

EMERGENCY WRIT PETITION: IMMEDIATE STAY OF DISCOVERY
ORDER AND EXPEDITED RELIEF REQUESTED

No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION _____

WILLIAM H. COSBY, JR.,

Petitioner,

v.

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES,

Respondent,

JANICE DICKINSON,

Real Party in Interest

From an Order of the Superior Court for the County of Los Angeles
Case No. BC 580909
The Honorable Debra Weintraub
(213) 633-0647

**PETITION FOR WRIT OF MANDATE
OR OTHER APPROPRIATE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES**

[APPENDIX OF EXHIBITS FILED CONCURRENTLY]

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

The undersigned certifies that there are no interested persons or entities to list in this certificate.

DATED: November 10, 2015 QUINN EMANUEL URQUHART & SULLIVAN, LLP

By



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TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SECOND APPELLATE DISTRICT COURT OF APPEAL FOR THE STATE OF CALIFORNIA:

INTRODUCTION

Defendant-Petitioner seeks review of an Order lifting the anti-SLAPP statute's automatic discovery stay in a defamation action. Courts of Appeal have issued writs on similar cases directing the Superior Court to first determine whether the Plaintiff had a reasonable probability of establishing the other elements of her claim *before* ordering discovery on the issue of actual malice.

Plaintiff alleged that calling her a "liar" was defamatory. The special motion to strike showed that in 2002, Plaintiff had written a book that included a description of her 1982 encounter with Defendant. He invited her into his room. She declined, and according to Plaintiff, nothing else happened. Notably, in her motion to lift the stay, Plaintiff did not deny that she had written in her autobiography that Defendant had not assaulted her. The flat-out contradiction between what Plaintiff was telling the world in 2014—that Defendant had assaulted her—and what she had written in 2002—that Defendant had not assaulted her—gave an undisputed factual basis for Defendant's former counsel to say Plaintiff was lying.

In any event, this Court need not rule on whether probable cause exists or not. The point here is that the anti-SLAPP statute was designed to prevent the burden of discovery on "malice" until the trial court resolved

the other legal issues raised by the motion to strike. California appellate courts have on multiple occasions issued writs on the grounds that the trial court abused its discretion by permitting discovery on malice without first determining whether Plaintiff could satisfy the other elements. This procedure is not a technicality. Rather, it is essential to the primary purpose of the automatic stay, which is to protect defendants exercising their free speech rights from harassing and unnecessary discovery.

Defendant respectfully requests that this Court immediately stay the underlying proceedings and issue a writ of mandate vacating the Order granting Plaintiff's motion to lift the stay of discovery, and directing the lower court to deny that motion, allow full briefing and argument on Defendant's anti-SLAPP motion, and fully decide the legal issues raised in the anti-SLAPP motion before any discovery is considered.

PETITION

Authenticity of Exhibits

1. All exhibits accompanying this Petition are true and accurate copies of original documents filed with the respondent Superior Court. The exhibits are incorporated by reference as though fully set forth in this Petition. The exhibits are paginated consecutively from page 1 through page 579, and the page references in this Petition are to the consecutive pagination.

The Parties to the Petition

2. Petitioner William H. Cosby, Jr. (“Defendant”) is the defendant in an action entitled *Janice Dickinson v. William H. Cosby, Jr.*, now pending before Department 47 of the Superior Court.

3. Janice Dickinson (“Plaintiff”) is the plaintiff and real party in interest.

4. Respondent is the Superior Court of the State of California for the County of Los Angeles (the “Superior Court”).

Pending Appeals

5. There are no other pending writs or prior appeals in this case.

Background

The Statements at Issue

6. This action arises out of statements made by Defendant’s former attorney that Plaintiff’s public accusations that Defendant assaulted her are inconsistent with Plaintiff’s prior statements.

7. In her autobiography published in 2002, Plaintiff wrote that in 1982, at Lake Tahoe, Nevada, Defendant asked if she wanted to go into his room after dinner. *See* Ex. 3 at 40-41 [¶ 8], 94-204. She said no, and Defendant allegedly “stepped into his suite, and slammed the door in [her] face.” *Id.* Plaintiff then went back to her own room and “popped two Qaaludes and drifted off to sleep.” In an interview with the *New York*

Observer in 2002, Plaintiff told the same story, stating that Defendant “blew her off” after she rejected his advances. *Id.* at 41 [¶ 9], 105-15.

