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March 9, 2018

Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Central Valley Hospitalists v. Dignity Health*
Court of Appeal Case No. A148742
California Supreme Court Case No. S247089
Request for Depublication
(Cal. Rules of Court, rule 8.1125(a))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Association of Southern California Defense Counsel (ASCDC) respectfully urges this Court to order the Court of Appeal's opinion in *Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203 (*Central Valley*) not to be published in the official reports.

While there are "no fixed criteria for depublication," this Court has most often depublished opinions where the Court of Appeal's decision was "wrong on a significant point" or the opinion "was too broad and could lead to unanticipated misuse as precedent." (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 11:180.1, p. 11-76.) Depublication is necessary here because the *Central Valley* decision is wrong in several key respects: its pronouncements about the anti-SLAPP statute deviate from well-settled precedent and create intolerable uncertainty about the standards governing the anti-SLAPP statute's applicability, its attacks on anti-SLAPP litigation are based on a flawed analysis that could wrongly expose attorneys to sanctions, and it could be misconstrued as challenging well accepted appellate procedures and attacking broad groups of attorneys.

To begin with, depublication is warranted because the Court of Appeal's published opinion—in holding that courts cannot consider evidence as part of their assessment of whether the anti-SLAPP statute applies to claims challenged by an anti-SLAPP motion—departs from the plain text of the statute as well as contravenes multiple opinions from this Court and Courts of Appeal that had previously considered this question. What had been a settled issue of law is now uncertain, and already another Court of Appeal has departed from this settled law in reliance on the opinion here. Depublication is necessary to bring back clarity to the law on this important issue.

Depublication is also warranted because the Court of Appeal's opinion indicates that the anti-SLAPP statute is being systematically abused, especially with respect to appeals from orders denying anti-SLAPP motions, based on an earlier opinion from the same court which contains the same dicta based on an examination of incomplete data. The complete data paints a very different picture that confirms no systematic abuse has occurred. This Court should not permit such an attack on anti-SLAPP litigation to continue to be cited in future cases when the complete data shows no abuse. Finally, depublication is necessary because the opinion could be misconstrued as broadly questioning the utility of appellate counsel, the integrity of defense counsel, and the use of routine stipulated extensions for appellate briefs. Although we assume the Court of Appeal did not intend its opinion to be read so broadly, the language it uses is troubling if citable as authority in other cases.

The Interest of the Requesting Organization

ASCDC is a preeminent regional organization of approximately 1,100 leading attorneys who specialize in defending civil actions. ASCDC is dedicated to promoting the administration of justice and enhancing the standards of civil litigation practice, and acts as a liaison between the defense bar and the courts. ASCDC has appeared as amicus curiae in cases involving issues of significance to its members. Among ASCDC's member are attorneys who participate in anti-SLAPP litigation. ASCDC's members therefore have a significant interest in seeing that the anti-SLAPP statute remains a vital tool for " 'protect[ing] citizens in the exercise of their First Amendment constitutional rights of free speech and petition.' " (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1414.)

Legal Argument

A. Depublication is necessary because the Court of Appeal's opinion creates a conflict in well-established law and is already leading other courts into error.

When a court decides whether or not to grant an anti-SLAPP motion, it must first determine whether the moving defendant has "ma[d]e a prima facie showing 'that the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." ' " (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 420.) This is known as the first prong of the anti-SLAPP analysis. The anti-SLAPP statute provides that, "in making [this] determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).) Years ago, this Court recognized the import of this statutory language, holding: "In deciding whether the 'arising from' requirement is met [under the first prong], a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' " (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

Since then, appellate decisions—including those from this Court—have repeatedly followed the anti-SLAPP statute's express statutory command to hold that courts must consider evidence in addition to the text of the complaint when determining whether the statute applies to claims under the first prong of the anti-SLAPP analysis. (E.g., *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1068 (*Park*) [in assessing whether anti-SLAPP statute applied to a claim based on a university's denial of tenure, this Court noted that "[n]o one disputes the University can submit evidence of communications leading to the decision to deny tenure" as part of its effort to meet its prong one burden]; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 ["In deciding whether the

'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based' "]; *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 111 [in deciding whether the first prong has been satisfied, courts "are 'not limited to examining the allegations of the complaint alone but rather consider[ ] the pleadings and the factual material submitted in connection with the special motion to strike' "]; *Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 408 [same]; *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 353-354 [examining declaration, attached exhibits, and text of complaint in analyzing prong one]; *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679 ["we do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action"]; see also PFR 19-23 [collecting additional cases permitting evidence in prong one analysis].)

