

HEARING DATE: WEDNESDAY, NOVEMBER 2, 2022

**STATE OF RHODE ISLAND
PROVIDENCE, SC.**

SUPERIOR COURT

**NATIONAL EDUCATION ASSOCIATION
RHODE ISLAND, et al.,
*Plaintiffs,***

vs.

C.A. No. PC 21-05116

**SOUTH KINGSTOWN SCHOOL
COMMITTEE, et al.,
*Defendants.***

**PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO VOLUNTARILY DISMISS COMPLAINT PURSUANT TO RULE 41**

I. BRIEF INTRODUCTION.

On or about June 21, 2022, Plaintiffs, National Education Association Rhode Island (“NEARI”) and National Education Association – South Kingstown (“NEASK”) (collectively referred to as “NEA” or the “Union”) filed the instant Motion for Voluntary Dismissal pursuant to R.I. R. Civ. P. 41(a)(2). The basis for seeking dismissal is that since the filing of the Complaint, events have occurred causing the claims raised in the Complaint to be moot. By stipulation, the Union and the School Committee Defendants agreed to the dismissal of claims. The Defendant Requestors, however, have refused and instead, responded by filing an Objection to the instant Motion, and a Renewed Motion for Summary Judgment, even though a Motion for Summary Judgment directed at the same issue was denied in June 2022.

The instant Memorandum is submitted in response to the arguments set forth in the Requestors’ Memorandum in Support of Objection to this Motion to Dismiss filed on July 21, 2022 (hereinafter, “Requestors’ Objection”).

II. ARGUMENT IN REPLY.

A. The Requestors argument that the Plaintiffs failed to exercise due diligence before filing suit is inaccurate and wrong.

One of the reasons why the Requestors argue the instant action should not be dismissed is essentially that the Union should have known that its action was moot before it was filed, an argument directed at one of the relevant elements – the legitimacy of the reasons for the request to take dismissal. The logic of the Requestors’ opposition to the Motion is questionable, given the Requestors allege they should not have been included in the first place (i.e., the Requestors have cried foul at being included in this lawsuit, but despite repeated offers, have refused to agree to dismissal).¹ Setting logic aside, the undisputed facts demonstrate the Union did its due diligence prior to filing suit and there was plainly a live controversy between the Union and School Department at the time the action was filed. Only after the action was filed did certain events render the need for resolution of the teacher and labor relations privacy issues become moot.

As set forth in the Union’s response to the First Motion for Summary Judgment, and reiterated in response to the Renewed Motion for Summary Judgment, the Union made multiple efforts before filing to discern whether there was a basis to file the suit, made additional efforts following the filing of the lawsuit to discern whether there was a basis to proceed to seek temporary injunctive relief, and after being advised there was no risk associated with the disclosure of the response to Request No. 47, took no affirmative steps to prosecute the action

¹ Significantly, the Requestors were only included in this action because it was required under the Uniform Declaratory Judgments Act, § 9-30-11. The Union sought no relief of any kind from the Requestors, nor did it ask the Court to restrain or enjoin the Requestors in any way.

and instead, has made multiple offers to dismiss the action. Every affirmative action other than the motion for temporary restraining order has been initiated by the Requestors.²

The undisputed facts demonstrate that the Union exercised due diligence in advance of filing the suit, that there was a basis to file the suit, and circumstances changed after the filing of the motion for temporary injunctive relief as follows.³

- In about May 2021, when the issue of potential teacher privacy issues arose, Barden reached out to discuss the issue with Aubrey Lombardo (“Lombardo”), counsel to the School Committee, to discuss the records requests that concerned individual members.
- Based on the available information at that time, no action was taken.
- In late May 2021, more information was shared by the School Department, but despite concerns that arose, no action was yet taken.
- In June 2021, the Union’s internal concerns and discussions continued.
- In July 2021, before making any final determination about whether, in fact, any of the pending requests implicated member privacy rights or were problematic from the Union’s perspective, the Union again reached out (through counsel) to find out whether in fact there were documents being produced that presented such concerns and what other requests were in the pipeline. It had now been about three (3) months since the Union was initially notified of the requests – i.e., the Union had not rushed to the Courthouse.
- Pursuant to the School Department’s instructions, the Union sent its own APRA request to get specific information about what requests had been made, what documents were being requested and whether they had been paid for and/or were pending disclosure.
- The response revealed hundreds of requests from March 2021 to July 2021 with about 100 outstanding.