8. In a November 18, 2014 television interview on *Entertainment Tonight*, Plaintiff gave an entirely different account of what happened at Lake Tahoe in 1982. She said that Defendant drugged and sexually assaulted her. *Id.* at 39-40 [¶¶ 4, 5], 46-67. Plaintiff was asked to explain the contradictions between her new allegations and what she had previously stated in 2002. *Id.* Plaintiff replied that in 2002 her publisher, HarperCollins, had been “pressured” into silence by Defendant and his legal team. *Id.*

9. The same day the *Entertainment Tonight* interview aired, Defendant’s former attorney sent a three-page “confidential legal notice” on law firm letter-head to the senior executive producer of *Good Morning America*, stating that Plaintiff’s allegations were “lies” and “fabricated,” and that any re-broadcast of her interview would result in “substantial liability.” *Id.* at 41-42 [¶ 11], 116-19. Counsel’s letter explained in detail that Plaintiff’s recent statements were directly contradicted by her autobiography as well as other prior statements. *Id.* It also explained that Defendant and his attorneys were not even aware of Plaintiff’s allegations of sexual assault at the time of her autobiography, and never had any contact with Harper Collins regarding any such claims. *Id.*

10. The next day, Defendant's counsel issued a statement refuting Plaintiff's allegations. *Id.* at 42 [¶ 13], 120-21. Defendant's counsel stated that Plaintiff's accusations were a "fabricated lie" because they were inconsistent with her prior statements, and that Harper Collins itself could confirm that, contrary to Plaintiff's claim, it was never "pressured" by Defendant or his attorneys. *Id.*

Complaint

11. On May 20, 2015, Plaintiff filed a Complaint initiating an action against Defendant in the Superior Court of the State of California for the County of Los Angeles. *See* Ex. 1 (Complaint filed May 20, 2015 (the "Complaint")). Plaintiff claims that the November 18 letter and November 19 press release issued by Defendant's former attorney contained false statements that harmed Plaintiff's reputation, and alleges causes of action for defamation, false light, and intentional infliction of emotional distress. *Id.* at 9-12 [¶¶ 47-73].

12. Notably, the Complaint made no mention of Plaintiff's allegation that Defendant's lawyers "pressured" HarperCollins in 2002. Nor did Plaintiff in subsequent interviews with the media. *See* Ex. 3 at 44 [¶ 18]. In fact, Plaintiff, through her counsel, has since recanted those allegations entirely. *See* Ex. 4 at 189 [¶ 4] (describing telephone conference where Plaintiff's counsel retracted her allegation that

Defendant's lawyers ever "pressured" HarperCollins); *see also* Ex. 2 at 1; Ex. 3 at 40 [¶ 6], 44 [¶ 17].

Defendant's Demurrer and Special Motion to Strike

13. On June 22, 2015, Defendant demurred on the grounds that the Complaint does not state facts sufficient to constitute the causes of action, and is ambiguous as to the statements that are the basis of the claims asserted. *See* Ex. 7 (Demurrer filed June 22, 2015).

14. Also on June 22, 2015, Defendant moved to strike the Complaint pursuant to California Code of Civil Procedure Section 425.16 *See* Ex. 2 (Special Motion to Strike filed June 22, 2015 (the "Anti-SLAPP Motion")). The Anti-SLAPP Motion makes the threshold showing that the Complaint arises from acts in furtherance of free speech in connection with a public issue because (a) the November 18 pre-litigation demand letter is protected petitioning activity, and (b) the November 19 statement relates to a public figure, was made in a public forum, and concerns an issue of public interest. *Id.* at 26-29.

15. The Anti-SLAPP Motion then identifies many legal bases for concluding that Plaintiff cannot establish a probability of prevailing on her defamation claim: (1) the November 18 letter is protected under the litigation privilege; (2) Defendant did not personally publish the November 18 letter or November 19 press release, and because actual malice is required, liability for Defendant's counsel's statements cannot be imputed

to Defendant under agency principles; (3) Defendant's counsel did not act with actual malice; (4) each of the statements are privileged as "predictable opinion"; (5) each of the statements are not actionable because they express opinions based on disclosed facts; (6) each of the statements are not actionable because they are substantially true; and (7) Plaintiff cannot prove any damages. *Id.* at 29-35. The motion also explains that the false light and intentional infliction of emotional distress claims fail as duplicative of, and for the same reasons as, the defamation claim. *Id.* at 35-36.

