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PERSPECTIVE

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Anti-SLAPP motions and hearsay

By Gary A. Watt & Rosanna W. Gan

On an anti-SLAPP motion, can a court accept hearsay evidence when determining whether the plaintiff's action has a reasonable probability of success? A recent Court of Appeal decision concludes that the only type of hearsay evidence that can be considered, absent a hearsay exception, are statements given under penalty of perjury. *Sanchez v. Bezos*, B309364, 2022 WL 2352784 (Cal. App. 2d Dist. June 30, 2022). However, this holding appears to be an overly narrow interpretation of the Supreme Court authority, *Sweetwater Union High School Dist. v. Gilbane Building Co.*, 6 Cal. 5th 931 (2019).

The anti-SLAPP statute provides that "in making its [reasonable probability of success] determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability … is based." Cal. Civ. Proc. Code § 425.16(f). Declarations, not just affidavits, are acceptable. *Id.*, § 2015.5. "Although affidavits and declarations constitute hearsay when offered for the truth of their content, [the anti-SLAPP statute] permits their consideration … ." *Sweetwater*, 6 Cal. 5th at 942. "[D]eclarations may be considered, not because they satisfy some other hearsay exception, but because they qualify as declarations or their equivalent under section 2015.5, and can be considered under section 425.16." *Id.*

Sweetwater involved plea forms and grand jury testimony excerpts from a prior criminal prosecution. The plea forms were signed under penalty of perjury. The testimony was given under oath. Nonetheless, defendants asserted that unless the former testimony and other hearsay exceptions are established, the evidence should be excluded from consideration. *Sweetwater* rejected that argument because "In the anti-SLAPP motion context ... reliability stems from the oath-taking procedures" and courts examine such documents to determine whether "evidence *exists,*" not to demonstrate *actual trial admissibility*. *Id.* at 944-45.

"To strike a complaint for failure to meet evidentiary obstacles that may be overcome at trial would not serve the SLAPP Act's protective purposes."

But what about the evidence referred to *in* affidavits, declarations, and other "equivalent[s]"? "[E]vidence may be considered at the anti-SLAPP motion stage if it is *reasonably possible* the evidence set out in supporting affidavits, declarations, or their equivalent will be admissible at trial." *Id.* at 947 (emphasis added). *Sweetwater* discussed cases supporting "the distinction between evidence that *may* be admissible at trial and evidence that could *never* be admitted." *Id.* at 948 (emphasis original). Only evidence that could never be admitted should be excluded from consideration during an anti-SLAPP motion. The reason for this is the "potential deprivation of [a] jury trial that might result were [section 425.16 and similar] statutes construed to require the plaintiff first to *prove* the specified claim to the trial court." *Id.* at 943 (quoting *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1122-1123 (1999).

Sweetwater approved of *Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles*, 117 Cal.App.4th 1138 (2004). There, in opposing the anti-SLAPP motion, plaintiffs submitted an unauthenticated, edited videotape. Defendants argued that the unauthenticated videotape should not be considered. But *Fashion 21* rejected that argument because the videotape could be admitted at trial if properly authenticated *later on*. Thus, it could be considered during the anti-SLAPP motion. *Id.* at 1147-1148. *Sweetwater* also favorably discussed cases excluding evidence from consideration at the anti-SLAPP stage because such evidence "could *never* be admitted," such as evidence barred by privilege, and evidence suffering from "the sort of evidentiary problem a plaintiff will be incapable of curing by the time of trial." *Sweetwater*, 6 Cal. 5th at 948. Tellingly, hearsay was not one of the examples.

