of 260,000 square feet, restaurant and dining facilities, conference rooms and large exhibition space located at 150 Mount Vernon Street, South Boston, Massachusetts. (Affidavit of Joseph J. Corcoran Jr. ¶ 1). Over the years, promoters of consumer shows, gate shows, trade shows, corporate and charitable events have held their events at Bayside Expo. *Id*. Consumer or gate shows are open to the general public, attract local attendees who primarily drive or take public transportation to the event, pay an entry fee, enjoy the show for a few hours, and then go home. *Id.* Gate or consumer shows are quite different from large scale conventions

[1] The facts germane to this special motion to dismiss are based on the pleadings, affidavits and orders on file. *See* G.L. c. 231, § 59H ("court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.").

which attract thousands out of town attendees who spend money bolstering the local economy where the event is held by staying at hotels, using public transportation and taxis, dining at restaurants, and shopping at local establishments. *Id*. The bulk of Bayside's business has historically been derived from consumer, gate and trade shows, and corporate events, not large scale conventions. Corcoran Aff. ¶ 1-3.

North American is a promoter and operator of consumer and gate shows. Verified Complaint ¶ 2. Among its shows are the New England Boat Show ("Boat Show"), the New England Camping and Recreational Vehicle Show, and the North American Home Show, all of which have been held at Bayside over the last several years. *Id*. ¶ 2, 25.

Bayside decided to establish a Request for Proposal ("RFP") for shows including the shows conducted by North American. Corcoran Aff. ¶ 11. On October 1, 2004, Bayside issued the RFP for a Boat Show and a Recreational Vehicle Show at the Bayside Expo for the years 2007 to 2011. *Id*. The RFP was sent to numerous show producers across the country, including North American. *Id*. North American responded to the RFP in a wholly unprofessional manner, and after review of all the proposals, Bayside selected the National Marine Manufacturers Association and began negotiating a contract. *Id*. ¶ 12. North American is now attempting to conduct its shows at the newly opened Boston Convention and Exhibition Center ("BCEC") through the "sponsorship" of the South Boston Community Development Foundation ("Foundation"). Verified Complaint ¶ 6.

The BCEC Enabling Act, Chapter 152 of the Acts of 1997

The BCEC was created and financed through special legislation enacted in March 1997, Chapter 152 of the Acts of 1997, § 1A (the "Act"). The BCEC was designed to attract large scale conventions, typically sponsored by professional and scientific organizations, whose

attendees came from out of town and stayed at hotels during the conventions. *See* Preamble Statement to the Act. The legislative intent was to leave the smaller scale consumer or gate shows to the relatively smaller facilities in Boston such as the Bayside Expo, Hynes Auditorium and World Trade Center. The Act does this by banning the BCEC from holding "so-called gate shows or other similar shows." *See* Act § 15(d).

The Act also purports to protect the smaller facilities by directing the Massachusetts Convention Center Authority ("MCCA") to contract with them in the areas of joint marketing, limitations on business and sharing of information. *See* Act § 15(a). Bayside's has had numerous meeting with the MCCA in an effort to reach an agreement on the contract required by § 15 of the Act. Corcoran Aff. ¶ 5. To date, however, the MCCA has refused to agree to the limitations on its trade show business. *Id*. A bill was introduced in 2005 requiring arbitration of the impasse, but it did not pass. *Id*.

The Act provides a narrow exception to the gate show ban by allowing the Foundation, which the Act legislatively created, to conduct three "charitable events" annually at the BCEC. Section 4 (g) (ii) provides, in pertinent part:

> Notwithstanding the prohibition against gate shows in subsection (d) of section 15, the [Massachusetts Convention Center] Authority shall allow the South Boston community Development Foundation to sponsor no less than three charitable events annually at the Boston Convention and Exhibition Center, and shall include access to on site parking facilities… Said community events shall not compete with the Boston exhibition and convention center and shall not solicit any event previously hosted by the Hynes convention center, the World Trade Center or the Bayside Exhibition Center in the ten year period before the effective date of this act, without the consent of the affected facility. Said events shall be sponsored by the foundation for the purposes set forth in this subsection; provided, further, that the net proceeds of said events shall not be used for any purpose other than those described in this subsection. The Authority shall deposit said proceeds, including, but not limited to, on site parking fees in the Community Development Fund.