Plaintiff's Motion to Lift the Stay of Discovery

16. On September 21, 2015, Plaintiff moved to lift the automatic stay of discovery imposed by the SLAPP statute. *See* Ex. 8 (Motion to Lift Stay of Discovery, filed September 21, 2015 ((the "Motion to Lift the Stay")). Plaintiff acknowledged that she bears the burden of proving actual malice, and argued that she needed immediate discovery on that issue. *Id.* at 229-33. Specifically, Plaintiff sought leave to take the depositions of Defendant and his former counsel on the issue of actual malice *before* further briefing or argument of Defendant's Anti-SLAPP Motion. *Id.*

17. On October 19, 2015, Defendant opposed the Motion to Lift the Stay. *See* Ex. 12 (Opposition to Motion to Lift Stay, filed October 19, 2015 (the "Opposition")). The Opposition identified the clear guidelines articulated by the California Court of Appeal for determining whether "good cause" exists to lift the automatic discovery stay in cases subject to

the constitutional malice standard. *Id.* at 299-300. When an anti-SLAPP motion raises significant legal defenses as to the other elements of plaintiff's claim, the trial court must first resolve those issues before even considering discovery on the question of actual malice. *Id.* at 300-01. The Opposition explained that these guidelines apply to this case because Defendant's Anti-SLAPP Motion raises many legal bases to strike the Complaint that have nothing to do with malice. *Id.* at 302-03.

18. Plaintiff replied to the Opposition on November 2, 2015. *See* Ex. 13 (Reply to Defendant's Opposition to Motion to Lift Stay, filed November 2, 2015 (the "Reply")). The Reply again acknowledged that Plaintiff must prove malice, and confirmed that Plaintiff sought discovery only as to that specific issue. *Id.* at 310-11.

The Superior Court's Order on Plaintiff's Motion to Lift the Stay of Discovery

19. The Superior Court heard oral argument on the Motion to Lift the Stay on November 2, 2015. The Superior Court ruled that there was good cause to lift the discovery stay because (1) the information necessary to establish actual malice is "in the hands" of Defendant and his former attorney, (2) that information cannot be obtained from other sources, and (3) malice is a necessary element of plaintiff's claim. *See* Ex. 16 (November 2, 2015 Hearing Tr.) at 406-09.

20. In its Minute Order for the hearing, issued November 5, 2015, the Superior Court stated that it had granted Plaintiff's motion and ordered the deposition of Defendant and his counsel be held by November 25, 2015. *See* Ex. 17 (Minute Order dated November 2, 2015) at 422. On November 9, 2015, the Plaintiff served Defendant with official notice of the Superior Court's November 2, 2015 ruling. *See* Ex. 24 (Notice of Ruling on Plaintiff's Motion to Lift Stay of Discovery, dated November 9, 2015).

Defendant's Ex Parte Application to Stay Discovery

21. On November 9, 2015, Defendant filed an ex parte application with the Superior Court, requesting that the Order be stayed pending consideration of this petition.¹ *See* Ex. 18 (Ex Parte Application to Stay Discovery & Preclude Disclosure of Deposition Location filed November 9, 2015). The Superior Court granted the request in part, staying the Order, but only until November 17, 2015. *See* Ex. 25 (Minute Order dated November 9, 2015).

22. Notably, the Superior Court did not fully stay the Order pending the resolution of this petition, or beyond the dates that the

¹ Defendant also requested a protective order barring Plaintiff from revealing the location of Defendant's deposition to the public. This request is not at issue in this writ.

depositions are currently scheduled.² Defendant will therefore be forced to incur the burden and expense of preparing for the depositions—and if this Court does not act by November 17, to hold those depositions—unless this Court stays the Order fully pending its rulings on this petition, with the depositions to be rescheduled if the petition is denied.

Grounds for Relief

23. An order granting a motion to lift the anti-SLAPP statute's automatic stay of discovery is reviewed for an abuse of discretion. *Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156, 1159 (2004). The California Court of Appeal has repeatedly held that a trial court abuses its discretion when it lifts the automatic stay to allow discovery on the issue of actual malice “before first determining, after briefing and argument, whether the plaintiffs had a reasonable probability of establishing the other elements of their libel cause of action.” *Id.* (granting defendant's writ petition); *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1345-46 (2008) (same).

24. The Superior Court abused its discretion by granting Plaintiff's Motion to Lift the Stay without first resolving the significant legal issues raised in the Anti-SLAPP Motion. The Anti-SLAPP Motion

² The deposition for Defendant's former attorney is currently scheduled for November 19 and Defendant's deposition is currently scheduled for November 23.

presents many bases for dismissal that have nothing to do with malice, and which must be resolved as a matter of law without discovery. The Superior Court ignored many of those significant legal defenses, and disregarded the Court of Appeal's clear mandate that such defenses be resolved, after full briefing and argument, before the stay of discovery can be lifted.

