

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 08/21/2017

TIME: 01:49:00 PM

DEPT: C-66

JUDICIAL OFFICER PRESIDING: Kenneth J Medel

CLERK: Grachelle Macedo

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2017-00020544-CU-BT-CTL** CASE INIT.DATE: 06/06/2017

CASE TITLE: **Neighborhood Market Association Inc vs. Arkan Somo [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Business Tort

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on 8/11/2017 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court rules as to Plaintiff's Objections submitted with the Opposition as follows: **OVERRULED**

The Court rules on Defendants' Objections submitted with the Reply as follows:

Adler Declaration – Overrule as to 3, Sustain as to 1, 2

Arabo Declaration – Overrule as to 1, 2, Sustain as to 3,4,5,6,7

Attisha Declaration – Overrule as to 1, Sustain as to 2, 3, 4, 5, 6 (both), 8, 9

Defendants Arkan Somo, Samir Salem, and Basil Zetouna's Motion to Strike Pursuant to CCP 425.16 is **GRANTED**.

Under CCP 425.16, the court makes a two-step determination: First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1)) *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88. "Only a cause of action that satisfies both prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning and lacks even minimal merit--is a SLAPP, subject to being stricken under the statute." *Id.*

Whether this action arises from protected activity.

The basis of the Complaint in this case is the misuse of a membership list. Corporations Code section 8338 places restrictions on the use of a membership list. That section states that: "[a] membership list is a corporate asset. Without consent of the board a membership list or any part thereof may not be obtained or used by any person for any purpose not reasonably related to a member's interest as a member." (Corp. Code § 8338(a).) Subdivision (3) states that the list may not be "used for any commercial purpose or purpose in competition with the corporation."

The allegation in this case, as pled in the First Cause of Action for Violation of Corporations Code 8338, is that the list was acquired (or reconstructed) "so [defendants] could directly mail out their disparaging letter to the retail members of the NMA. Based upon information and belief, Plaintiff alleges the list Defendants created was disseminated to at least the other eight candidates with no restrictions on its use or disclosure despite the fact they knew that the NMA Membership List was a corporate asset of the plaintiff." [Paragraph 30]

The Court finds that this action is within the Anti-SLAPP litigation at least under CCP 425(e)(4) - or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[1]

Issues involving governance, whether of a union (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669), a homeowners association (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468), or a large publicly held corporation (*Global Telemedia Intern., Inc. v. Doe 1* (C.D.Cal.2001) *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993 (*ComputerXpress*)) have also satisfied section 425.16's protection of statements involving a public interest.

The principle allegation in this pleading involves the misuse of membership information in the form of mailing a disparaging letter to retail members of the NMA. (Paragraph 30) The sharing and use of the list to contact Plaintiffs members were acts engaged in for the purpose of seeking election to the board of directors of a nonprofit mutual benefit corporation, and thus would be protected under the anti-SLAPP statute as "conduct in furtherance of the exercise of the constitutional right of petition ... in connection with a public issue or an issue of public interest."

Probability of Prevailing

Plaintiff has the burden to show a probability of prevailing. This burden is "much like that used in determining a motion for nonsuit, directed verdict, or summary judgment." (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.) Thus, a defendant's anti-SLAPP motion should be granted when a plaintiff presents an insufficient legal basis for the claims or "when no evidence of sufficient substantiality exists to support a judgment for the plaintiff" (*Wilcox, supra*, 27 Cal.App.4th at 828.). In making this determination, the court considers the pleadings, and supporting and opposing affidavits stating the facts upon which liability is premised. (Civ. Proc. Code § 425.16(b)(2).)

As for the litigation privilege, the gravamen of the causes of action is not the litigation, but the alleged misappropriation of the membership list. Section 47(b) provides in part that a privileged communication is one made in a judicial proceeding. "The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or

logical relation to the action. [Citations.]" (Silberg v. Anderson (1990) 50 Cal.3d 205, 212 Even though allegedly acquired in litigation, it is the improper use of the membership information outside of the litigation that forms the basis for this action. The allegation is not a communication in litigation. See Wentland v. Wass (2005) 126 Cal.App.4th 1484,1493.