As one of the earliest anti-SLAPP cases explained, the Legislature wanted courts to consider evidence as part of their first prong analysis precisely because "traditional pleading-based motions such as demurrers and motions to strike are ineffective in combatting SLAPP's." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 821, disapproved in part on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) Thus, courts have declined to "wear the blinders that . . . have [been] fashioned for [them]" by a complaint and instead determine whether defendants meet their burden of demonstrating that the anti-SLAPP statute applies by "consider[ing] not only the pleadings, but also ' "supporting and opposing affidavits stating the facts upon which the liability or defense is based." ' " (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 630.)

Here, for the first time, a published Court of Appeal opinion holds that a defendant *cannot* rely on the supporting and opposing affidavits submitted with the anti-SLAPP motion, and instead must rely solely on the language of the complaint in determining whether the first prong of the anti-SLAPP analysis is satisfied. (*Central Valley, supra*, 19 Cal.App.5th at pp. 217-219.) In reaching this extraordinary conclusion, the Court of Appeal's opinion does not mention the plain language of the anti-SLAPP statute, which requires courts to consider "supporting and opposing affidavits stating the facts upon which the liability or defense is based" as part of the first prong analysis. (Code Civ. Proc., § 425.16, subd. (b)(2).) Nor does the opinion address the fact that many prior cases decided by this Court and other Courts of Appeal—like the case law cited above—construe the anti-SLAPP statute as directing courts to consider not only the challenged complaint but also evidence submitted in connection with an anti-SLAPP motion when assessing whether a claim falls within the anti-SLAPP statute's scope.

Instead, the opinion here bases its conclusion on snippets from cases that simply did not address the central question at issue in this case (see *Central Valley, supra,* 19 Cal.App.5th at pp. 217-219)—whether the plain text of the anti-SLAPP statute requires courts engaging in the first prong of the anti-SLAPP analysis to consider *both* the evidence filed in connection with an anti-SLAPP motion as well as the text of the challenged complaint, a question this Court and other Courts of Appeal have already answered by concluding both the evidence and the pleading must be considered. None of the inapposite cases relied on by the opinion on this critical point are authority for the opinion's (erroneous) proposition that courts may not consider evidence under the first prong. (See *People v. Avila* (2006) 38 Cal.4th 491, 566 [" 'It is axiomatic that cases are not authority for propositions not considered' "].)

The opinion's analysis on this point begins by quoting *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942, for the proposition that " '[t]he question is what is pled—not what is proven.' " (*Central Valley, supra*, 19 Cal.App.5th at p. 217.) But this quoted statement has nothing to do with the issue before the Court of Appeal in *Central Valley*. Rather, in an appeal arising from a cross-defendant's anti-SLAPP motion that successfully sought

to strike a cross-complaint, the cross-complainant in *Comstock* argued that the challenged claims fell outside the anti-SLAPP statute's scope because the cross-defendant had never established with evidence that she actually engaged in the protected activity alleged in the cross-complaint. (See *Comstock*, at pp. 941-942.) It is in that far different context that *Comstock* held that the "question is what is pled—not what is proven." (*Id.* at p. 942.) In other words, *Comstock* did not address whether the party who brings an anti-SLAPP motion can meet its threshold burden based on the evidence she files with her anti-SLAPP motion (the issue in *Central Valley*), and instead decided a distinct question, holding that the party opposing an anti-SLAPP motion cannot defeat the motion by requiring the defendant to present evidence establishing that the protected activity clearly alleged in the challenged pleading occurred in fact. (See *id.* at p. 943.)