Absence of Other Adequate Remedies

25. An order granting a motion to lift the anti-SLAPP statute's automatic stay of discovery is not an appealable order. *See* Cal. Civ. Proc. Code § 904.1(a)(3). An order granting a motion to lift the stay is reviewed by writ. *See Paterno*, 163 Cal. App. 4th at 1345-46; *Garment Workers*, 117 Cal. App. 4th at 1159.

26. Without a writ directing the Superior Court to vacate its Order, Petitioner would be required to submit to expensive and burdensome discovery on the issue of actual malice, which will turn out to be wholly unnecessary if the legal defenses raised in the Anti-SLAPP Motion are resolved in Petitioner's favor.

Request for Immediate Stay of Challenged Order

27. California appellate courts routinely stay discovery orders while a writ petition is pending, including in the anti-SLAPP context specifically. *See, e.g., Paterno*, 163 Cal. App. 4th at 1348 (stay issued by Court of Appeal while it considered a petition challenging order lifting anti-SLAPP discovery stay); *Garment Workers*, 117 Cal. App. 4th at 1161

(same). That is done in order to “avoid [the] irreparable harm” caused by forcing a defendant to submit to discovery that turns out to be unnecessary. *Paterno*, 163 Cal. App. 4th at 1357.

28. Here, an immediate stay of the underlying proceedings until this petition is resolved is necessary because the Superior Court ordered that the depositions of Defendant and his former counsel be held by November 25, 2015, and stayed the Order only temporarily, until November 17, 2015. Unless this Court stays the Order pending resolution of this petition, Defendant will be forced to continue to incur the burden and expense of preparing for the depositions, which are currently scheduled to occur on November 19 and 23—*after* the Superior Court’s partial stay ends. Furthermore, if this Court does not decide the petition by November 17, Defendant would be forced to proceed with the depositions, even though this petition would still be undecided, and the depositions may turn out to be wholly unnecessary. Defendant thus respectfully requests that this Court immediately stay the Superior Court’s Order until this petition is resolved, with the depositions to be rescheduled at a later date if the petition is denied.

PRAYER FOR RELIEF

Wherefore Petitioner prays that this Court:

1. Issue an immediate stay of the underlying proceedings pending determination of this petition.
2. Issue a writ of mandate or other appropriate extraordinary relief directing the Superior Court to (a) set aside and vacate its Order granting Plaintiff's Motion to Lift the Stay, (b) enter a new and different Order denying the Motion to Lift the Stay, (c) resolve the legal defenses raised by Defendant's Anti-SLAPP Motion, after full briefing and argument of that motion, before considering lifting the stay of discovery, and (d) consider lifting the stay to allow discovery on the issue of actual malice only if Defendant's legal defenses have been denied and actual malice remains an unresolved issue of fact.
3. Award Petitioner his costs and reasonable attorneys' fees pursuant to Rule 8.493 of the California Rules of Court.
4. Grant such further relief as this Court may deem just and proper.

DATED: November 10, 2015 Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

A large, stylized handwritten signature in black ink, appearing to read 'Christopher Tayback', is written over a horizontal line.

By

Christopher Tayback

Randa Osman

Justin Griffin

Counsel for Petitioner William H.

Cosby, Jr.

VERIFICATION

I, Randa Osman, declare as follows:


1. I am a member of the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, attorneys of record and specially appearing for Petitioner, William H. Cosby, Jr.

2. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true.

3. I make this verification instead of Petitioner, and on his behalf, because all facts alleged in the Petition, not otherwise supported by citations to exhibits, declarations, or other documents, are within my personal knowledge and are not within the knowledge of Petitioner.

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

Executed the 10th day of November in Los Angeles, California.


Randa Osman

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE SUPERIOR COURT MUST RESOLVE OTHER LEGAL DEFENSES BEFORE PERMITTING DISCOVERY ON ACTUAL MALICE

A. California Courts Have Repeatedly Held That Allowing Discovery Before Legal Defenses Are Decided Is An Abuse of Discretion That Subverts The Purpose Of The SLAPP Statute

The California Court of Appeal has clearly and repeatedly stated that a trial court abuses its discretion when it allows discovery on the issue of actual malice “before first determining, after briefing and argument, whether the plaintiffs had a reasonable probability of establishing the other elements of their libel cause of action.” *Garment Workers Center v. Superior Court*, 117 Cal. App. 4th 1156, 1159 (2004) (issuing writ of mandate overturning order lifting the automatic stay); *Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1345-46 (2008) (same).

