PRINCE LOBEL

June 7, 2017

Chief Justice Ralph D. Gants and Associate Justices
Supreme Judicial Court for the Commonwealth
John Adams Courthouse
One Pemberton Square
Suite 2500
Boston, MA 02108

Re: *Blanchard v. Steward Carney Hospital, Inc. et al.*, SJC-12141
On Petition for Rehearing

Dear Chief Justice Gants and Associate Justices of the Court:

On behalf of the New England First Amendment Coalition,[1] the American Civil Liberties Union of Massachusetts,[2] the Reporters Committee for Freedom of the Press,[3] the Electronic Frontier Foundation,[4] and TripAdvisor LLC,[5] I respectfully submit this letter in support of the defendants' Petition for Rehearing in *Blanchard v. Steward Carney Hospital, Inc.*, SJC-12141. The Court in *Blanchard* announced a new standard for deciding whether an action should be dismissed as a "strategic lawsuit against public participation" under the Anti-SLAPP Law, G.L. c. 231, § 59H. It did so without the benefit of briefing—either by parties or *amici curiae*—about the benefits, drawbacks, and potential unintended consequences of any new standard. The organizations represented in this letter respectfully submit that the Court's opinion would have benefited from such briefing, and they support the request for rehearing for that reason.

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[1] The New England First Amendment Coalition is a Massachusetts-based nonprofit that advocates for the protection of First Amendment freedoms, including the right of citizens to petition the government. http://nefirstamendment.org/about/

[2] The American Civil Liberties Union of Massachusetts has a long-standing interest in protecting the rights of those who have petitioned the government, and it helped obtain the enactment of the Anti-SLAPP Law. The organization's experience is that the statute has significantly reduced the number of calls it receives from those sued or threatened with a lawsuit for their petitioning activity. https://aclum.org/about/

[3] The Reporters Committee for Freedom of the Press works to defend the First Amendment rights and freedom of information interests of the news media. RCFP has a strong interest in minimizing "strategic lawsuits against public participation" and ensuring that anti-SLAPP statutes continue to provide journalists, publishers, sources, and others with an effective means of disposing of lawsuits based on protected speech and petitioning activities. http://www.rcfp.org/about

[4] The Electronic Frontier Foundation is one of the leading organizations devoted to defending civil liberties in the digital world, and it frequently participates in litigation around the country to preserve freedom of speech online. https://www.eff.org/about

[5] TripAdvisor LLC, based in Needham, Massachusetts, operates the world's largest travel website, and is a vocal supporter of free speech and the "right to write" for individuals around the globe. https://tripadvisor.mediaroom.com/us-about-us

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The *Blanchard* decision introduces a new way for a plaintiff who files suit based on protected petitioning activity to avoid dismissal under the Anti-SLAPP Law: by establishing, "such that the motion judge may conclude with fair assurance, that the non-moving party's primary motivating goal in bringing its claim, viewed in its entirety, was not to interfere with and burden defendants' petition rights, but to seek damages for the personal harm to it from the defendants' alleged legally transgressive acts." *Blanchard v. Steward Carney Hosp., Inc.,* No. SJC-12141, 2017 WL 2257586, at *11 (Mass. May 23, 2017) (internal quotations and citations omitted). Before *Blanchard,* a court faced with a special motion to dismiss under the Anti-SLAPP Law examined objective factors only: what allegedly wrongful actions underlie the claims, and, if those actions amount to petitioning activity, whether the petitioning had some factual or legal merit. *Duracraft Corp. v. Holmes Prod. Corp.,* 427 Mass. 156, 167–68 (1998). Under *Blanchard,* the non-moving party's subjective "primary" motivation is now central to the analysis.