See Act § 4(g)(ii). While the Foundation is allowed to sponsor these thrice yearly "charitable

events," this section protects the existing exhibition halls, including Bayside Expo, from any raiding of its current or past events through an anti-solicitation provision. *Id*. ("Said community events shall not compete with the Boston exhibition and convention center and shall not solicit any event previously hosted by the Hynes convention center, the World Trade Center or the Bayside Exhibition Center in the ten year period before the effective date of this act, without the consent of the affected facility.").

Despite the Act's attempts to protect Bayside, it remains at a significant disadvantage in competing with the BCEC for a number of reasons. Corcoran Aff. ¶ 6. The BCEC is a brand new state-of-the art facility which costs hundreds of millions of dollars to build, and provides up to 516,000 square feet of contiguous exhibition space, almost double that of Bayside Expo. *Id*; Verified Complaint ¶ 55. Unlike the privately owned and operated Bayside Expo, the BCEC's construction was funded by public bond issues, and is operations are supported and subsidized by the general public through increased taxes on hotels, car rental agencies and taxis. Corcoran Aff. ¶ 6. The BCEC is able to and has cannibalized Bayside's trade show business, and signed contracts with trade shows that were formerly located at Bayside Expo. Corcoran Aff. ¶ 7. As a result, gate shows are the only type of events being conducted by Bayside Expo. *Id*.

The Parties' Lobbying and Petitioning Efforts Regarding Bills To Amend The Gate Show Ban

The Act's gate show ban has generated a sizeable amount of debate and political lobbying by the affected parties. In 2004, a legislative effort was made to open the BCEC to consumer and gate shows by through a budget attachment amending the Act to permit consumer and gate shows at the BCEC in excess of 300,000 square feet. Corcoran Aff. ¶ 8. It was defeated on April 27, 2004, by voice vote. Corcoran Aff., Ex. C. A different tack was taken in a bill filed in December, 2004 in the House (House Bill No. 4153), which proposed an

amendment to the Act that would permit gate shows at the BCEC if they had previously been produced at a "private facility" and such private owner "refuses" to renew the agreement. Order at 10; Corcoran Aff., Ex. D.

Most recently, North American has spearheaded a lobbying effort to amend the Act once again with a special interest bill, House Bill No. 4153. *See* Affidavit of Joseph J. Corcoran In Support of Defendants' Special Motion To Dismiss ¶ ___, ("Corcoran Second Aff."), filed herewith; bill text attached as Exhibit A thereto. The bill[2] would amend § 15(d) of the Act to enable North American to hold any gate show at the BCEC where Bayside "refuses to renew an agreement" with it. *Id*. ¶ __. The bill is presently before the Joint Committee on State Administration & Regulatory Oversight. *Id*. ¶ __. The bill has already garnered attention from the press. *See, Boat Show Adrift*, Boston Globe, Editorial (Aug. 10, 2005) ("Clarity would be welcome, but not in the form of a special-interest bill that North American is quietly steering through the Legislature to get it into the Convention Center under the auspices of the foundation. The legislature ought to think hard, with plenty of public input, before it amends the 1997 law.").[3]

Bayside's Petitioning Activities

Throughout the political and legislative debate on the Act's gate show ban and the proposes amendments to it, Bayside has engaged in petitioning activities through actively lobbying and advocating its position to elected officials and others on the matter. Second Corcoran Aff. ¶__. Bayside continued to engage in petitioning activities when in the end of January, 2005, Bayside was contacted by a representatives of the Foundation requesting a meeting. Corcoran Aff. ¶ 13. On February 1, 2005, Catherine O'Neill, Bayside's community

[2] As of this writing the bill still is not available on the General Court's website.