In *Garment Workers*, the plaintiff requested relief from a SLAPP discovery stay to take depositions of defendants’ employees on the issue of actual malice. *Id.* at 1163. The trial court granted the discovery “before first determining, after briefing and argument, whether the plaintiffs had a reasonable probability of establishing the other elements of their libel cause of action.” *Id.* at 1159. The Court of Appeal for the Second District held that the trial court abused its discretion by granting the request because it failed to consider the “serious questions about the falsity of the statements”

raised by defendants in their anti-SLAPP motion. *Id.* at 1163. The Court of Appeal therefore issued a writ of mandate directing the trial court to vacate its discovery order, allow briefing and argument on the anti-SLAPP motion, and first decide whether the defamation claim has “a reasonable probability of success of the merits.” *Id.*

A similar result was reached in *Paterno*. There, the Court of Appeal for the Fourth District also issued a writ of mandate overturning the trial court’s grant of the plaintiff’s request to depose defendant on the issue of actual malice, while an anti-SLAPP motion was pending. 163 Cal. App. 4th at 1346. Citing *Garment Workers*, the court recognized plaintiffs “cannot show good cause for discovery on the question of actual malice without making a prima facie showing that the defendant’s published statements contain provably false factual assertions,” and held the plaintiffs failed to make that showing, in light of the arguments raised in the anti-SLAPP motion. *Id.* at 1351.

This sequence—delaying discovery on actual malice until after resolution of the elements of defamation—is no accident. Rather, it is essential to the anti-SLAPP statute, which exists to “[p]rotect defendants exercising their freedom of speech from having their personal and financial resources exhausted by SLAPP-ers’ discovery demands.” *Garment*

Workers, 117 Cal. App. 4th at 1161.³ Where, as here, “the defendant contends the plaintiff cannot establish a probability of success on the merits because its complaint is legally deficient, no amount of discovery will cure that defect.” *Id.* at 1162.⁴

Allowing discovery on actual malice *before* resolving legal defenses that may dispose of the claim entirely would subvert the purpose of the automatic stay. *See Metabolife Int’l, Inc. v. Wornick*, 264 F. 3d 832, 839 (9th Cir. 2001) (the anti-SLAPP law “allow[s] early dismissal of meritless first amendment cases aimed at chilling expression through costly, time-consuming litigation”). Allowing such discovery would also cause irreparable harm to the defendant, because that discovery cannot be

³ *See also Britts v. Superior Court*, 145 Cal. App. 4th 1112, 1124 (2006) (holding that the anti-SLAPP statute was designed to “protect defendants from having to expend resources defending against frivolous SLAPP suits unless and until a plaintiff establishes the viability of its claim by a prima facie showing”).

⁴ *See also Diamond Ranch Academy, Inc. v. Filer*, 2015 WL 5446824, at *3 (D. Ut. Sept. 15, 2015) (denying request for discovery on actual malice because the question of whether the statements were false had yet to be decided); *see generally Fuchs v. Levine*, 2011 WL 507258, at *12 (Cal. Ct. App. Feb. 15, 2011) (unpublished) (cited in Plaintiff’s Motion to Lift the Stay) (in malicious prosecution action, denying request for limited discovery because “while issues of malice and favorable termination might have turned on the mindset of [defendants], the ultimately dispositive issue of probable cause largely did not”); *Mitchell v. Superior Court*, 37 Cal. 3d. 268 (1984) (holding that “[t]he falsity of the . . . charges . . . should be drawn into question and established as a jury issue before discovery is compelled,” because “to routinely grant motions seeking compulsory disclosure . . . without first inquiring into the substance of a libel allegation would utterly emasculate . . . fundamental principles”).

“undone” if it is later determined to have been unnecessary. *See Paterno*, 163 Cal. App. 4th at 1357 (stating that the trial court’s order would cause “irreparable harm” to defendant, and granting writ petition “to allow the anti-SLAPP statute to serve its intended purposes”). Thus, “[e]ven if it looks as if the defendant’s actual malice may be an issue in the case, if it appears from the SLAPP motion there are significant issues [] which the plaintiff should be able to establish without discovery—the court should consider resolving those issues before permitting what may otherwise turn out to be unnecessary, expensive and burdensome discovery proceedings.” *Garment Workers*, 117 Cal. App. 4th at 1163; *see also Paterno*, 163 Cal. App. 4th at 1351.