² This includes the Requestors’ Motion to Compel Limited Discovery and Motion for More Definite Statement, two Motions which they never scheduled, and the two Motions for Summary Judgment.

³ The following facts were set forth in response to both Motions for Summary Judgment and further supported by the Affidavit of Mary Barden. None of these facts were contradicted by the Requestors.

- The response revealed that many of the requests were directed at teacher personnel and disciplinary records as well as labor relations matters.
- Even then, the Union did not file suit immediately. Instead, the Union first reached out to School Committee counsel to find out whether it intended to produce records responsive to requests that implicated teacher personnel files, e-mails, labor relations documents, etc. and also, *when* the School Department intended to respond to Request No. 47 which, according to the document, was the only request that had been paid for and called for copies of the former Superintendent's e-mails for a period of six months.
- The Union was informed that the Superintendent's e-mails would include communications with teacher members and that Response to No. 47 would ultimately result in the production of about 90,000 pages of documents.
- Under these circumstances, the School Department was not in a position to be able to satisfy the Union's concerns as to what would be produced and what would not be produced given the size of the project and the timelines within which it needed to be complete.
- The School Department was not able to inform the Union at that time that it would not produce non-public documents or that it would conduct a balancing test to protect teacher privacy and exclude exempted labor relations documents.

Accordingly, the Union made multiple efforts to carefully assess the situation and need for the lawsuit *before filing on August 2, 2021*. See Plaintiff's Memorandum in Opposition to Renewed Motion for Summary Judgment, pp. 3-8 (hereinafter "Pl's Mem. Opp. Renew SJ"). The lawsuit became necessary to obtain a declaratory judgment on the issues stated therein, and a restraining order was necessary to stop the production of potentially non-public teacher-related documents before a proper balancing test could be conducted.

Thus, on August 5, 2021, the Union filed its motion for temporary restraining order. The motion for temporary injunctive relief was scheduled for argument on Monday, August 23, 2021. The School Committee filed its Answer on August 16, and the Requestors filed their Answer on August 18.

On August 18, during the week before the hearing, the Court held a conference. During the conference, *it became apparent that between the time the Union initially reached out to the School Department and August 18, counsel for the School Department had continued working on the response to Request No. 47 and was able to conduct a review to determine whether the records at issue were subject to disclosure and/or whether certain records were not subject to disclosure because they implicated teacher privacy rights (or fell within another appropriate exemption). The School Department essentially then provided the assurance that the Union initially sought.*

Given this latest information which did not exist before the action was filed, on August 23, the date of the hearing, the Union withdrew its motion and the Union offered to voluntarily dismiss the Requestors from the action. The Union made the offer to dismiss the Requestors because Defendant Solas had publicly and widely complained on social media about being “sued,” by the Union *because she sought records about her child’s school.* See Pl’s Mem. Opp. Renew SJ, pp. 10-12 and Exhibit G. Accordingly, the Union offered the Requestors the option of dismissal on August 23, within three (3) weeks of the filing of the Complaint. Even though the Requestors submitted numerous requests for non-public documents, *it had not paid for the production of any other records other than Request No. 47 and had apparently decided not to pursue their many requests.* Id. Significantly, the Requestors declined the opportunity for dismissal.⁴

⁴ Significantly, despite the fact that the Requestors filed a Motion for Summary Judgment on August 20, at the time of the hearing and offer of dismissal, the Requestors had not taken the appropriate steps to assign the Motion to the dispositive motion calendar. No motions were formally assigned and pending. Only after the Union withdrew the Motion for Temporary Restraining Order and offered dismissal did the Requestors schedule the First Motion for Summary Judgment.