[3] The editorial is attached as Exhibit __ to the Affidavit of Joseph J. Corcoran In Support of Defendants' Special Motion To Dismiss.

liaison, and Bayside's President, Joseph J. Corcoran, met with four members of the Foundation, Joe Nee, Paul Mustone, Allison Dresher[4], City Councilor James Kelly, and their attorney, William Kennedy, in the Curley Room of the Boston City Hall. *Id*. At that time, House Bill No. 4153 was pending, and that bill would amend the Act to permit gate shows at the BCEC if they had previously been produced at a "private facility" and such private owner "refuses" to renew the agreement,. *Id*. The parties discussed the gate show ban provision, and Mr. Corcoran outlined Bayside's legal position that the Act limited the Foundation to conducting purely charitable events and that they were not able to conduct commercial consumer or gate shows. *Id*. Mr. Corcoran said that he did not believe the Legislature created such a large loophole in the ACt, and stressed the huge negative impact the proposed amendment would have on Bayside's business, especially where the BCEC had already taken some of its shows. *Id*.

Several weeks later, the Foundation contacted Mr. Corcoran again for another meeting which took place on March 8, 2005. Corcoran Aff. ¶ 14. Present were Messrs. Nee and Mustone, Ms. Drescher, Councilor Kelly, Ms. O'Neill and Mr. Corcoran. *Id*. The Foundation members again asked Mr. Corcoran what he thought of the Act's gate show ban provision. Mr. Corcoran again articulated Bayside's position that under the Act, the Foundation could not sponsor gate shows other than charitable events. *Id*. Mr. Corcoran was told that the Foundation did not want "crumbs," and the legislation permits them to do three "shows" and that new legislation was pending that would take away Bayside's "monopoly." *Id*. One Foundation member who is an elected official told Mr. Corcoran, "You're in the cat bird seat now, but what if the legislation changes, you could lose everything." *Id*. Mr. Corcoran reemphasized that the Foundation's position would have a serious impact on Bayside's business, and it could not

[4] Mr. Nee, Mr. Mustone and Ms. Dresher were appointed by the Governor.

survive without gate shows. *Id*. Mr. Corcoran and Foundation members agreed to continue to talk to see if there was a resolution. *Id*.

Finally, in early July 2005, Mr. Corcoran and Ms. O'Neill met with Councilor Kelly and Representative Jack Hart about the matter. Corcoran Aff. ¶ 15; Corcoran Second Aff. ¶ __. The elected officials and Mr. Corcoran discussed the Act and the potential impact to the proposed amendment to the Act. *Id*. Mr. Corcoran told them that his position had not changed. *Id*.

At no time did Mr. Corcoran threaten to sue the Foundation or its members. Corcoran Aff. ¶ 16.

II. Argument

A. Bayside's Special Motion To Dismiss Must Be Granted Because North American's Claims Against It Are Based On Bayside's Petitioning Activities Alone And Have No Substantial Basis Other Than Or In Addition To The Petitioning Activities.

1. The Anti-SLAPP Law—G.L. c. 231, § 59H

As this Court is well aware, the acronym SLAPP stands for Strategic Lawsuit Against Public Participation. *See Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 161 (1998), citing Alexander Pring, SLAPPs: Strategic Lawsuits Against Public Participation, 7 Pace Envtl. L. Rev. 3, 4 (1989) which coined the phrase. Like the many other states which have enacted anti-SLAPP laws, the Legislature recognized that "full participation by persons and organizations and robust discussion of issues before legislative, judicial, and administrative bodies and in other public forums are essential to the democratic process, [and] 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." *Duracraft.*, 427 Mass. at 161, quoting 1994 House Doc. 1520. In order that such "disfavored" litigation could "be resolved quickly with minimum cost to citizens who have participated in

matters of public concern," the Legislature enacted G.L. c. 231, § 59H to provide a procedural remedy for early dismissal of the disfavored SLAPP suits. *Id*.