B. Defendant Raised Multiple Legal Defenses That The Superior Court Was Required To Resolve Before Considering Lifting The Discovery Stay

Here, Defendant raised multiple bases for striking the Complaint that the Superior Court was required to resolve in the context of Defendant’s Anti-SLAPP Motion before even entertaining a request to lift the discovery stay. Good cause to lift the stay could not be found as a matter of law until these legal questions were resolved after full briefing and argument. As shown below, all of those issues remain unresolved.

1. **The Statements Are Protected As “Predictable Opinion”**

The Anti-SLAPP Motion explains that California courts recognize a version of the “self-defense privilege” under the doctrine of “predictable opinion.” *See* Ex. 2 at 33. This doctrine provides that an individual may respond to accusations made by another with one-sided statements of his or her own. *Id.* In this context, responsive statements which “generally might be considered as statements of fact may well assume the character of statements of opinion,” and are thus not considered to be defamatory. *Id.* (citing *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1401 (1999)).

The Anti-SLAPP Motion asserts that the “predictable opinion” doctrine applies to this case because Defendant’s former lawyer’s statements were made in response to Plaintiff’s public accusations that Defendant sexually assaulted her and “pressured” her into silence. *Id.* One-sided denials of those accusations, particularly from the accused’s attorney, were entirely predictable statements of opinion, and are thus not actionable as defamation. *Id.*

2. **The Statements Express Opinion Based On Disclosed Facts**

The Anti-SLAPP Motion also explains that statements based on disclosed facts are not defamatory, regardless of how derogatory or unreasonable the conclusion is. *See* Ex. 2 at 33-34 (citing *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 387 (2004)).

Defendant's former attorney's statements refuting Plaintiff's allegations are thus not defamatory, because they were based directly on fully disclosed facts. *Id.* Both the November 18 letter and November 19 press release clearly identify the undisputed factual bases for the assertion that Plaintiff's allegations were "lies": that Plaintiff told a completely different story in her autobiography, that she repeated that story in an interview with the New York Observer, and that HarperCollins itself could confirm that it was never "pressured" by Defendant's lawyers. *Id.*

3. The Statements Are Substantially True

The Anti-SLAPP Motion also asserts a defense under the "substantial truth" doctrine. *See* Ex. 2 at 34. California courts "permit the defense of substantial truth and would absolve a defendant even if she cannot justify every word of the matter; it is sufficient if the substance of the charge proved to be true." *Id.* (citing *GetFugu, Inc. v. Patton Boggs LLP*, 220 Cal. App. 4th 141, 154 (2013)).

Here, Plaintiff alleges that Defendant's attorney's statements harmed her because they "imput[ed] dishonesty to her, effectively calling her a liar." *See* Ex. 1 at 9 [¶ 50]. But Plaintiff does not deny that her November 2014 accusations of sexual assault are contrary to her autobiography and other prior statements. *See* Ex. 2 at 34. It is thus undisputed that plaintiff made two inconsistent statements. One written statement said, in effect, that Defendant never assaulted her. He invited her

into his room, and she said no. According to Plaintiff, the only “drugging” occurred when she, in her own room by herself, took two Quaaludes. Twelve years later, Plaintiff made allegations that are the complete opposite of her previous statements. That flat-out inconsistency can be described with many different words, but the “gist” of Defendant’s attorney’s statement—that Plaintiff’s allegations are contradicted by her own words—is substantially true.

Plaintiff also does not deny that her attempt to explain away her prior statements as the result of “pressuring” by Defendant’s lawyers has been exposed as baseless. *See* Ex. 2 at 34. In fact, Plaintiff has since recanted those accusations and omitted them from her complaint and subsequent interviews. Again, the falsity of Plaintiff’s statement has been confirmed by her own words. The trial court should have decided whether there was “substantial truth” in calling each of these inconsistent statements a lie.

4. **The Statements Cannot Be Imputed To Defendant Under Agency Principles**

The Anti-SLAPP Motion notes that it is undisputed that Defendant did not personally publish the November 18 letter or November 19 press release. *See* Ex. 2 at 30-31. Rather, Plaintiff’s theory of liability is that Defendant “authorized” his attorney to make the statements. *Id.* However, where, as here, actual malice is required, courts have held that “general

agency rules do not apply.” *Id.* (citing *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1370 (N.D. Cal. 1993), *Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985)). Thus, that statements were made by an attorney representing Defendant does not make Defendant liable for their content. *Id.* at 31.