Turning to the grand jury transcripts and plea forms, *Sweetwater* observed that "there is no categorical bar to [them] … there are no undisputed factual circumstances suggesting the evidence would be inadmissible at trial." *Id.* at 949. "The signers of those documents [the plea forms] or other competent witnesses *could testify at trial* to support the [plaintiff's] claims. That live testimony *would supplant any improper reliance on hearsay* …

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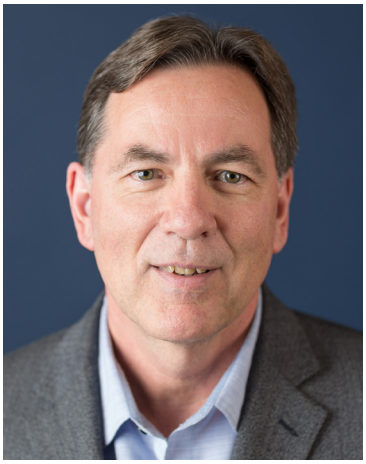

[and] plaintiff would have the opportunity to satisfy the requirements of any other applicable hearsay exceptions *before admission at trial.*" *Id.* (emphasis added).

Turning to *Sanchez*, plaintiff brought a defamation action, alleging defendants told reporters that plaintiff had provided explicit photographs of one defendant to the National Enquirer. Defendants filed an anti-SLAPP motion. To show a reasonable probability of success, plaintiff offered his own declaration referencing the statements of numerous unidentified reporters who purportedly said defendants attributed submission of the photos to him. His declaration identified at least one reporter by name. And he identified the names of several news organizations with which the unnamed reporters were affiliated. *Sanchez*, 2022 WL 2352784, at *1-2.

The trial court refused to consider the declaration, ruling it contained inadmissible hearsay. It also refused to lift the automatic stay on discovery created by the filing of the anti-SLAPP motion so that plaintiff could take a deposition. Because there was no other evidence submitted by plaintiff, defendants' anti-SLAPP motion was granted. *Id.* at *3.

On appeal, plaintiff relied on *Sweetwater*, arguing "hearsay may be considered for anti-SLAPP purposes if there is a reasonable possibility the hearsay will be cured at trial … [and] any hearsay in his declaration can be cured when the reporters testify under oath in deposition or at trial." *Id.* at *1. But *Sanchez* rejected these arguments, asserting that "Plaintiff misreads *Sweetwater*." *Id.*

Sanchez asserted that *Sweetwater* had, "reaffirmed that hearsay, absent an applicable exception, may not be considered for anti-SLAPP purposes." *Id.* It then treated *Sweetwater* as ratifying two narrow exceptions to the asserted rule, allowing statements under oath or penalty of perjury to come in. By contrast, the witness statements plaintiff sought to rely on in his declaration were not made under oath, so *Sanchez* concluded they fell outside the *Sweetwater* "rule."

Specifically, *Sanchez* held that plaintiff's declaration contained two levels of out-of-court statements making the showing inadequate in the anti-SLAPP motion. Instead of providing a declaration from the reporters, who personally heard the defendants make the defamatory statements, plaintiff provided his own declaration describing what the reporters recounted. *Id.* at *5. "Whereas defendants' alleged defamatory comments are not being offered for their truth, the reporters' statements describing those comments and identifying defendants as the speakers *are* being offered for their truth." *Id.* To *Sanchez*, reliance on hearsay at the anti-SLAPP motion was fatal.

Did *Sanchez* misread *Sweetwater*? There are reasons to think so.

Sweetwater first addressed the *form* in which evidence could be submitted. It was with respect to form that the Court compared plea forms and grand jury transcripts with affidavits and declarations. The Court was *not* saying those come in as some sort of categorical exception *whatever* their content. The Court *was* saying that the anti-SLAPP statute *authorizes* the submission of evidence through affidavits/declarations, and that "equivalents" (such as plea forms and grand jury testimony) can also be utilized. As *Sweetwater* put it, the anti-SLAPP statute authorizes courts to scrutinize affidavits and declarations (and their equivalents) because "reliability stems from the oath-taking procedures." *Sweetwater*, 6 Cal. 5th at 944. In other words, the gravity of the oath is supposed to act as a check on misrepresentations as to what the evidence is that supports minimal merit.

