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THE SPECIAL MOTION REQUIREMENTS OF THE MASSACHUSETTS ANTI-SLAPP STATUTE: A REAL SLAP IN THE FACE FOR TRADITIONAL CIVIL PRACTICE AND PROCEDURE

I. INTRODUCTION

A “Strategic Lawsuit Against Public Participation” (or “SLAPP”)¹ is a term used to describe lawsuits filed against individuals or an organization in retaliation for bringing an action or speaking out on an issue of public interest or concern. Generally SLAPP suits are camouflaged as ordinary civil actions such as defamation or abuse of process, but are generally without merit and brought simply to induce the other party to retract their statements or drop their lawsuits.² The following scenario exemplifies the SLAPP paradigm: Ms. Little brings an action against Powerful, Inc., alleging that the corporation violated an environmental regulation. Powerful, Inc., in retaliation, claims that Ms. Little has slandered the corporation and that her union is plotting against the corporation. The counterclaims arise not because the corporation’s legal team has any good faith belief that Ms. Little has violated a law, but rather because it hopes to create a nuisance sufficient to induce Ms. Little to drop her claim.³ Hence, SLAPPs are meritless claims with the sole purpose of increasing the time, costs, and stress of litigation.

To assist citizens like Ms. Little in fending off frivolous lawsuits filed to deter them from maintaining legal action, twenty-four states, including Massachusetts,

¹ University of Colorado professors Penelope Canan and George W. Pring coined the acronym in the 1980s. See George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 4 (1989) (establishing four SLAPP suit criteria: (1) a civil complaint or counterclaim (for monetary damages or injunction); (2) filed against nongovernmental individuals or groups; (3) because of their communications to a government body, official, or the electorate; and (4) on an issue of some public interest or concern). See also Michael Eric Johnston, *A Better SLAPP Trap: Washington State’s Enhanced Statutory Protection for Targets of “Strategic Lawsuits Against Public Participation,”* 38 GONZ. L. REV. 263, 276 (2002-2003).

² First Amendment Project, The Anti-SLAPP Resource Center, available at <http://www.thefirstamendment.org/antislappresourcecenter.html> (last visited Mar. 16, 2007).

³ For another good example of the typical SLAPP suit scenario, see Johnston, *supra* note 1, at 263.

have enacted anti-SLAPP statutes.⁴ These statutes adjust state civil procedures to enable defending parties to seek dismissal of these frivolous claims and counterclaims very early in the litigation process, prior to any discovery.⁵ The statutes accomplish this task by creating a special motion to dismiss, which defending parties can use in lieu of other procedural tactics, such as summary judgment or a Rule 12(b)(6)⁶ motion to dismiss.⁷ Thus, by allowing citizens to more easily dispense with SLAPPs brought against them, state legislatures have carved out an "exception" under traditional civil procedure that "favors" the ability of these citizens to bring their claims over the ability of other parties to bring counterclaims against these citizens.

The Massachusetts special motion, like other state anti-SLAPP provisions, further "punishes" a party who files a SLAPP suit.⁸ According to the Massachusetts law, if a party succeeds in fending off a SLAPP, not only will the court dismiss the counterclaims against that party, but it will also allow that party to recover its costs from the opposing party.⁹ Furthermore, the judge has no discretion on the matter.¹⁰ Thus, the universal aim of anti-SLAPP legislation is to empower citizens to bring lawsuits without fear of meritless retaliatory suits from their

⁴ For a list of states that have enacted anti-SLAPP statutes, see California Anti-SLAPP Project, *Other States: Statutes and Cases*, <http://www.casp.net/menstate.html> (last visited Jan. 17, 2006). Specifically, the Massachusetts anti-SLAPP statute passed into law in December 1994. See *Massachusetts: Statutes and Cases*, California Anti-SLAPP Project, available at <http://www.casp.net/statema.html> (last visited Jan. 22, 2007) (summarizing the statute's legislative history).