Going to the merits of the claims, is not clear that this "membership list" is a trade secret. Unlike "customer" or "client" lists, "[M]embership lists cannot qualify as a trade secret." (Service Employees Intern. Union v. 12 Roselli (N.D. Cal., May 14,2009, No. C 09-00404 WHA) 2009 WL 1382259, at *4.) [union lists] The Complaint in this case alleges that the membership list would be a "trade secret", but there is no authority that membership list in a trade organization can be considered a trade secret. The Court in Service Employees Intern Union held with respect to union membership that, unlike customer lists, membership lists are designed to not be secretive. This list is available for inspection pursuant to Corp. Code 8338(a). (As Judge Strauss recognized in denying the motion to compel the list directly in the A&B case.) Economic power is not derived from the secrecy of the list. There does not appear to be a basis for a trade secret violation claim in this case.

While not a "trade secret", Corporations Code section 8338 places restrictions on the use of a membership list. That section states that: "[a] membership list is a corporate asset. Without consent of the board a membership list or any part thereof may not be obtained or used by any person for any purpose not reasonably related to a member's interest as a member." (Corp. Code§ 8338(a).) Subdivision (3) states that the list may not be "used for any commercial purpose or purpose in competition with the corporation."

The allegation in this case – at least in the First Cause of Action for Violation of Corporations Code 8338 - is that the list was acquired (or reconstructed) "so [defendants] could directly mail out their disparaging letter to the retail members of the NMA. Based upon information and belief, Plaintiff alleges the list Defendants created was disseminated to at least the other eight candidates with no restrictions on its use or disclosure despite the fact they knew that the NMA Membership List was a corporate asset of the plaintiff." [Paragraph 30]

The question is whether this was a legitimate use of the "membership" list. (Obtaining the list for improper purpose is not enough – there must be misappropriation of the membership list - KQED, Inc. v. Hall (1982) 135 Cal.App.3d 951, 954.) There is very little authority on this issue, but as indicated in the moving papers, the CEB guide indicates that the using a membership list for campaign purposes is most likely a legitimate purpose. "If a group of members band together and demand the right to inspect and copy the mailing list ... to promote candidates for election who support their views, a proper purpose is likely to exist regardless of the board's annoyance with the opposing faction." (I Advising California Nonprofit Corporations (Cont.Ed.Bar 3d ed. 2015) § 10.111, p. 10-92.) As stated in the moving papers, that treatise has been cited approvingly by the California Supreme Court, albeit on other grounds. (Frye v. Tenderloin Housing Clinic, Inc. (2006) 38 Cal.4th 23, 53.) This is consistent with WorldMark v. Wyndham Resort Development Corp. (2010) 187 Cal.App.4th 1017, 1029, where the Court held "use the membership information solely to contact other members regarding [a] proposed petition to amend the corporation's bylaws" was a legitimate purpose. This finding would be consistent with constitutional protections of free speech and certainly relevant to the purposes of Anti-SLAPP.

There is some concern expressed regarding defendants attempts to us the membership list to create a competing organization. However, even if this is properly pled, there is very little evidence to substantiate the claims. Objections to the declarations on this issue have been sustained based on conclusion and lack of personal knowledge.

Based on this, there does not appear to be a probability of prevailing on the merits in this case. The case is DISMISSED under CCP 425.16(e).

/n

[1] Because this Court finds that CCP 425(e)(4) applies, the Court does not reach the issue of whether CCP 425.16(e)(1) or (2) and the judicial litigation privilege applies.

Plaintiff's Request for Leave to Amend is DENIED.

Kenneth J. Medel

Judge Kenneth J Medel