The *Blanchard* test will substantially increase the burdens on moving parties, and will encourage the filing of more lawsuits based on petitioning activities. Although the opinion implies that lawsuits directed at such activities will be treated as presumptively motivated by the desire to chill speech, in practice, judges will likely apply different standards of proof to determine the plaintiff's primary motivation. That will make it more difficult for attorneys to advise their clients on the likelihood of dismissal on a special motion than under the objective *Duracraft* test. *See Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 62 (2002) (rejecting subjective "intent to chill" requirement for California SLAPP statute because objective standard is "neutral" and "easily applied" (citing Canan & Pring, SLAPPs: Getting Sued for Speaking Out (1996) p. 8)). Lawyers for parties who wish to sue based on protected petitioning activity will thus be less likely to discourage such suits at the outset, increasing the number of cases where "the classic indicia of a 'SLAPP' suit" are present. *Blanchard*, 2017 WL 2257586, at *10.

The *Blanchard* test is also likely to result in the increased use of discovery to resolve special motions—contrary to the legislative intent behind the Anti-SLAPP Law. In other, similar contexts, courts have recognized that it is inappropriate to attempt to determine a party's motive before discovery has been taken. *Eisenberg v. City of Miami Beach*, 1 F. Supp. 3d 1327, 1344 (S.D. Fla. 2014) (denying motion to dismiss "unconstitutional conditions" claim, holding that analysis of whether plaintiff's exercise of free speech was substantial or motivating factor for government action "is premature when the parties have not conducted discovery"); *Johnson v. Conway*, No. 1:13-CV-0524-RWS, 2013 WL 5493380, at *4 (N.D. Ga. Sept. 30, 2013) (determination whether defendants engaged in impermissible retaliation for First Amendment activity "is not appropriate at the motion to dismiss phase"). Indeed, this Court has held that motive questions are "often inappropriate" even for *summary judgment*, because they largely depend "on the credibility of the witnesses testifying as to their own states of mind." *Flesner v. Tech. Commc'ns Corp.,* 410 Mass. 805, 809 (1991). Yet here, the Court has directed trial courts to attempt to determine the non-moving party's "primary motivating goal" on a motion to dismiss, in a context where discovery is automatically stayed. *Blanchard,* 2017 WL 2257586, at *11.

In practice, the *Blanchard* formulation will force many anti-SLAPP movants to seek leave (on motion and after a hearing) to take "specified discovery" under G.L. c. 231, § 59H to rebut a non-moving party's assertion of a legitimate "motivating goal." Moving parties must do so

notwithstanding that the Anti-SLAPP Law's automatic stay of discovery was intended to save *them* from expense, not the other way around. *See Duracraft Corp.*, 427 Mass. 161 (quoting preamble to anti-SLAPP bill, 1994 House Doc. No. 1520, to the effect that SLAPP suits should "be resolved quickly with minimum cost to citizens who have participated in matters of public concern"). Requests for discovery into the non-moving party's state of mind will make even routine anti-SLAPP motions more expensive for movants and non-movants alike, contrary to the intent of the Legislature. *Equilon*, 29 Cal. 4th at 65 ("A requirement that courts confronted with anti-SLAPP motions inquire into the plaintiff's subjective intent would commit scarce judicial resources to an inquiry inimical to the legislative purpose that unjustified SLAPP's be terminated at an early stage.").

For these and other reasons, the organizations represented in this letter believe the *Blanchard* decision will substantially weaken the protections of the Anti-SLAPP Law and will chill the speech of all who speak out on matters of public concern—whether in print, online or in person. The kinds of parties most likely to be burdened by the costs of the new standard are those most in need of protection. They include low-income tenants who report building code violations; columnists or bloggers who write about corporate malfeasance; consumers who report unscrupulous business practices; and digital activists organizing collective action on social media.

The Court did not solicit *amicus* briefs from organizations concerned with the protections of the Anti-SLAPP Law before altering the longstanding *Duracraft* framework, nor did it direct the parties to brief this issue. Quite apart from the question of which "side" should prevail in *Blanchard* itself, the parties represented in this letter believe the Court's opinion would have benefited from briefing by the parties and concerned *amici* about the merits and likely impact of any new test. Accordingly, they respectfully support the defendants' request for rehearing, and intend to seek leave to participate as *amici* if the request for rehearing is granted.

Sincerely yours,

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