⁵ See, e.g., MASS. GEN. LAWS ch. 231, § 59H (2005) ["Massachusetts anti-SLAPP Statute"]. The Massachusetts anti-SLAPP statute states that "The court shall advance any such special motion so that it may be heard and determined as expeditiously as possible . . . [a]ll discovery proceedings shall be stayed upon the filing of the special motion . . ." *Id.* For other anti-SLAPP statutes stating similar provisions, see First Amendment Center, *Anti-SLAPP Statutes: state summary*, <http://www.firstamendmentcenter.org/about.aspx?id=13565> (last visited Jan. 17, 2006) [hereinafter "First Amendment Center"].

⁶ Fed. R. Civ. P. 12(b)(6); Mass. R. Civ. P. 12(b)(6).

⁷ See ch. 231, § 59H. The Massachusetts anti-SLAPP statute states that "[i]n any case which a party asserts that the civil claims, counterclaims, or cross claims against said party are based on said party's exercise of its right of petition . . . said party may bring a special motion to dismiss."

⁸ *Id.*

⁹ *Id.* ("If the court grants such special motion to dismiss, the court shall award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters.") For a judicial application of this provision, see *McLarnon v. Jokisch*, 727 N.E.2d 813, 818 (Mass. 2000) (holding that in order to collect the attorney and court fees, the party must file for them).

¹⁰ Compare ch. 231, § 59H (guaranteeing compensation), with 10 DEL. CODE § 8136(b) (2005) (stating that "damages may only be recovered if the . . . communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false . . .").

opponents, which, arguably, increases society's welfare.¹¹

The purpose of this Note is to examine how the Massachusetts anti-SLAPP statute impacts traditional practice and procedure by creating a special motion to dismiss. Section II begins by discussing the Massachusetts Supreme Judicial Court's ("SJC") analysis of the Massachusetts anti-SLAPP statute in *Duracraft Corp. v. Holmes Prods. Corp.*¹² and *Baker v. Parsons*.¹³ In deciding these cases, the SJC identified two peculiarities in the law that differentiate it from its counterparts in other states: (1) the statute's broad applicability to various types of petitioning activities that do not pertain to the public interest;¹⁴ and (2) the statute's contrasting procedural burdens upon the party who must demonstrate a "petitioning activity" to use the anti-SLAPP special motion to dismiss a claim ("moving party"), versus the party who must demonstrate that the contentions in the original petition are "devoid of fact" in order to maintain its claim against the petitioner ("non-moving party").¹⁵

The remaining subsections of Section II and all of Section III then explore how these nuances, taken together, contribute to the displacement of traditional civil practice and procedure, including motions to dismiss, summary judgment, abuse of process and malicious prosecution tort claims. Section IV moves to an examination of the Massachusetts Legislature's proposed amended statute, which lessens the burden of proof for the party seeking to defeat the special motion, but does not create a public interest requirement. Section IV also examines the statute's legislative history to explore the possibility of limiting the special motion to situations pertaining to the public interest. Finally, Section V ultimately concludes that a public interest requirement is necessary to make the law consistent with the general policies underlying the anti-SLAPP concept and to lessen its negative impact on civil practice and procedure.

II. THE MASSACHUSETTS ANTI-SLAPP STATUTE AND THE APPLICATION OF ITS SPECIAL MOTION

A. *The Duracraft Decision: Broadly Defining Petitioning Activity*

Lower courts in the Commonwealth have interpreted the Massachusetts anti-SLAPP statute since its enactment on December 29, 1994;¹⁶ however, the Supreme

¹¹ Yvette Mendez, Sugarman, Rogers, Barshak & Cohen, P.C., "*SLAPP*" Attack: Has Public Concern Gone South in Massachusetts?, 42 B.B.J. 6 (1998).

¹² *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935 (Mass. 1998).

¹³ *Baker v. Parsons*, 750 N.E.2d 953 (Mass. 2001).

¹⁴ *Duracraft*, 691 N.E.2d at 941.

¹⁵ *Baker*, 750 N.E.2d at 961-62.