Analyzing the legislative history surrounding our anti-SLAPP law as well as comparing it to other states' laws, the Supreme Judicial Court in *Duracraft* found that lawmakers intended to provide "*very* broad protection" for petitioning activities. *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 162 (1998) (emphasis supplied). *See also MacDonald v. Paton*, 57 Mass. App. Ct. 290, 291 (2003). Recognizing that G.L. c. 231, § 59H was not scaled down to certain prescribed types of situations as other states' laws, the Court held that "the Legislature . . . did not address concerns over its breadth and reach, and ignored its potential uses in litigation far different from the typical SLAPP suit." *Duracraft, supra,* at 163. Thus, as is apparent from the already burgeoning case law developing under the anti-SLAPP statute, there is no "typical" case to which the anti-SLAPP law may apply. *See Baker v. Parsons*, 434 Mass. 543, 549 (2001).

2. What Constitutes Protected Petitioning Activities?

G.L. c. 231, §59H contains, as *Duracraft* aptly characterized, a "very" broad definition of a party's exercise of its right of petition. The statute, without limitation, lists five categories of protected petitioning activities:

1. any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding;

2. any written or oral statement made in connection with an order under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding;

3. any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body or any other governmental proceeding;

4. any statement reasonably likely to enlist public participation in an effort to effect such consideration; or

5. any other statement falling within constitutional protection of the right to petition government.

Following the dictates of *Duracraft*, Massachusetts courts have construed broadly the term "petitioning activities" to such varying situations as:

- A bird observatory staff biologist responding to inquiries of state and federal environmental officials relating to endangered species on Clark's Island in Plymouth. *Baker v. Parsons*, 434 Mass. 543 (2001).
- An abuse victim filing affidavits and testifying in support of an application for c. 209A restraining order. *McLarnon v. Jokischi*, 431 Mass. 343 (2000).
- An employee reporting harassment by a city councilor to a city's affirmative action office. *O'Neil v. Gilvey*, 9 Mass. L. Rptr. 237, 1998 WL 792424 (Mass. Super. Ct. Oct. 28, 1998);
- Condominium owners petitioning local, state and federal elected officials opposing the sale of commercial units to an alleged provider of telephone sex. *See Office One, Inc. v. Lopez,* 437 Mass. 113, 124 (2002).
- The posting of a derogatory comment of a former town selectman by a website billing itself as an interactive forum for town politics. *MacDonald v. Paton*, 57 Mass. App. Ct. 290 (2003).
- A jewelry merchant reporting theft to police. *Hashem v. Filene's, Inc*., 16 Mass. L. Rprt. 622, 2003 WL 22049513 (Mass. Super. Ct. May 23, 2003).
- A conservation trust attorney's writing a settlement letter to the developers of a controversial subdivision proposal under consideration by a planning board. *Plante v. Wylie*, 63 Mass. App. Ct. 151, 158 (2005).

3. Burden Shifting Framework

G.L. c. 231, § 59H provides that a party may bring a "special motion to dismiss . . . [i]n

any case in which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth…" The statute goes on to provide that "[t]he court shall grant such special motion, unless the party against whom such special motion is made shows ...:(1) that the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) that the moving party's acts caused actual injury to the responding party."

A special movant must first "make a threshold showing through the pleadings and affidavits that the claims against it are 'based on' the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Duracraft*, 427 Mass. at 167. Then, "the burden shifts to the nonmoving party as provided in the anti-SLAPP statute." *Id*. at 167-68. The responding party's burden is two-pronged. It must show, by a preponderance of the evidence, that: "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law, *and* (2) the moving party's acts caused actual injury to the responding party." G.L. c. 231, § 59H, ¶ 1 (emphasis supplied); *Baker v. Parsons*, 434 Mass. 543, 553-54 (2001)(imposing preponderance of evidence standard). The nonmoving party must satisfy both of these requirements to defeat a special motion to dismiss. *See Office One, Inc. v. Lopez*, 437 Mass. 113, 124 (2002) (declining to consider actual injury where responding party could not show that petitioning activities devoid of factual and legal basis).

B. Bayside's Actions Are Protected Petitioning Activities Because They Are Statements Made Concerning A Highly Charged Political Issue Under Consideration By The Legislature.