The other cases on which the Court of Appeal's opinion relies for its refusal to consider evidence under the first prong of the anti-SLAPP analysis are equally inapposite. For example, the opinion cites *Freeman v. Schack* (2007) 154 Cal.App.4th 719 and *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35 for the proposition that the court must "accept as true [the plaintiff]'s pleaded facts." (*Central Valley*, *supra*, 19 Cal.App.5th at p. 217.) But *Freeman* and *Young* addressed distinct legal issues. In *Freeman*, the defendant submitted evidence to demonstrate the allegations asserted in the pleading were wrong on the merits, and the Court of Appeal simply held that "[t]hese merits based arguments have no place in [the court's] threshold analysis of whether plaintiffs' causes of action arise from protected activity" because "the fact [the defendant] 'might be able to otherwise prevail on the merits under the [second] step [of the anti-SLAPP analysis] is irrelevant.' " (*Freeman*, at pp. 732-733.) Similarly, *Young* merely "accept[ed] as true [the plaintiff's] pleaded facts" in the distinct context of holding that courts "do not resolve the merits of the overall dispute" in deciding whether to grant an anti-SLAPP motion. (*Young*, at p. 54.) Neither case addressed whether courts are prohibited from considering evidence under the first prong.

Likewise, the opinion's citation to *Moriarity v. Laramar Management Corp.* (2014) 224 Cal.App.4th 125 for *Moriarity*'s discussion of a moving party's " 'selective reading' " of the complaint (*Central Valley*, *supra*, 19 Cal.App.5th at p. 218) provides no support for the opinion's refusal to consider evidence as part of the first prong analysis. This is so because *Moriarity* did not address whether courts could disregard evidence when deciding if the anti-SLAPP statute applies. *Moriarity* involved a different issue, with the defendant asserting that the anti-SLAPP statute applied based "on a few words in a few paragraphs" of the challenged complaint—an inapposite argument *Moriarity* rejected because this "selective reading" of those allegations involved "a strained, myopic reading of [plaintiff's] complaint" and drew the wrong conclusion about the complaint. (*Moriarity*, at p. 135.)

The opinion's reliance on *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611 is equally misplaced. The opinion finds *Martin* to be "persuasive" (*Central Valley*, *supra*, 19 Cal.App.5th at p. 218) based on *Martin*'s statement that "it is difficult, if not impossible, to see how defendants could have met this [prong one] burden with plaintiff's failure to specifically plead the allegedly defamatory statements." (*Martin*, at p. 628.) But *Martin* made that statement in connection with a discrete issue having nothing to do with the opinion here. The trial court there granted an anti-SLAPP motion because it concluded plaintiffs were unable to demonstrate a probability of prevailing, effectively "skipping over" defendants' burden to show the anti-SLAPP statute applied. (*Ibid.*) *Martin* held that the anti-SLAPP statute "has no mechanism for simply skipping over the first prong" to "go directly to the second prong." (*Ibid.*) It was in that context that *Martin* assessed whether the defendants could satisfy the first prong burden the trial court had skipped over and said "it [was] difficult, if not impossible, to see how defendants could have met" that burden given "plaintiff's failure to specifically plead the allegedly defamatory

statements." (*Ibid.*) In doing so, *Martin* did *not* hold that defendants cannot try to satisfy their burden based on evidence filed with their anti-SLAPP motion, as the Court of Appeal did here. To the contrary, *Martin* considered the defendants' evidence, but decided it "was insufficient to meet [the defendants' first prong] burden" solely because the evidence was *inadmissible*, since it "consisted of hearsay and speculation." (*Id.* at p. 625.)

For the same reasons, the opinion's reliance on *Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602 does not support the opinion's refusal to consider evidence under prong one. The opinion found *Medical Marijuana* to be "persuasive" (*Central Valley*, *supra*, 19 Cal.App.5th at p. 218) but *Medical Marijuana* is wholly inapposite. The trial court there found the anti-SLAPP statute applied to two claims "based on allegations" from the complaint. (*Medical Marijuana*, at p. 616.) The Court of Appeal examined those allegations and disagreed because those allegations did not involve any protected conduct alleged to have been undertaken by the moving defendants since those allegations concerned conduct "alleged to have been engaged in *by other defendants*." (*Id.* at pp. 616-621.) Under these circumstances, the court held it "would be inappropriate for us to insert into a pleading claims for relief based on allegations of activities that the plaintiffs simply have not identified, even if the parties suggest on appeal how the plaintiffs might have intended to frame those claims and/or attempt to identify the specific conduct . . . on which the plaintiffs intended to base such claims for relief." (*Id.* at p. 621.) Thus, *Medical Marijuana* focused solely on the distinct issue of when allegations suffice to show the anti-SLAPP statue applies, and the case had no occasion to consider the role evidence plays under the first prong.