¹⁶ See, e.g., *Vittands v. Sudduth*, 671 N.E.2d 527, 531 (Mass. App. Ct. 1996), *rev'd on other grounds*, 730 N.E.2d 325, (Mass. App. Ct. 2000) (establishing that the Massachusetts anti-SLAPP statute took effect on March 29, 1995); *Evan Fray-Witzer, Yurko & Perry P.C., Massachusetts Superior Court Cases*, available at <http://www.casp.net/ma-supct.html> (last

Judicial Court (“SJC”) did not review the statute until 1998 in a landmark decision, *Duracraft Corp. v. Holmes Prods. Corp.*¹⁷ This case provided the court with its first opportunity to dissect the special motion to dismiss created by the anti-SLAPP statute.¹⁸

In *Duracraft*, a judge of the Massachusetts Superior Court denied a party’s special motion, reasoning that the Legislature had not intended for the anti-SLAPP statute to protect the claim at hand because the case lacked a subject matter that concerned the public.¹⁹ The trial court held that a party’s attempt to use the special motion in a case involving only private interests did not further the policies underlying the statute.²⁰ To further support its finding, the lower court noted that the Massachusetts anti-SLAPP statute included a preamble that cited the increasing number of lawsuits seeking to curb free speech and thwart participation in matters of public concern.²¹ The Massachusetts Appeals Court reversed the trial court decision, holding that the Commonwealth’s anti-SLAPP statute does not impose such a public interest requirement.²² The SJC granted review specifically to clarify the Legislature’s intentions regarding the applicability of the statute.²³

In its *Duracraft* opinion, the SJC affirmed the Appeals Court’s reversal of the trial court’s judgment.²⁴ The SJC first identified the anti-SLAPP law as providing a special motion to dismiss “civil claims, counterclaims, or cross claims against [a] party . . . based on [that] party’s exercise of its right of petition under the [C]onstitution of the United States or of the [C]ommonwealth.”²⁵ As interpreted by

visited Jan. 25, 2007) (listing Superior Court cases which addressed the anti-SLAPP statute in 1996 and 1997). See generally *infra* note 34 and accompanying text.

¹⁷ *Duracraft*, 691 N.E.2d 935.

¹⁸ See *Mendez*, *supra* note 11. In addition to being the first anti-SLAPP case for SJC review, “[t]he *Duracraft* case [had also been] the Appeals Court’s first opportunity to thoroughly evaluate the the right to petition since passage of the anti-SLAPP legislation in 1994” since the Appeals Court’s prior decision in *Vittands* was limited to determining the effective date of the statute. *Id.* at 6. See also *Vittands*, 671 N.E.2d at 527.

¹⁹ *Duracraft*, 691 N.E.2d 935 at 940-41. The case concerned two competing companies disputing over the disclosure of trademark secrets. Marino, a former employee of *Duracraft*, went to work for the company’s competitor, *Holmes Products Corporation*, and later provided deposition testimony that revealed some of *Duracraft*’s trademark secrets. *Id.* at 937. *Duracraft* filed suit, alleging, among other charges, that Marino had breached confidentiality. *Id.* at 938. Marino filed a special motion to dismiss, alleging that his deposition testimony was “petitioning activity” protected under the statute. *Id.* at 938-39.

²⁰ *Id.* at 941.

²¹ See *id.* (citing H.R. Doc. No. 1520 (1994)).

²² *Id.* at 941.

²³ *Id.* at 938.

²⁴ *Id.* at 941-42.

²⁵ *Id.* at 939 (quoting MASS. GEN. LAWS ch. 231, § 59H (2005)). The rights protected under the Massachusetts anti-SLAPP statute derive from the First Amendment of the U.S. Constitution and the Massachusetts Declaration of Rights. Specifically, the U.S. Constitution guarantees that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances” (emphasis added). U.S.

non-governmental organizations concerned with First Amendment rights, “petitioning” refers to those activities designed to procure favorable government or judicial action—for example, making a request to an administrative agency or bringing a lawsuit—without undue interference that would violate constitutional rights to free speech.²⁶ The *Duracraft* court provided specific examples of “petitioning activity,” noting that

SLAPP suits target people for[, among other things,] “reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations.”²⁷

Despite the court’s suggestion that the definition of “petitioning activity” implicates public matters, the SJC emphasized that the Massachusetts statute broadly defines the “right of petition.”²⁸ Any party engaging in activity with the executive, legislative, or judicial branches is at least technically eligible to be

CONST. amend. I. See also *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 419 (7th Cir. 1988) (holding that “litigation is a method recognized by the Supreme Court . . . for advancing ideas and seeking redress of grievances; retaliation against one who institutes litigation (or its condition precedent in Title VII litigation, the lodging of charges with civil rights agencies) discourages litigation; therefore such retaliation invades a First Amendment right”). The Massachusetts Declaration of Rights includes the following provision:

The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, *petitions*, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

MASS. CONST. pt. I, art. XIX (emphasis added).