Bayside can easily satisfy its initial burden of showing that all of North American's claims against it are based its protected petitioning activities alone. Bayside's petitioning activities fall under almost all of the categories delineated in G.L. c. 231, § 59H, as they are statements made concerning a hot button political issue under consideration by the Legislature. Putting aside the irrelevant allegations concerning the prior, dismissed litigation between the parties, the primary allegations supporting North American's claims appear in paragraphs 67 through 73 of the Verified Complaint. Summarized, those allegations are that (1) Bayside communicated its legal position to members of the Foundation, including the elected officials who are its appointed members, that the Act prohibits North American from hold a gate show at the BCEC and that the Foundation's sponsorship of the Boat Show would require Bayside's consent under the Act, and (2) Bayside allegedly threatened to sue the Foundation if it went forward on such an agreement with North American. Mr. Corcoran's affidavit provides the actual substance of all of his communications and meetings with the Foundation and elected officials concerning this matters. While he did advocate Bayside's legal position on the gate show ban to Foundation representatives, Mr. Corcoran flatly denies that he threatened to bring a lawsuit. Corcoran Aff. ¶ 16.

The subject of Bayside's petitioning activities – the gate show ban and its exception – has been and remains a proverbial "hot potato" political issue generating intense lobbying efforts by both North American and Bayside. In 2004, two bills to amend the Act to allow the BCEC to hold gate shows were before the Legislature, both of which failed to pass. Order at 10. The Legislature also considered the bill to require arbitration of the dispute over the contract envisioned in § 15 of the Act providing for the limitation of business by the BCEC and joint marketing efforts. And certainly this Court can take judicial notice that the Act, the creation of

the BCEC, and "political efforts to extract monies resulting from the use of the BCEC for the benefit of the community asserted to be most impacted – said to be South Boston" (Order at 3) has generated an abundance of political debate and press. Although there is no requirement in the anti-SLAPP law that the subject of the petitioning activities be a matter of "public concern," here, it is. *See Duracraft* at 427 Mass. at 164; *McLaron*, 431 Mass. at 347.

The recipient of Bayside's petitioning communications is the Foundation, a quasi-governmental body, and the elected officials who serve as its members. The Foundation was legislatively created by the Act itself in § 4(g)(i) with its members appointed by the Governor, the Mayor, with seats reserved for the Senator from the First Suffolk District, the representative from the Fourth Suffolk District, and the Boston City Councilor for District Two. The Foundation is obligated by statute to report its income and expenditures each year to the Secretary of Administration and Finance and the House and Senate Committees on Ways and Means.

Finally, Bayside and Mr. Corcoran's right to express their opinions on a matter of public and political concern is one of the most sacred, fundamental rights protected by the First and Fourteenth Amendments to the Constitution of the United States. *See Whitney v. California*, 274 U.S. 347, 375 (1927) (Brandeis, J., concurring) (holding that freedom of speech is "indispensable to the discovery and spread of political truth," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market."). First Amendment "protects [the right of] the defendants as well as the plaintiffs ... to engage in the rough and tumble of political debate and action, based on their personal views" *FTC v. Cement Inst.,* 333 U.S. 683, 1010 (1948). The right to free speech belongs to individuals as well as corporations. *First National Bank of Boston v. Billotti*, 435 U.S. 765 (1978). Disappointing to those bemoaning

today's litigious society, the right of free speech encompasses the right to tell someone you will sue them. Such words are pure speech, and also implicate the constitutional right to access to the courts. *See Hall v. Ochs,* 817 F.2d 920, 922 (1st Cir.1986) (holding that individual has "First Amendment right to access to the courts to vindicate his rights secured under state and federal law."). The right to file a legal action is also one of the fundamental rights protected by the anti-SLAPP statute. *See* G.L. c. 231, § 59H (defining protected petitioning activity as statement made before a judicial body); *Duracraft*, 427 Mass. at 940 (commenting that protected petitioning activities include filing law-reform suits, agency protests and appeals).