In short, the Court of Appeal opinion's refusal to consider evidence here as part of the first prong of the anti-SLAPP analysis deviated sharply from the anti-SLAPP statute's mandate and contrary precedent, and it did so based on authorities that provide no support for its erroneous approach. Unfortunately, the damage to the law created by this opinion has now spread. Another recent opinion, *Bel Air International, LLC v. Morales* (Feb. 26, 2018, B270268) ___ Cal.App.5th ___ [2018 WL 1045222], has cited *Central Valley* for the proposition that courts can "reject[ ] efforts by moving parties to redefine the factual basis for a plaintiff's claims" by looking at evidence, maintaining that evidence "does not provide license to ignore the allegations of a plaintiff's complaint." (*Id.* at pp. *6-*7.) *Bel Air*, like *Central Valley*, is inconsistent with the prior case law holding that courts cannot be limited solely to the allegations in the complaint because of the high risk that artful and vague pleading could otherwise obscure the complaint's efforts to impose liability for protected activities.

Depublication is required to ensure the opinion here can cause no further damage and to eliminate the uncertainty the opinion creates over whether litigants and lower courts can still rely on prior precedent in which this Court and other Courts of Appeal previously made clear that the anti-SLAPP statute's plain text requires courts to consider evidence under prong one and that the text of the complaint is not the end of the first prong analysis.

B. Depublication is warranted because the Court of Appeal wrongly criticizes the anti-SLAPP statute based on a prior published opinion's flawed analysis of anti-SLAPP data.

The Court of Appeal's opinion here criticizes "the anti-SLAPP process," quoting a prior opinion by the same court—*Grewal v. Jammu* (2011) 191 Cal.App.4th 977 (*Grewal*)—for the premise that " 'the anti-SLAPP procedure is being misused—and abused.' " (*Central Valley*, *supra*, 19 Cal.App.5th at p. 206.) The opinion in this case calls particular attention to *Grewal*'s view that a " '[l]osing [d]efendant's [r]ight to [a]ppeal [i]s the [a]spect of the [a]nti-SLAPP [s]tatute [m]ost [s]ubject to [a]buse.' " (*Ibid.*) The opinion maintains that the same type of abuse identified

by *Grewal* "once again warrants criticism about such abuse" in this case. (*Ibid*.) The opinion faults this appeal under *Grewal* (*Central Valley*, at pp. 206, 221-223) but goes further than *Grewal*. Whereas *Grewal* called on "the Legislature to revisit whether a defendant losing an anti-SLAPP motion has an absolute right to appeal" (*Grewal*, at p. 981), the opinion here seems to indicate that *Grewal*'s criticism can be weaponized to threaten attorneys representing those who file anti-SLAPP motions and anti-SLAPP appeals with sanctions. The opinion noted that the court considered sanctioning defense counsel, but ultimately elected not to do so in the court's discretion. (*Central Valley*, at pp. 221-223.) The opinion's cursory reaffirmation of *Grewal*'s criticism—and especially the opinion's seeming suggestion that *Grewal*'s critique could potentially expose attorneys to sanctions—warrants depublication because *Grewal*'s erroneous criticism stemmed from a flawed analysis of anti-SLAPP data.

To support its claim that litigants were systematically abusing the anti-SLAPP statute, *Grewal* relied on the number of pages in the annotated code setting out the cases decided under the anti-SLAPP statute to suggest there must be abuse because there are too many anti-SLAPP opinions. (See *Grewal*, *supra*, 191 Cal.App.4th at p. 998.) *Grewal* further indicated that the anti-SLAPP statute is especially flawed because it permits immediate appeals from orders denying anti-SLAPP motions, thereby compounding the abusive ills already caused by anti-SLAPP motions. (See *id.* at pp. 998, 1000-1003.) But, as detailed below, objective data shows that no abuse is occurring—and that the finding of abusive anti-SLAPP litigation is thus without merit.