5. The State Of Mind Of Defendant’s Counsel Is Already Well-Established

The Anti-SLAPP Motion also asserts that even if the state of mind of Defendant’s attorney were relevant, it is already well-established in a sworn declaration. *See* Ex. 2 at 31-32; Ex. 3. That declaration explains what information the statements were based on (Plaintiff’s prior public statements and activities, and counsel’s own investigation), and why he made the statements (because he believed that Plaintiff’s assertions were false). *Id.* The state of mind of the maker of the statements—Defendant’s former attorney—is thus readily available, which is by itself reason to deny Plaintiff’s discovery request. *See* Ex. 2 at 31-32 (citing *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174, 190 (2002) (affirming denial of plaintiff’s request for limited discovery where the material sought was readily available from other sources)).

* * * * *

The Anti-SLAPP Motion posits each of these doctrines as a complete legal defense to Plaintiff’s claims. *See* Ex. 2 at Anti-SLAPP Mot.

at 30-34. The Superior Court did not resolve these issues—nor could it have, since they were not, and are still not, fully briefed or argued.⁵ The Superior Court’s refusal to allow full briefing and argument and reach a decision on each of these discrete legal issues *before* allowing discovery on the unrelated issue of actual malice flouts the clear guidelines articulated by the Court of Appeal, negates the purpose of the anti-SLAPP statute, and would cause irreparable harm to Defendant. *See, e.g., Paterno*, 163 Cal. App. 4th at 1357. The Superior Court’s Order thus constitutes an abuse of discretion and should be vacated by this Court.⁶

⁵ The sole legal defense raised in the Anti-SLAPP Motion that the Superior Court did purport to reach is that the November 18 letter is protected by the litigation privilege. *See* Ex. 16 at 407-08. The Superior Court ruled that Defendant “does not explain what litigation” the statement relates to, and concluded that it “does not appear that the litigation privilege would apply.” *Id.* As an initial matter, this ruling is obviously premature, as Defendant has not had the opportunity to fully brief and argue this issue in the Anti-SLAPP Motion. The Superior Court’s conclusion also ignores the relevant section of the Anti-SLAPP Motion, which explains that under California law, pre-litigation demand letters are protected. *See* Ex. 2 at 29-30.

⁶ The single Court of Appeal decision that the Superior Court “found guidance in” does not alter this conclusion. *See* Ex. 16 at 405. *Hawran v. Hixson*, 209 Cal. App. 4th 256 (2012) did not even concern a request to lift the anti-SLAPP discovery stay. Rather, the trial court in that case ruled on an anti-SLAPP motion that was fully briefed and argued—including with a reply, sur-reply, and multiple declarations by the parties and their attorneys. That motion also did not involve any of the legal defenses to falsity raised here—*e.g.*, litigation privilege, predictable opinion, disclosed facts, or substantial truth. That the Court of Appeal in that case found that a press release issued by a company regarding its internal investigations did not qualify as “commercial speech” under the SLAPP statute thus has no bearing on this case.

II. PLAINTIFF'S PURPORTED CONCERNS DO NOT WARRANT DEVIATING FROM THE CLEAR GUIDELINES ARTICULATED BY CALIFORNIA COURTS

Plaintiff did not dispute that unless the legal defenses raised in the Anti-SLAPP Motion were resolved in her favor, her claims would fail. Nor did Plaintiff dispute that discovery on actual malice would be unnecessary if the other legal issues were decided in Defendant's favor. Instead, Plaintiff argued at length that she needs evidence of malice to succeed on her claims. But that puts the cart before the horse. Plaintiff first has to establish that the statements were not privileged, were not substantially true, and that her claim survives each of the other legal defenses raised in the special motion to strike—only then does she get to the issue of malice. As discussed above in Section I, all of those defenses remain unresolved.

The two additional arguments that Plaintiff made at oral argument are belied by the record and the guidelines articulated by the Court of Appeal. First, Plaintiff asserted that all of the legal defenses raised in the Anti-SLAPP Motion had *already* been fully briefed and argued. *See* Ex. 16 at 413. But that motion had not been fully briefed—the opposition and reply have not been filed—and argument is not scheduled until January. Moreover, the assertion begs the question. The Superior Court has not yet ruled on those defenses.

