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REQUEST TO DEPUBLISH OPINION
CALIFORNIA RULES OF COURT RULE 81125(a)

VIA: FEDEX

September 23, 2016

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

Re: *Nam v. Regents of the University of California*
Third District Court of Appeal Case No. C074796
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to request under California Rules of Court, rule 8.1125(a) that the opinion in the matter of *Un Hui Nam v. Regents of the University of California* (*Nam*), filed July 29, 2016, be ordered depublished.

Depublication is warranted because the Court of Appeal's analysis under prong one of the anti-SLAPP statute is inconsistent with this Court's recent opinion in *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 (*City of Montebello*) and no petition for review is being filed to allow this court the opportunity to address the inconsistency. Permitting *Nam* to remain published will only serve to confuse lower courts and litigants who might think that *Nam* correctly applies the law as recently confirmed in *City of Montebello*.

Interest of the Requesting Organization

ASCDC is an association of over 1,000 leading attorneys who specialize in defending civil actions in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. ASCDC affords professional education, fellowship and advancement for its members. It acts as a liaison between the defense bar and the courts and the Legislature. It is actively involved in matters of interest to the judiciary and bar. It has appeared as amicus curiae in numerous cases before both this Court and the Court of Appeal across the state.

Legal Argument

In *City of Montebello*, this Court confirmed "The Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition. It went on to include 'any act . . . *in furtherance* of' those rights. The Legislature's directive that the anti-SLAPP statute is to be 'construed broadly' so as to 'encourage continued participation in matters of public significance' supports the view that statutory protection of acts 'in furtherance' of the constitutional rights incorporated by section 425.16 may extend beyond the contours of the constitutional rights themselves." (*City of Montebello, supra,* 1 Cal.5th at pp. 421-422, citations omitted.) Thus, the four enumerated categories contained in Code of Civil Procedure section 425.16, subdivision (e) constitute acts in furtherance of those rights. (*Id.* at p. 422.)

In short, "[r]equiring the moving party to make a constitutional case in support of every anti-SLAPP motion would be inconsistent with the Legislature's desire to establish an efficient screening mechanism for 'disposing of SLAPP's quickly and at minimal expense to taxpayers and litigants.' The statutory categories provided in section 425.16, subdivision (e) provide objective guidelines that lend themselves to adjudication on pretrial motion." (*City of Montebello*, *supra*, 1 Cal.5th at p. 422; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90-91 [rejecting focus on label of cause of action and instead simply applying the four subdivision (e) factors] (Citations omitted).)

In *Nam*, the Court of Appeal appeared to be quite concerned that certain categories of cases (harassment, discrimination, and retaliation) would become subject to anti-SLAPP motions which is supposedly improper because it would be "at odds with the purpose of the anti-SLAPP law, which was designed to ferret out meritless lawsuits intended to quell the free exercise of First Amendment rights, not to burden victims of discrimination and retaliation." (Typed opn. 14.) The Court of Appeal's focus on the label given to a particular cause of action is inconsistent with this Court's reminder in *City of Montebello* that the key focus under prong one is whether the allegations in the complaint fit within one of the four Code of Civil Procedure section 425.16, subdivision (e) categories.

The foundation for the Court of Appeal's error in *Nam* can be illustrated by the two Court of Appeal opinions they declined to follow and the two Court of Appeal opinions they followed instead, thus exacerbating and re-kindling a split of authority that should have been resolved by this Court's opinion in *City of Montebello*. The *Nam* court heavily relied on prior decisions, *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273 and *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611. (Typed opn. 14-16.) The *Alta Loma* and *Martin* courts likewise focused on the label of the cause of action rather than whether the actual allegations in the complaint fit within one of the Code of Civil Procedure section 425.16, subdivision (e) categories. (See, e.g., *Martin,* at p. 625 [characterizing cause of action as one for "racial and retaliatory discrimination" and not analyzing text of complaint with subdivision (e) factors in mind]; *Alta Loma,* at p. 1288 ["if this kind of suit could be considered a SLAPP, then landlords and owners, if not Alta Loma, could discriminate during the removal process with impunity knowing any subsequent suit for disability discrimination would be subject to a motion to strike and dismissal. We are confident the Legislature did not intend for section 425.16 to be applied in this manner either. As the trial court aptly observed, 'I just feel like to rule for the defendant in this case would be to say that section 425.16 provides a safe harbor for discriminatory conduct and I don't think that's what it's intended to do' "].)

By contrast, the *Nam* court expressly declined to follow two other Court of Appeal opinions that compared the allegations in the complaint to the relevant Code of Civil Procedure section 425.16, subdivision (e) factors because the result of following those decisions would be to subject many discrimination and retaliation

complaints to anti-SLAPP motions, which the *Nam* court did not believe was appropriate. (See typed opn. 11-14 [rejecting *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257 (*Tuszynska*) and *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th. 1510 (*Hunter*)].)

Nam erred in doing so because the *Tuszynska* and *Hunter* courts properly refused to look at the label given to a particular cause of action and instead (consistent with *City of Montebello, Navellier*, and numerous other authorities) carefully analyzed the specific allegations in the complaint and compared them to the categories of conduct listed in Code of Civil Procedure section 425.16, subdivision (e). (See, e.g., *Tuszynska, supra,* 199 Cal.App.4th at pp. 268-269 ["Plaintiff and the trial court thus drew a critical distinction between plaintiff's claim that she was not getting cases *because* she was a woman, on the one hand, and the communications defendants made in connection with making their attorney selection and funding decisions, on the other. This distinction conflates defendants' alleged injury-producing conduct—their failure to assign new cases to plaintiff and their refusal to continue funding cases previously assigned to her—with the unlawful, gender-based discriminatory *motive* plaintiff was ascribing to defendants' conduct—that plaintiff was not receiving new assignments or continued funding because she was a woman. [¶] This type of distinction is untenable in the anti-SLAPP context *because* it is at odds with the language and purpose of the anti-SLAPP statute" which requires application of the subdivision (e) factors]; *Hunter, supra,* 221 Cal.App.4th at. pp. 1520-1522 [same].)

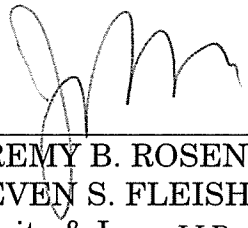
By endorsing one side of this prior split of authority, the *Nam* court has interjected confusion into the proper analysis courts should apply under prong one. This Court made clear in *City of Montebello* that courts should look at the actual allegations in the complaint and carefully compare them to the factors set forth in Code of Civil Procedure section 425.16, subdivision (e). *Nam* took an incorrect approach and instead gave more impact to the label of the cause of action as opposed to what was actually alleged. By endorsing *Alta Loma* and *Martin*, and by rejecting *Tuszynska* and *Hunter*, *Nam* has further entrenched an improper analytical framework for determining whether a lawsuit could be subject to an anti-SLAPP motion. Accordingly, this Court should depublish the opinion.

Conclusion

This is one of the rare cases in which depublication is warranted because leaving *Nam* published will create confusion among lower courts in applying the proper prong one framework that this Court has recently reconfirmed in *City of Montebello*.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFONRIA DEFENSE COUNSEL



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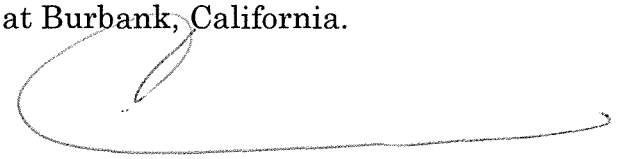

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