Accordingly, the Requestors insistence that the undersigned or the Union did not have a good-faith basis to file the initial lawsuit is simply wrong.

Similarly, the record is clear with respect to the fact that the action only became moot after filing. In particular, the School Department could not assure the Union that the type of documents at the heart of the Union's concern would not be produced prior to the filing of the action on August 2, 2021. In fact, it is because the School Department could not do so that the action was filed. By the time of the hearing on the temporary restraining order, however, the School Department would have had to (a) evaluate the claims in the Complaint; (b) prepare an Answer; (c) appear at a court conference; and (d) decide whether to respond to the motion. By that time, the School Department must have spent a sufficient amount of time on the Response to No. 47, apparently, that it could now provide verbal assurance that there was no risk of improper disclosure with Respect to No. 47, and that no other requests had yet been paid for. This was the change in circumstances that did not exist on August 2 – which plainly occurred after the filing of the lawsuit.

The Requestors argue that the Union waited until September 22, 2021, to speak to the School Department and assess the risk associated with the potential disclosure. The Requestors conveniently ignore all events which pre-dated that inquiry set forth supra. The record is clear that after all the events listed supra, and before responding to the First Motion for Summary Judgment, on September 22 the Union reached out to the School Department to assess whether any circumstances had changed. But that contact was simply one in a series of efforts and communications as detailed herein. On September 22, the Union simply wanted to ensure the status quo had been maintained. Had the Requestors paid for any of the other requests that were aimed at teacher and labor relations matters? The response confirmed that the Requestors had

taken no action on the records requests submitted after receiving response No. 47. Accordingly, the Requestors' bald statements such as "[t]he Union admits it filed this lawsuit without a factual basis," is untrue, plainly contradicted by the undisputed facts. Accordingly, the Requestors' empty accusations⁵ carry no weight in the context of this motion to dismiss and the inquiry into whether the Union has a legitimate basis to request dismissal must be resolved in favor of the Union.

B. That the affirmative defense at issue is based upon anti-SLAPP does not make the case inappropriate for dismissal.

The Requestors argue that because it is seeking damages and attorneys' fees in the context of its anti-SLAPP affirmative defense, and because the trial justice determined an issue of fact precluded resolution of the defense on summary judgment, it means there is a dispute that must proceed. The existence of a dispute, however, is not one of the elements relevant to the Rule 41(a)(2) inquiry. Presumably, in all pending cases there are factual and legal disputes at the

⁵ The Requestors' Objection contains several highly inappropriate Rule 11 threats. For example, the Requestors allege the "Union" filed a meritless claim, that a "lawyer's failure to make a 'reasonable inquiry into the factual basis' of a claim violates Rule 11," they cite to the Rules of Professional Conduct, and state that "when a lawyer files a meritless lawsuit without conducting a reasonable investigation" the aggrieved party may obtain relief, and other serious accusations. This Court should ignore those baseless accusations. "[A] Rule 11 violation is a serious thing, and an accusation of such wrongdoing is equally serious. * * * Unsupported threats to pursue Rule 11 sanctions obstruct the truth-seeking process, build acrimony between the parties, and frequently waste judicial resources. In the analogous context of inequitable conduct, the Federal Circuit harshly criticized 'the habit of charging' personal misconduct as 'an absolute plague,' noting that some 'lawyers seem to feel compelled to make the charge against other reputable lawyers on the slenderest grounds.' * * * Increased acrimony also has the tendency to increase the expenditure of judicial resources by obstructing compromises that might have been within the reach of more collegial counsel. There is also a direct and significant expenditure of judicial resources when the Court must address issues relating to the propriety of sanctions—or the threat of sanctions—under Rule 11. * * * Any party who wields the sword of Rule 11 sanctions without a clear basis should remember that such sword can cut both ways." Motiva Patents, LLC v. Sony Corp., 408 F. Supp. 3d 819, 839 (E.D. Tex. 2019) (internal citations omitted).