²⁶ Lori Potter, *Strategic Lawsuits Against Public Participation: Overview*, First Amendment Center, available at <http://www.firstamendmentcenter.org/petition/topic.aspx?topic=slapp> (last visited Feb. 19, 2006).

²⁷ *Duracraft*, 691 N.E.2d at 940 (quoting Pring, *supra* note 1, at 5).

²⁸ See MASS. GEN. LAWS ch. 231, § 59H. The law states:

“[A] party’s exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

Id.

labeled a “petitioner.”²⁹ The Legislature specifically did not qualify the type of legal action that could be considered a “petition” under the statute, but instead broadly defined “a party’s exercise of its right of petition” to include “any written or oral statement made before or submitted to a . . . judicial body.”³⁰ While procuring action from a government body or assisting the government in an investigation might inherently implicate a public concern because the government acts on behalf of the state, “claims and related pleadings filed in court may [also] be classified as petitioning activities.”³¹ As no other language in the statute serves to qualify the definition of “petition,” the special motion is applicable to a wide variety of lawsuits, even those between private parties. Consequently, a lawsuit need not implicate a grievance affecting the public to qualify as a “petition.”³²

Thus, while the pre-*Duracraft* judicial interpretation of the statute narrowed its application to matters of public concern,³³ post-*Duracraft* jurisprudence makes it clear that the statute’s language does not limit the use of the special motion to petitions addressing “public issues.”³⁴ Even though Massachusetts courts may continue to acknowledge the historical definition of SLAPP suits (“generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so”³⁵), *Duracraft* firmly established that the language of the Massachusetts anti-SLAPP

²⁹ The post-*Duracraft* decisions illustrate the broad realm of actions that fall within the definition of “petitioning activities” under the statute. *See, e.g.,* *Donovan v. Gardner*, 740 N.E.2d 639, 642 (Mass. App. Ct. 2000) (holding that reports to such government agencies as the fire department, the board of health, and the conservation commission can be classified as “petitions”); *Millennium Equity Holdings, LLC v. Mahlowitz*, 2006 Mass. Super. LEXIS 276, at *36 (Mass. Super. Ct. May 15, 2006) (seeking relief in Probate Court by an attachment constitutes petitioning activity).

³⁰ MASS. GEN. LAWS ch. 231, § 59H.

³¹ *Duracraft*, 691 N.E.2d at 943 n.20.

³² *Id.* at 941 (holding that judges are not permitted to insert a “public concern” requirement that the state legislature specifically rejected). *Contra* *Wilcox v. Superior Court of Los Angeles County*, 27 Cal. App. 4th 809, 818 (Cal. Ct. App. 1994) (discussing the California Legislature’s anti-SLAPP statute as a procedural remedy *limited* to furthering a person’s right of petition or free speech *in connection with a public issue*).

³³ *See, e.g.,* *Sullivan v. Murphy*, 5 Mass. L. Rptr. 67, 68 (Mass. Super. Ct. 1996) (holding that in a case where “the parties are litigating matters of purely private interest, the policies underlying the anti-SLAPP statute are not implicated”).

³⁴ *See, e.g.,* *McLarnon v. Jokisch*, 727 N.E.2d 813, 816-17 (Mass. 2000) (citing *Duracraft*, 691 N.E.2d at 940-41) (holding that the Massachusetts anti-SLAPP statute applies to cases where no issue of public concern is involved); *Katz v. Carriage Hill*, 20 Mass. L. Rptr. 29, 2005 Mass. Super. LEXIS 422, at *8, n.4 (Mass. Super. Ct. 2005) (citing *McLarnon*, 727 N.E.2d at 816-17) (“The Massachusetts law, unlike the anti-SLAPP laws of every other jurisdiction, is not limited to suits involving public disputes, and applies to conduct between private parties such as the trustees and corporate and individual defendants involved in this case.”).