The Judicial Council maintains data on anti-SLAPP motion filings, which is available upon request, as well as data about civil filings generally, which it makes available online. *Grewal* looked at an incomplete portion of this data—the information concerning anti-SLAPP motion filings—and insisted it reflected an abusive "explosion" of litigation. (*Grewal*, *supra*, 191 Cal.App.4th at pp. 998-999.) But an examination of the complete data—i.e., a comparison of the number of anti-SLAPP motions filed to civil filings generally—demonstrates that anti-SLAPP motions are little more than a tiny fraction of trial courts' civil dockets. For example, between fiscal years 2010 and 2016, parties filed a total of 3,146 anti-SLAPP motions in trial courts, or roughly 449 anti-SLAPP motions per fiscal year on average throughout the entire state. Given the 6,442,081 total civil filings over that same period, these 3,146 motions constitute only about 0.049 percent—far less than one percent—of total civil filings. (See Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2017) Civil Filings, Dispositions, and Case Load Clearance Rate: Fiscal Years 2006-07 through 2015-16, p. 95 (hereafter 2017 Court Statistics Report).) Such data shows that no systematic abuse of the anti-SLAPP statute is occurring.

As for the anti-SLAPP law's statutory right of appeal, it is important to appreciate the history and purpose of this provision. Prior to 1999, orders denying anti-SLAPP motions could "only be reviewed by writ until the proceedings in the trial court" were complete. (Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California* (1999) 32 U.C. Davis L.Rev. 965, 1008 (hereafter Braun).) In 1998, SLAPP scholars George Pring and Penelope Canan recommended amending the statute to include an immediate right of appeal from orders denying anti-SLAPP motions. (Braun, *California's Anti-SLAPP Remedy After Eleven Years* (2003) 34 McGeorge L.Rev. 731, 778-779 & fn. 280.) In response, the Legislature enacted Assembly Bill No. 1675, which provided that "[a]n order granting or denying a special motion to strike shall be appealable." (Stats. 1999, ch. 960, § 1.)

The Legislature viewed the right to an interlocutory appeal as essential to protecting defendants from SLAPP suits. (See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 193 (*Varian*); *Doe v. Luster* (2006) 145 Cal.App.4th 139, 144-145.) Much like critics today, the Judicial Council back then recommended against an

immediate right of appeal, insisting no such right was necessary because review by writ petition was "sufficient." (Braun, *supra*, 32 U.C. Davis L.Rev. at p. 1011 & fn. 182; see also *Grewal*, *supra*, 191 Cal.App.4th at p. 1002 [indicating the availability of writ review suffices to rectify erroneous anti-SLAPP orders].) The Legislature disagreed because writ review was " 'discretionary and rarely granted' " and the Legislature therefore deemed the theoretical availability of writ review to be insufficient to protect the constitutional rights at stake in an anti-SLAPP motion. (*Doe*, at p. 145.) " 'Since the right of petition and free speech expressly granted by the U.S. Constitution are at issue when these motions are filed,' " the Legislature determined that " 'the defendant should have the same right to appeal as plaintiffs already have under current law and have the matter reviewed by a higher court.' " (*Ibid*.)

The enrolled bill report for Assembly Bill No. 1675: (1) concluded that under then-existing law, appellate courts reviewed approximately 30 anti-SLAPP motions each year; and (2) noted that "[t]he Judicial Council estimate[d] that the SLAPP appeals authorized in AB 1675 would result in an increase of approximately 90 additional cases per year." (Cal. Dept. of Finance, Enrolled Bill Rep. on Assem. Bill No. 1675 (1999-2000 Reg. Sess.) Sept. 16, 1999, p. 1.) In other words, the Legislature anticipated that appellate courts would consider a mere 120 or so anti-SLAPP appeals per year. This prediction proved accurate. Based on the data on California appellate decisions available from Westlaw, from fiscal years 2010 to 2016 appellate courts decided 915 appeals from orders granting or denying anti-SLAPP motions, or roughly 130 anti-SLAPP appeals per fiscal year. (This number consists of both published and unpublished opinions that affirmed or reversed such an order in whole or in part.)