time the Court considers a Rule 41(a)(2) dismissal and that is why the plaintiff seeking dismissal needs Court permission for dismissal in the first place. But the relevant factors do not preclude dismissal based on the existence of affirmative defenses. The point is, there is nothing special about the anti-SLAPP defense or the decision on summary judgment that means the lawsuit must continue.⁶

To be sure, many cases involving Rule 41(a)(2) dismissals involve affirmative defenses and claims for attorneys' fees. Although the Requestors argue they will be prejudiced by the inability to pursue their claim for attorneys' fees, the fact that the Requestors do not get a judgment in their favor or an adjudication on a claim for attorneys' fees does not support a claim of prejudice in the context of a Rule 41(a)(2) Motion to Dismiss. See e.g., Craig-Little Enterprises, Inc. v. Massie, 1991 U.S. App. LEXIS 13103, at *6 (4th Cir. 1991). In Craig-Little Enterprises, the company sued Massie for copyright infringement, seeking an injunction, damages, costs and attorneys' fees. Id. at *4. Massie responded by asserting the affirmative defense of unclean hands, since the company had itself copied the materials at issue from another company. Id.

⁶ The Requestors argue "this Court has already determined that this case should proceed to determine whether Anti-SLAPP immunity applies, and if so, whether Parents should be awarded affirmative relief in the form of attorneys' fees and possible damages under that statute for having to defend against an action that violates their rights." Requestors' Objection, p. 5. That is not an accurate summary of the trial justice's decision. The question before the trial justice was whether the anti-SLAPP defense could be resolved on summary judgment. That the trial justice found there was a dispute of fact is not an order or requirement that the parties proceed to trial, was not a determination that the "Parents" have been forced to "defend against an action that violates their rights" or that this Court cannot consider a proper motion to dismiss. In fact, the holding was that there was sufficient evidence presented to establish that the Requestors alleged protected activity *was a sham* such that that issue *could not be resolved in the Requestors' favor* as a matter of law. In short, the Requestors did not prevail on their First Motion for Summary Judgment. As noted in response to the Renewed Motion, nothing in the Renewed Motion changes the circumstances – there is still a dispute on the issue of sham, but that does mean it has to be resolved as opposed to granting dismissal.

The lawsuit was filed in December 1987. In August 1989 (nearly two years later) the company filed a motion for voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2) “because it was no longer ‘economically advantageous’ to pursue the case.” Id. Massie objected arguing that the dismissal, if allowed, must be with prejudice or on the condition that he be awarded costs and attorneys’ fees. Id. at *5. The district court granted the company’s motion without conditions (i.e., the court did not award fees and granted the dismissal without prejudice).

On review the Fourth Circuit recognized Massie’s claim that prejudice would result if attorneys’ fees were not granted, “[h]owever, the cases cited do not provide a clear formula for determining what in particular would unfairly prejudice a defendant. Furthermore, Massie makes no clear statement as to how he has been prejudiced by this dismissal, *except that he must bear \$20,000 in legal fees and costs.*” Id. at *6 (emphasis added). The Fourth Circuit found the district court did not abuse its discretion by dismissing the action even where the defendant had a claim for \$20,000 in attorneys’ fees – that simply did not amount to the type of prejudice which would warrant denying dismissal.⁷ Significantly, the dismissal was upheld (without prejudice) and with the Court noting that at least 10 percent of Massie’s fees were incurred in his own motion to change venue. Id. at *6, n. 1 & 2. The point is, even if the Requestors incurred attorneys’ fees in the first three weeks of the lawsuit, that is not “prejudice” that precludes dismissal – had the Requestors simply accepted the Union’s offer, it would have eliminated the need for both motions for summary judgment and the instant motion to dismiss.