The parties' limited discussion of those defenses in the briefing on the Motion to Lift Stay is no substitute. That motion focused on the issue

of actual malice, and did not even mention many of the legal defenses raised in the Anti-SLAPP Motion. Instead, Plaintiff cited to testimony Defendant gave ten years ago in an unrelated case, and a Massachusetts court's motion to dismiss ruling in a case not involving a discovery stay or the constitutional malice standard—neither of which is even pertinent too, much less dispositive of, the legal defenses that the Superior Court has not even addressed in *this* case. *See* Ex. 13 at 314-17.

Second, Plaintiff also argued that she needed immediate discovery on actual malice because she will get “only one chance” to oppose the Anti-SLAPP Motion. *See* Ex. 16 at 413. That is a false concern. In delineating a process where legal defenses should be resolved before discovery on factual issues like malice is taken, the Courts of Appeal clearly contemplated that if discovery was warranted, the results of that discovery could then be put before the court for further consideration. Otherwise, there would be no point in allowing the factual discovery in the first place. Here, if the Superior Court were to resolve Defendant's legal defenses in Plaintiff's favor, and then decide that depositions were still needed on the issue of malice, it could of course allow further briefing on that issue based on the results of those depositions.

III. THIS COURT SHOULD IMMEDIATELY STAY THE ORDER WHILE THIS PETITION IS PENDING

California appellate courts routinely grant temporary stays of discovery orders while a writ petition is pending. *See Izazaga v. Superior Court*, 54 Cal. 3d 356, 364 (1991) (the California Supreme Court stayed the trial court's discovery order while considering the Court of Appeal's denial of writ of petition); *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 355 (2000) (staying order compelling discovery responses while proceedings on writ petition challenging the order were pending); *Kleitman v. Superior Court*, 74 Cal. App. 4th 324, 330 (1999) (same).

In both *Paterno* and *Garment Workers*, each of which involved a writ petition from a trial court order that lifted the automatic stay under the anti-SLAPP statute to allow discovery into the issue of malice, the Court of Appeal stayed further proceedings in the trial court while the writ petitions were pending. *Paterno*, 163 Cal. App. 4th at 1348; *Garment Workers*, 117 Cal. App. 4th at 1161. As noted in *Paterno*, forcing a defendant to submit to discovery while a writ petition is pending jeopardizes the protections afforded by the anti-SLAPP statute against harassing litigation and constitutes an irreparable harm. 163 Cal. App. 4th at 1357.

Here, an immediate stay of the underlying proceedings until this petition is resolved is necessary because the Superior Court ordered that the depositions of Defendant and his former counsel be held by November 25, 2015, and stayed the Order only temporarily, until November 17, 2015. Unless this Court stays the Order pending resolution of this petition, Defendant will be forced to continue to incur the burden and expense of preparing for the depositions, which are currently scheduled for November 19 and 23—*after* the Superior Court’s partial stay ends. Furthermore, if this Court does not decide the petition by November 17, Defendant would be forced to proceed with the depositions, even though this petition would still be undecided, and the depositions may turn out to be wholly unnecessary.

Granting the requested temporary stay will not prejudice Plaintiff, who waited months to even seek to lift the stay, did not request the depositions occur by any particular date (much less by the deadline imposed in the Order), and neither has, nor can, identify any harm that would be caused by staying the depositions until this petition is resolved. Defendant thus respectfully requests that this Court immediately stay the Superior Court’s Order until this petition is resolved, with the depositions to be rescheduled at a later date if the petition is denied.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Court issue an immediate stay of the underlying proceedings and issue a writ of mandate directing the Superior Court to vacate its Order and enter an Order denying Plaintiff's motion to lift the stay of discovery, allow full briefing and argument on the Anti-SLAPP Motion, and decide the legal issues raised in the Anti-SLAPP Motion before any discovery is considered.

DATED: November 10, 2015 Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

By 

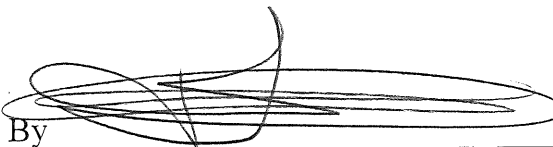
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WORD COUNT

Counsel for Petitioner William H. Cosby, Jr. certifies that the brief contains 5,968 words, based on the “Word Count” feature of Microsoft Word.

DATED: November 10, 2015 Respectfully submitted,

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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 First Legal, 1511 West Beverly Blvd., Los Angeles, CA 90026.

On November 10, 2015, I served true copies of the following document(s) described as **PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:


Lisa Bloom
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BY PERSONAL SERVICE: I personally delivered the document(s) to the person at the addresses listed in the Service List. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

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

Executed on November 10, 2015, at Los Angeles, California.



Dave Quintana