Moreover, the Legislature correctly predicted these anti-SLAPP appeals would have a negligible impact on appellate courts. Given Judicial Council data showing that California appellate courts disposed of a total of 67,114 appeals by written opinion in fiscal years 2010 to 2016, the 915 anti-SLAPP opinions by the appellate courts during that time period constituted roughly 1.36 percent of the total appellate opinions issued by those courts. (See 2017 Court Statistics Report, *supra*, Appeals Terminated by Written Opinion: Fiscal Years 2013-14 through 2015-16, p. 92; Judicial Council of Cal., Admin. Off of Cts., Rep. on Court Statistics (2015) Appeals Terminated by Written Opinion: Fiscal Years 2011-12 through 2013-14, p. 67 (hereafter 2015 Court Statistics Report); Judicial Council of Cal., Admin. Off. of Cts., Rep. on Court Statistics (2012) Appeals Terminated by Written Opinion: Fiscal Years 2008-09 through 2010-11, p. 70 (hereafter 2012 Court Statistics Report).) Hardly a crisis.

Furthermore, data confirms that the anti-SLAPP statute does not systematically enable meritless appeals from orders denying anti-SLAPP motions. Westlaw shows that, of the 915 anti-SLAPP appeals decided between fiscal years 2010 and 2016, only 438 were from orders that denied anti-SLAPP motions. These 438 appeals were a mere .65 percent—less than one percent—of the 67,114 appeals disposed of by written opinion during that time period. Appellate courts completely reversed the orders in 116 of these 438 appeals, for a 26 percent reversal rate. The rate is often higher in certain years. For example, in fiscal year 2016, appellate courts decided 90 appeals from orders denying anti-SLAPP motions, and they reversed in 30 of those cases—a reversal rate of roughly 33 percent. These reversal rates are markedly higher than the general reversal rate of 9 percent to 11 percent in all appeals during this same period, and also higher than the general reversal rate of 16 percent to 19 percent in all civil cases. (See 2017 Court Statistics Report, *supra*, Appeals Terminated by Written Opinion: Fiscal Years 2013-14 through 2015-16, p. 92; 2015 Court Statistics Report, *supra*, Appeals Terminated by Written Opinion: Fiscal Years 2011-12 through 2013-14, p. 26; 2012 Court Statistics Report, *supra*, Appeals Terminated by Written Opinion: Fiscal Years 2008-09 through 2010-11, p. 27.) Thus, defendants often need the right of immediate appeal to vindicate their right to early termination of meritless SLAPP suits because trial courts too often erroneously deny anti-SLAPP motions.

In sum, data that *Grewal* never examined contradicts *Grewal*'s insistence that litigants are systematically abusing anti-SLAPP motions and appeals. The anti-SLAPP statute, like any other procedural device, can be abused, and courts possess the authority to correct those occasional instances of abuse. (See *Varian, supra*, 35 Cal.4th at pp. 195-196.) But *Grewal* went too far when it wrongly attacked the anti-SLAPP process based on its flawed analysis of incomplete data concerning the number of anti-SLAPP filings. The opinion here, with its reaffirmation of *Grewal* and its indication that the court apparently seriously considered sanctioning defense counsel, should be depublished to ensure *Grewal*'s unfounded criticism is not misused to threaten attorneys with sanctions based on generalized grievances with the anti-SLAPP statute. Otherwise, other courts in future cases may look to this opinion as a basis for invoking *Grewal*'s critique to sanction attorneys who pursue anti-SLAPP litigation on behalf of their clients, which would improperly chill the use of anti-SLAPP motions in contravention of the Legislature's intent to have such motions serve as vital procedural tools for the vindication of important constitutional rights.

C. Depublication is necessary because the opinion fails to acknowledge the uncertainty in the law that justified the actions of the defendant's counsel, and could be misconstrued as criticizing broad groups of attorneys and the use of stipulated extensions.

The opinion criticizes the defendant's counsel for their reliance on *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192 (*Kibler*) in their appellate briefing, noting that "*Kibler* is hardly all that Dignity Health cracks it up to be, as shown by the Supreme Court's discussion of it in *Park.*" (*Central Valley, supra*, 19 Cal.App.5th at p. 219.) This criticism fails to account for the confusion generated among the Courts of Appeal by *Park*'s narrow holding and the timing of when the appellate briefs here were filed.