⁷ In this case, it appears that the Requestors may not even have incurred any attorneys’ fees that could be claimed if it prevailed after a trial, since they are represented by the Goldwater Institute.

The same rationale exists for the affirmative defense.⁸ See, e.g., Moore v. Irving Materials, Inc., 2007 U.S. Dist. LEXIS 76628 (W.D. Ky. 2007). In Moore, a concrete company was sued by individuals who claimed defective concrete. Id. at *3. The concrete company (Irving) filed a third-party complaint against the supplier (Hanson). Hanson filed a “counterclaim” premised on its claim that it was entitled to judgment as a matter of law, damages, costs of defense, and attorneys fees. Id. at *5. After summary judgment motions were filed, a settlement conference took place which resolved all claims except those between Irving and Hanson. Id. Irving then filed a motion to dismiss its third-party complaint against Hanson pursuant to Rule 41(a)(2).

Hanson argued that one of the reasons the complaint should not be dismissed was because of its pending “counterclaim.” The Court found that “this pleading is more properly viewed as an affirmative defense” and accordingly, since there was no actual counterclaim the action was ripe for dismissal – even though the substance of the argument was that Hanson was entitled to damages and attorneys’ fees. Id. at *9-10. In sum, the existence of an affirmative defense, even one which may entitle the defendant to damages, is simply not one of the factors that courts consider in the context of a Rule 41(a)(2) motion. The Requestors’ *preference* to litigate, requiring the Union (and potentially the School Department) to incur additional costs and waste judicial resources, cannot carry the day. The action is moot and dismissal should enter extinguishing the entirety of the action.

⁸ The Rhode Island Supreme Court has made clear that § 9-33-1 et seq. provides for an “affirmative defense” not a “counterclaim.” Sisto v. Am. Condo. Ass’n, 68 A.3d 603, 615 (R.I. 2013)

C. The Requestors have presented no binding or persuasive authority supporting denial of this Motion.

The Requestors argue that none of the cases presented by the Union support dismissal given the anti-SLAPP defense. But in response, the Requesters have presented no binding authority in which a Court has *denied a Motion to Dismiss pursuant to Rule 41(a)(2)* because: (a) a claim for attorneys' fees' was made or (b) because an anti-SLAPP affirmative defense was unresolved. Instead, citing to a California Court of Appeals case, the Requestors argue "[c]ourts typically do not allow an offending party to escape the consequences of filing a lawsuit improperly targeted at the right of petition or free speech *by unilaterally seeking to dismiss* the action once an Anti-SLAPP motion is filed." Requestors' Objection, p. 7 (emphasis added); see Pfeiffer v. Venice Props. v. Bernard, 2002 Cal. App. LEXIS 4507 (Ct. App. Cal. 2d 2002).

Pfeiffer, however, does not stand for such a proposition. In Pfeiffer, the plaintiffs were corporations that owned Lincoln Place, an apartment building. In September 2000, the companies (including Pfeiffer) sued 12 tenants or former tenants after (1) the tenants were told to vacate parking spaces for purposes of construction; (2) the tenants objected; and (3) Pfeiffer's signs were removed and two door locks were broken. Id. at *2-4. Pursuant to California anti-SLAPP law, the tenants filed a motion to strike the complaint and notified the plaintiffs of their SLAPP motion. The complaint was amended (dropping some defendants) and the defendants re-filed the motion to strike and SLAPP motion. Id. at *4 (referring to California law that requires the party asserting the anti-SLAPP defense to file a motion to strike and if he or she prevails on the motion to strike, he or she is entitled to attorneys' fees).

The trial court questioned the plaintiff's motives in bringing the suit, primarily because the plaintiff was a large corporation and the dispute concerned "two broken door locks. Counsel,

this is offensive. It's outrageous." Id. at *4. *The Court then dismissed the action because "it is disturbing that the plaintiff has chosen the forum of the Superior Court, * * * to litigate what is at best a very petty Small Claims case."* Id. The reason the action was dismissed had nothing to do with Rule 41(a)(2), but instead, the Court applied the doctrine of de minimis non curat lex⁹ because it was "improper, frivolous, and abusive." Id. at *5.