Accordingly, Bayside's statements to the Foundation and its elected official members concerning a highly charged political issue fall squarely within four of the five the statutory definitions of petitioning activities.[5] Moreover, a comparison of Bayside's petitioning activities to the case law under the anti-SLAPP law cited above demonstrates that Bayside's actions are exactly the type of broad petitioning activities the statute seeks to protect. *See, e.g., Office One*, 437 Mass. 113, 124 (2002) (condominium owners petitioning elected officials to oppose sale of commercial units to alleged provider of telephone sex); *MacDonald v. Paton*, 57 Mass. App. Ct. 290 (2003) (posting of derogatory comment of former town selectman by website billing itself as interactive forum for town politics).

North American's most recent lobbying efforts only serves to underscore that Bayside's activities are protected under the statute. As it has done throughout this political debate, Bayside continues to advocate its legal position on the Act and lobby for legislative action in its favor.

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[5] The applicable definitions are: "any written or oral statement made in connection with an order under consideration or review by a legislative ….body, or any other governmental proceeding," "any statement reasonably likely to encourage consideration or review of an issue by a legislative . . .body or any other governmental proceeding," "any statement reasonably likely to encourage consideration or review of an issue by a legislative, … body or any other governmental proceeding," and "any other statement falling within constitutional protection of the right to petition government." G.L. c. 231, § 59H.

North American has done the same. Both parties have a First Amendment right to do so. Both parties are engaging in petitioning activities protected under the anti-SLAPP statute.

In sum, North American's suit is a SLAPP designed to restrain and chill Bayside from giving its opinion of the Act's restrictions. There is no suggestion of a threat of physical violence or criminal behavior. What North American complains of here is pure speech, the content of which is an expression of a legal position on an important political issue.[6]

C. North American Cannot Satisfy Its Burden Of Showing That Bayside's Exercise Of Its Right To Petition Was Devoid Of Any Reasonable Factual Support Or Any Arguable Basis In Law, And It Has Suffered Actual Injury.

As Bayside has satisfied its initial burden, the burden shifts to North American to show, by a preponderance of the evidence, that: "(1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law, *and* (2) the moving party's acts caused actual injury to the responding party." G.L. c. 231, § 59H, ¶ 1 (emphasis supplied); *Baker v. Parsons*, 434 Mass. 543, 553-54 (2001). One need to look no further than this Court's order denying North American's motion for injunctive relief to determine that Bayside's petitioning activities have both factual and legal merit and North American has not suffered any harm at the present. This Court correctly points out that the statutory language is far from clear, characterizing it as a "fog" and that its phrasing and syntax leave much to be desired. Order at 7-8. Notwithstanding these problems, this Court has initially ruled in

[6] Bayside's petitioning activities do not remotely approach the topic of harassment that concerned the court in *Brookline v. Goldstein*, 388 Mass. 443 (1983), cited by North American in a prior brief. There the speech consisted of repeated telephone calls and vexatious and baseless litigation arising to the level of an abuse of ones First Amendment rights. The other cases cited by the plaintiffs are equally extreme. *Zal v. Steppe*, 968 F. 2d 924 (9th Cir. 1992) dealt with contemptuous behavior by counsel for abortion activists acting in their defense that was patently offensive and insulting to the court. *See Carroll v. The Jaques Admiralty Law Firm, P.C.,* 110 F. 3d 290 (1997) for a similar result involving an attorney. *United States v. O'Brien,* 391 U. S. 367 (1968) involved the defendant's burning of his draft card, which he claimed was a symbolic act protected by the First Amendment. However, it happened to violate a criminal statute that prohibited the destruction of one's draft card, a substantial governmental interest in the eyes of the Court. None of the cases involve a private individual's peaceful expression of his opinions regarding a statute that affects his business.

Bayside's favor, that it has a legal right to petition as it did. This Court has held: "In this legislative thicket can Bayside refuse to consent to the Foundation's sponsorship of the Boat Show and the Camping & RV Show? It clearly appears that it can. And if the Foundation proceeds with the sponsorship over Bayside's refusal to consent, can Bayside sue to enforce its rights? Again, it clearly can." Order at 9. Even this Court were reversed on appeal, the most that is present here is a reasonable disagreement as to the intent and meaning of a statute. The anti-SLAPP law ensures that *both* North American and Bayside's right First Amendment right to speech and petition government is preserved in these instances. *See Plante v. Wylie*, 63 Mass. App. Ct. 151, 158 (2005). Accordingly, North American cannot show that Bayside's petitioning activities are devoid of any reasonable factual support or any arguable basis in law.