What about the *content* of affidavits, declarations, and equivalents? *Sweetwater* plainly stated that the function of a court considering reasonable probability of success is to determine whether "evidence *exists*." *Id.* at 945 (emphasis added). "[E]vidence may be considered at the anti-SLAPP motion stage if it is reasonably possible the evidence *set out in* supporting affidavits, declarations, or their equivalent will be admissible *at trial*." *Id.* at 947 (emphasis added).

It is true that *Sweetwater* recognized that sometimes, content-based evidentiary rulings should occur at the anti-SLAPP stage. However, such rulings should only be made when the evidence "could *never* be admitted" at trial. *Id.* at 948. The cases *Sweetwater* discussed for this narrow proposition involved privileged statements, statements made only on information and belief (lacking any personal knowledge), evidence inadmissible because disclosure requirements were not met such as expert opinions, and the like. By contrast, with respect to hearsay, "the signers of those documents [affidavits, declarations, plea forms] or *other* competent witnesses could *testify at trial* to support the [plaintiff's] claims." *Id.* at 949 (emphasis added). The same is true for the reporters referred to in the plaintiff's declaration in *Sanchez*, at least one of whom was listed by name.

Moreover, in deciding *Sweetwater*, the Court noted an important difference between the anti-SLAPP statute and the summary judgment statute – the latter expressly requires the plaintiff to "set forth *admissible* evidence." Cal. Civ. Proc. Code § 437c (emphasis added). As *Sweetwater* put it, "the summary judgment statute still requires the evidence provided in declarations to be *admissible at trial*." *Id.* at 948. But the same express language does not appear in the anti-SLAPP statute.

Most importantly, *Sweetwater* did not ratify the plea form and grand jury testimony content as some unique exception to the hearsay rule, but rather, considered whether there are grounds that *could* make the content admissible at trial. As the Court put it, "the statements themselves *appear to be* statements against interest." *Id.* at 949 (emphasis added). Or, the witnesses could just appear at trial, and "plaintiff would have the opportunity to satisfy the requirements of any other applicable hearsay exceptions *before admission at trial*." *Id.* at 949 (emphasis added). In other words, since ways and means to get the evidence in *at trial* appeared to the Court, the presence of hearsay in a document a court is allowed to consider, is no reason to grant the anti-SLAPP motion. That is, so long as it is "reasonably possible that the *facts asserted* in those statements [and in affidavits and declarations] can be established by admissible evidence at trial." *Id.* at 948, fn. 12 (italics original).

Was it "reasonably possible" that the plaintiff in *Sanchez* could identify reporters, take their deposition, obtain their appearance at trial, and so on? Seems like it. Put another way, was the hearsay evidence described in plaintiff's declaration the sort of evidence that "could *never* be admitted" at trial no matter what occurred during discovery? Doesn't seem like it.

Perhaps *Sanchez* misread *Sweetwater*'s quoting of *Fashion 21's* statement that hearsay cannot be used when establishing a reasonable probability of success. *Id.* at 946. But *Sweetwater* expressly rejected the argument that admissibility showings must be "definitively made *at the hearing*," explaining that "evidence may be considered at the anti-SLAPP motion stage if it is reasonably possible the evidence set out in supporting affidavits, declarations or their equivalent will be admissible at trial." *Id.* at 946-947. Critically, if *Sanchez* is right, there was no reason for *Sweetwater* to state that the hearsay in the plea forms and grand jury transcripts could be cured by the appearance of "other competent witnesses" *at trial. Id.* at 949. This also undermines *Sanchez*'s further justification that since plaintiff knew of the identity of the witnesses, he had to obtain their declarations for the anti-SLAPP motion or ask the trial court to lift the discovery stay.

The time for the plaintiff in *Sanchez* to fish or cut bait on *admissible* evidence should have come later – when and if the defendants moved for summary judgment. "To strike a complaint for failure to meet evidentiary obstacles that *may* be overcome at trial would not serve the SLAPP Act's protective purposes." *Id.* at 949 (emphasis added). But to dismiss an action for inability to establish the elements of the claim *with* admissible evidence *is* the purpose of summary judgment. Did *Sanchez* conflate the two? It looks that way.