The defendants in Pfeiffer requested attorneys' fees asserting they prevailed on the anti-SLAPP defense, even though the Court never ruled on the motion. Id. at *7. The Court found, because it had already dismissed the case, it lacked jurisdiction to award fees. The defendants appealed. On review, the appeals court considered whether the trial court lacked jurisdiction to award attorneys' fees since the statute required the defendants to be a "prevailing party." After considering various other California SLAPP decisions, the Court found that "upon the defendants' motion for a fee award," the "merits of the SLAPP motion" must be addressed even if the matter has already been dismissed because "the fee motion is wholly dependent upon a determination of the merits of the SLAPP motion." Id. at *16.

While Pfeiffer's reasoning could be initially appealing, it is significant to note that the case was not dismissed voluntarily, and the trial justice concluded that the action was frivolous at the outset. By comparison, the trial justice on summary judgment here found there was a dispute of fact on the issue of whether *the Requestors actions are a sham*. Accordingly, Pfeiffer did not balance a Rule 41(a)(2) motion against the desire to resolve the SLAPP defense because the plaintiff in that case did not unilaterally move to dismiss its own action. Instead, *the Court dismissed the case* because it found it was a frivolous and de minimis action.

⁹ The Latin phrase de minimis non curat lex means "the law does not concern itself with trifles." Black's Law Dictionary, 496 (9th ed. 2009)

Furthermore, although the Requestors rely on Pfeiffer, they conveniently omit reference to the California Supreme Court decision that deals with voluntary dismissal before the merits of the anti-SLAPP motion are resolved. See S. B. Beach Props. v. Berti, 138 P.3d 713, 717-18 (Cal. 2006). In California, the anti-SLAPP statute requires a defendant to file the anti-SLAPP motion within 60 days. If a plaintiff voluntarily dismisses the action before the motion is filed, *a defendant is not entitled to resolution of its anti-SLAPP defense or any attorneys' fees*. The reasoning of the California Court is persuasive.

“The purpose behind section 581 ‘is to allow a plaintiff a certain amount of freedom of action within the limits prescribed by the code.’ * * * Meanwhile, section 425.16 ‘is designed to enable the defendant-victim of a SLAPP suit *to extract himself or herself from the lawsuit as quickly and inexpensively as possible*.’* * * *Allowing plaintiffs to voluntarily dismiss an action without penalty before the filing of an anti-SLAPP motion serves both purposes. Plaintiffs have the freedom to reconsider the wisdom of their actions without penalty before defendants have incurred clearly identifiable and recoverable legal fees.*¹⁰ Defendants are expeditiously relieved of the burden a SLAPP suit imposes, because they must generally file their anti-SLAPP motion ‘within 60 days of the service of the complaint.’ (§ 425.16, subd. (f).)

A contrary holding would accomplish neither purpose. *Penalizing plaintiffs despite a voluntary dismissal would restrict their freedom of action in a manner inconsistent with the Code of Civil Procedure*. Permitting defendants to recover attorney fees and costs without filing a viable anti-SLAPP motion would only prolong and likely increase the overall costs of SLAPP litigation. In reaching this conclusion, we recognize that ‘[a]n action which is ultimately dismissed by the plaintiff, with or without prejudice, is nevertheless a burden on the target of the litigation and the judicial system * * * We further recognize that a defendant may incur legal fees and expenses in preparing an anti-SLAPP motion, before the voluntary dismissal of the action. But to conclude differently would raise other vexing questions. For instance, how is a trial court to evaluate the viability of an incomplete anti-SLAPP

¹⁰ Of course, the reasons for dismissal in this case are different than those in Berti (i.e., mootness as opposed to concern about the merits of the anti-SLAPP defense) but the point is the same.

motion, not yet filed at the time of dismissal? Is a defendant entitled to finish briefing the motion, or to include the expense of completed briefing as part of a motion for fees and costs? To allow recovery for post dismissal work runs counter to the purpose of section 425.16: to compensate defendants for expenses incurred in extricating themselves from SLAPP suits. Drawing a bright line is fully consistent with the terms and purposes of sections 425.16 and 581 and has the additional benefit of discouraging prolonged litigation solely over the matter of fees and costs.