Kibler held that "a lawsuit arising out of a peer review proceeding is subject to an" anti-SLAPP motion. (*Kibler, supra*, 39 Cal.4th at p. 198.) After *Kibler*, Courts of Appeal repeatedly concluded that claims involving the peer review process were subject to the anti-SLAPP statute. (See, e.g., Burke, Anti-SLAPP Litigation (The Rutter Group 2017) ¶ 3:57, pp. 3-39 to 3-40.) But in early May 2017, this Court in *Park* disapproved of two Court of Appeal decisions "to the extent they indicate[d]" *Kibler* held "disciplinary decisions reached in a peer review process" were per se protected activities under the anti-SLAPP statute. (*Park, supra*, 2 Cal.5th at p. 1070.) *Park* clarified that "*Kibler* does not stand for the proposition that disciplinary decisions reached in a peer review process, as opposed to statements made in connection with that process, are protected." (*Ibid.*) *Park* did not say that claims arising from peer review proceedings can *never* fall within the anti-SLAPP statute's scope. In fact, *Park* held that the statute applies to any claim where protected "activity *itself* is the wrong complained of." (*Id.* at p. 1060.)

Consistent with *Park*'s narrow holding, some courts have continued to strike peer review claims pursuant to the anti-SLAPP statute after *Park.* (See, e.g., *Bhandari v. Washington Hospital* (June 14, 2017, A144184) 2017 WL 2570660, at pp. *1, *19 [nonpub. opn.] [directing trial court to strike certain peer review claims under the anti-SLAPP statute].)[1] But other Courts of Appeal have (erroneously) construed *Park* as precluding the application of

[1] Unpublished opinions cannot be cited as persuasive authority regarding California law. (Cal. Rules of Court, rule 8.1115(a).) We are not doing so. Rather, we cite this opinion only to demonstrate that Court of Appeal decisions are inconsistent on this issue. (See *id.*, rule 8.500(b); *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443-444, fn. 2 ["unpublished opinions may be cited if they are not 'relied on' "].)

the anti-SLAPP statute to peer review claims alleging retaliation or discrimination. (See, e.g., *Bonni v. St. Joseph Health System* (2017) 13 Cal.App.5th 851, review granted Nov. 1, 2017, S244148 (*Bonni*).) This division among the Courts of Appeal demonstrates the confusion *Park* has spawned over the anti-SLAPP statute's continuing applicability to peer review claims. Moreover, it is important to bear in mind that the defendant's opening appellate brief here was filed in December 2016 (*before* this Court decided *Park*) and its appellant's reply brief was filed on May 23, 2017 (only a few weeks after this Court decided *Park*, when courts and attorneys were presumably still in the initial stages of assessing *Park*'s potential impact on anti-SLAPP litigation). (See *Docket (Register of Actions)* <https://goo.gl/oSNosb> (hereafter *Docket*) [last visited Mar. 8, 2018].)

The opinion's criticism of the defendant's counsel for making appellate arguments about *Kibler* that were arguably correct at the time counsel filed the opening brief—especially where Courts of Appeal are currently in disarray over the anti-SLAPP statute's continuing applicability in cases where defendants argue a plaintiff's claims implicate the peer review process—sends a terrible message to appellate advocates throughout the state. Lawyers should not be criticized for relying on then-existing authority in their briefing. Indeed, it was the defendant's counsel, not plaintiff, who first advised the Court of Appeal of the unfavorable *Bonni* decision when it came out. (See *Docket*, *supra*, <https://goo.gl/oSNosb> [docket entry for August 1, 2017].)

The opinion also omits facts that are necessary to understand the actions of the defendant's counsel. The opinion states the court first sent out a notice that it was considering sanctions, and then counsel filed a request to dismiss the defendant's appeal, making it appear to the reader of the opinion that the defendant's counsel tried to abandon their appeal only after the court suggested it was considering sanctions. (*Central Valley*, *supra*, 19 Cal.App.5th at pp. 221-222.) As explained in the petition for review and the depublication request filed by the California Academy of Appellate Lawyers, defendant's counsel alerted the Court of Appeal clerk by telephone that the appeal would be dismissed in light of recent authority *before* the court issued its sanctions letter. (See PFR 15, fn. 6; Cal. Academy Depub. Letter 3, fn. 2; *Docket*, *supra*, <https://goo.gl/oSNosb> [August 11, 2017 docket entry for telephone conversation].) Courts should not discourage voluntary dismissals of appeals when the law changes.