Although this Court need not reach the question of whether North American has suffered actual injury because it cannot satisfy the first prong of the test, this Court has ruled that "it is not readily apparent that there is harm on the horizon that cannot be cured by monetary damages." Order at 9. This Court noted that North American has had substantial advance notice that it would need a new venue for its shows, and that "[i]t should not be down to the last minute in that hunt." Order at 9-10. North American has proven no cognizable legal harm at this juncture, and its repeated claim that it will be "out of business" if it cannot have its shows at the BCEC are belied by its holding shows at other venues such as Gillette Stadium. North American has adequate remedies available, especially lobbying for amending legislation to the Act which it is pursuing vigorously. It cannot show actual injury at this time.

The final question is what, if any, of North American's claims withstand the special motion to dismiss. Certainly, Count I (injunctive relief) and Count III (Tortious Interference With Prospective Business Advantage) are based solely on Bayside's protected petitioning

activities and are classic sounding SLAPP claims. *See Office One, Inc. v. Lopez*, 437 Mass. 113, 115 (2002) (affirming dismissal of tortious interference claims under anti-SLAPP statute). Likewise, Count IV (Breach of Covenant of Good Faith And Fair Dealing) and Count V (G.L. c. 93A), are grounded solely in the allegations that Bayside wrongfully withheld its consent under the Act and threatened to sue the Foundation – again, protected petitioning activities. Despite styling these counts in contract and under c. 93A, they are bases only on the allegations that Bayside interfered with North American's dealings with the Foundation by stating its position on the Act and allegedly threatening to sue the Foundation –protected petitioning activities under the anti-SLAPP act. The focus is not on the nature of the claims, but on the petitioning activity the special movant asserts bars the plaintiff's claims. *Duracraft*, 427 Mass. at 165.

That leaves Count II (Declaratory Judgment) remaining. While a declaratory judgment claim seems rather innocuous, again, the focus is on the facts giving rise to the claim and whether they are protected petitioning activities. As with all of North American's other claims, the facts giving rise to the alleged actual controversy regarding the gate show ban under the Act are Bayside's petitioning activities. No other facts are alleged giving rise to the need for declaratory relief other than Bayside advocating its legal position on the Act and allegedly threatening to sue the Foundation. Moreover, North American effectively seeks a declaration that the Foundation can sponsor its shows at the BCEC, yet the Foundation and the MCCA are not parties to this suit. Complete relief cannot even be granted on this claim without these necessary parties. *See* Mass. R. Civ. P. 19. Meanwhile, the policy of the anti-SLAPP – to allow victims of SLAPPs to quickly extricate themselves from the litigation and recoup their legal fees – is thwarted by letting a creatively drafted declaratory judgment claim based solely on a party's

petitioning activities go all the way to trial. All of North American's claims, therefore, should be dismissed under G.L. c. 231, § 59H.

"Parties are not entitled to decisions upon abstract propositions of law unrelated to some live controversy." *Duane v. City of Quincy*, 350 Mass. 59, 61 (1956)

IV. Conclusion

North American's suit and its now failed attempt to obtain a preliminary injunction is simply a SLAPP aimed at muzzling Bayside and Joseph Corcoran from exercising their First Amendment rights to free speech, lobbying and petitioning elected officials and the Legislature to act in their best interests on a highly charged political issue. All of North American's claims are based entirely on Bayside's protected petitioning activities. Moreover, in light of this Court's decision denying injunctive relief upholding Bayside's legal position on the merits, North American cannot sustain its burden of overcoming Bayside's special motion to dismiss. The special motion to dismiss, therefore, should be granted, and pursuant to the statute, Bayside should be awarded its attorneys' fees and costs incurred in defense of this SLAPP suit.

Respectfully submitted,

Joseph J. Corcoran, Jr,
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By their attorneys,

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