Accordingly, we hold that defendants who do not file an anti-SLAPP motion before plaintiffs' voluntary dismissal may not recover attorney fees and costs pursuant to section 425.16, subdivision (c)." Id. (emphasis added).

The Requestors would like this Court to follow California law, but even in California there is a period of time at the beginning of the lawsuit where it makes sense to permit voluntary dismissal because the point of the anti-SLAPP defense is to afford defendants an opportunity to "extract" themselves from a lawsuit they claim is impermissible and voluntary dismissal permits the defendants to achieve that goal. Applying that reasoning here, the Requestors were given the opportunity *to extract themselves from the lawsuit as quickly and inexpensively as possible* on August 23, before they even scheduled their First Motion for Summary Judgment. Given that offer, policy reasons dictate that the lawsuit should be dismissed regardless of the status of the Requestors anti-SLAPP defense.

The Requestors argue, relying on the California cases, that the anti-SLAPP defense must be resolved before the case can be dismissed. But this case differs significantly from the cases in which the California courts have said if a special motion to strike is filed, that motion should be resolved first. The difference is the process in California contemplates quick resolution by motion to strike, and attorneys' fees are limited only to those fees incurred in filing the motion to strike. Here, there is no such process - but the process that is available (a motion for summary

judgment) was tried and failed by the Requestors. In other words, the Requestors tried to establish itself as the prevailing party and it failed. It is now seeking to repeat that process but all it has done is expend more judicial resources with no end in sight.

Accordingly, since the Requestors have offered no binding or persuasive authority requiring the Union to continue to prosecute the suit, because the offer of dismissal came before any motions for summary judgment were assigned, and because all other relevant factors weigh in favor of dismissal, this motion should be granted.¹¹

III. CONCLUSION.

For the reasons set forth in the original Motion and for the additional reasons stated herein, the Union respectfully requests that its motion to dismiss be granted.

¹¹ The Requestors also cite to Coltrain v. Shewalter, 1998 Cal. App. LEXIS 723 (Ct. App. Cal. 4th 1998) to support the argument that this action cannot be dismissed before resolving the anti-SLAPP defense. However, Coltrain was distinguished by Berti because those motions were filed before the plaintiff sought dismissal. Significantly, in California, even if attorneys' fees are awarded the party asserting the anti-SLAPP defense must still establish that it is a prevailing party and is only entitled to recover attorneys' fees in connection with the special motion to strike and no other aspect of a defense. See Berti, 138 P.3d at 717, n. 2; see also Liu v. Moore, 1999 Cal. App. LEXIS 76, at ***8 (Ct. App. 2d 1999) (discussing limits on attorneys' fees under California anti-SLAPP law which allows "only those fees expended in connection with the [special motion to strike] and not the entire action.").

Plaintiffs,
NEARI and NEASK,
By their Attorney,

/s/ Carly Beauvais Iafrate

Carly Beauvais Iafrate, #6343
Law Office of Carly B. Iafrate, PC
408 Broadway, 1st Fl.
Providence, RI 02909
(401) 421-0065
ciafrate@verizon.net

CERTIFICATION

I hereby certify that, on the 11th day of October 2022, I filed and served this document through the electronic filing system and that it is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System to counsel of record.

Aubrey Lombardo, Esq.
alombardo@hcclawri.com

Giovanni Cicione, Esq.
g@cicionelaw.com

Jonathan Riches, Esq.
jriches@goldwaterinstitute.org

Stephen Silverman, Esq.
ssilverman@goldwaterinstitute.org

/s/ Carly Beauvais Iafrate