Furthermore, in the context of explaining that the court had considered sanctioning defense counsel, the opinion stresses that the court did "not understand how 90 days of extensions in an anti-SLAPP appeal can be a manifestation of anything but delay." (*Central Valley*, *supra*, 19 Cal.App.5th at p. 222.) In particular, the opinion criticizes defendant for bringing on new lawyers to the appeal who did not appear in the trial court when "the analysis on appeal is the same analysis as in the trial court, the classic case of de novo review," and finds fault that "the attorney who signed the appellate briefs" but who "did not even participate below" was the lawyer selected to present oral argument and who had scheduling issues that required a continuance of the oral argument. (*Ibid*.) As eloquently explained in the depublication letter filed by the California Academy of Appellate Lawyers, the opinion could harm appellate advocacy by calling into question the use of new appellate counsel to handle the briefing and argument on appeal. (See Cal. Academy Depub. Letter 2-3.) ASCDC's membership includes both trial lawyers and appellate counsel who work together to represent clients on appeal. This arrangement of associating in new appellate counsel when the case heads to the Court of Appeal (which is often replicated by plaintiff-side trial lawyers and appellate specialists) is one that aids clients and the courts, who both benefit from the objective analysis of a case once it is on appeal. (See *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1449-1450; see also *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 621-622 [emphasizing critical differences between appellate and trial court work].) And the extensions in question came about as a result of

stipulations in which the parties courteously agreed to extend each side's briefing deadlines (see *Docket*, *supra*, <https://goo.gl/oSNosb> [docket entries for August 24, 2016, December 16, 2016, and April 5, 2017])—an unremarkable appellate practice embraced by the Rules of Court (see Cal. Rules of Court, rule 8.212(b); Willenburg, *Anti-SLAPP appeals: extensions and civility are not bad faith*, L.A. Daily J. (Feb. 7, 2018) p. 5). Depublication is necessary because the likely effect of this opinion will be that un-civil lawyers will use it as an excuse to reject reasonable scheduling requests for briefing proposed by their opposing counsel.

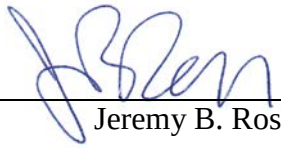
Finally, the opinion concludes with language that could be mistakenly read as a general attack on defense counsel of all kinds: "A lesser known saying, known to be attributable to prominent defense lawyers from major law firms is that ' "Justice delayed is justice." ' " (*Central Valley*, *supra*, 19 Cal.App.5th at p. 223.) The ASCDC's many members, along with their nonmember colleagues, work hard to represent defendants with integrity and zealous advocacy, taking seriously their obligation to discharge their duties without engaging in litigation for the purpose of delay or harassment. While a few attorneys—whose ranks also include counsel for plaintiffs—occasionally violate this obligation, there is no reason for categorical aspersions against any group of attorneys. We assume the Court of Appeal intended no such aspersions, but because the opinion could be read as broadly disparaging all defense counsel, it should not remain published in the official reports.

Conclusion

The Court of Appeal's opinion should be depublished. Moreover, even if review is granted, the court should order the opinion not to be citable as well. (See Cal. Rules of Court, rule 8.1115(e).)

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA
DEFENSE COUNSEL

By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On March 9, 2018, I served true copies of the following document(s) described as **REQUEST FOR DEPUBLICATION** on the interested parties in this action as follows:

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BY MAIL (*TRIAL JUDGE ONLY*): I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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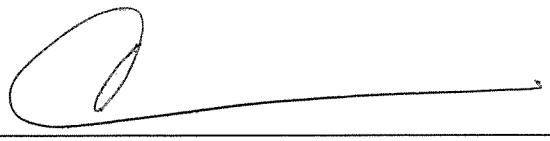
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 9, 2018, at Burbank, California.



Connie Christopher

SERVICE LIST

Central Valley Hospitalists v. Dignity Health
Court of Appeal Case No. A148742
Supreme Court Case No. S247089

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