³⁵ *Duracraft*, 691 N.E.2d at 940 (quoting *Wilcox*, 27 Cal. App. 4th at 816-17 (citing *Pring, supra* note 1, at 5-6, 9)).

statute allows parties to use the special motion to dismiss claims outside of the classic SLAPP paradigm.³⁶

Recall the SLAPP litigation scenario presented in the introduction of this Note.³⁷ Ms. Little was the typical candidate to use the anti-SLAPP special motion because she was an individual citizen at the mercy of a large corporation, Powerful, Inc.³⁸ In Massachusetts, however, corporations, and even large developers have used the special motion to dismiss claims made by parties of modest means.³⁹ Thus, in a Massachusetts judicial proceeding, under a somewhat reversed set of facts, Powerful, Inc. could hypothetically be the party seeking to dismiss Ms. Little's claims. For example, suppose that Powerful, Inc. is a construction company petitioning the government to change the local zoning laws. Ms. Little does not want the disruption to her quiet neighborhood that would ensue, so she sues Powerful, Inc. for being in contempt of a court's previous determination that the zoning laws prohibited certain activities on the company's land. Powerful, Inc. will claim that Ms. Little is trying to interfere with its petition to the zoning board, and seek to dismiss Ms. Little's claim under the special motion.⁴⁰

Since the statute's enactment in 1994, parties have demonstrated that they were engaged in "petitioning activity" and thus entitled to use the special motion under a wide variety of factual circumstances.⁴¹ With no limitations on the socio-economic

³⁶ See *supra* note 3.

³⁷ See *supra* Section I.

³⁸ Florida's anti-SLAPP statute specifies that a "SLAPP" is not determined based on *who* is filing a suit. The statute states that just because SLAPPs "are mostly filed by private industry and individuals . . . it is the [state's] public policy . . . that *government entities* not engage in SLAPP suits because such actions are inconsistent with the right of individuals to participate in the state's institutions of government." (emphasis added). FLA. STAT. § 768.295(2) (2004).

³⁹ See *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 756 (Mass. 2002) (granting the special motion to politically connected trustees of an upscale condominium complex to dismiss the tort claims brought by a corporation seeking to buy the land); *MacDonald v. Paton*, 782 N.E.2d 1089, 1093-94 (Mass. App. Ct. 2003) (granting the special motion to a publisher to dismiss a libel complaint from an individual citizen). See generally Daniel P. Dain, *Mass. Court Grants Developers Anti-SLAPP Protection Coverage*, BANKER & TRADESMAN, Mar. 29, 2004, available at www.goodwinprocter.com/getfile.aspx?filepath=/Files/publications/dain_d_03_29_04.pdf (discussing that "[t]he typical mischief that the legislature intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects" and now a developer filing the special motion has "turn[ed] the anti-SLAPP statute on its head.").

⁴⁰ Cf. Dain, *supra* note 39 (discussing an unpublished Superior Court case, *Pierce v. Mulhern*).

⁴¹ *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998). See, e.g., *Weinberg v. Colon*, 11 Mass. L. Rptr. 82, 84 n.3 (Mass. Super. Ct. 1999) (holding that, post-*Duracraft*, the plaintiff's "efforts to distinguish matters of private and public concern is [sic] unconvincing and are not supported by established legal precedent"). See also *Baker v. Parsons*, 750 N.E.2d 953, 958 (Mass. 2001) (quoting *Duracraft*, 691 N.E.2d at 940) (granting the special motion to a wealthy, politically connected defendant against an

classification of parties that may elect to use the special motion, nor boundaries on whether the subject matter of a dispute falls within the purview of the statute, the types of cases where parties can use the special motion have increased exponentially.⁴²

Return to the classic SLAPP paradigm described in the introduction;⁴³ recall that Ms. Little's case against Powerful, Inc. was aided by her use of an anti-SLAPP statute. Now suppose that in addition to Ms. Little, Ms. Boston, who lives in Massachusetts and who also works for Powerful, Inc. has her own complaints against the same corporation, namely that she has not been receiving her paychecks in a timely manner, and that corporate activities have trespassed onto her neighboring private property line. While Ms. Little's petitioning activity included sending a letter to an environmental agency to complain about Powerful, Inc.'s business practices, a matter which undoubtedly pertains to the public interest, Ms. Boston's complaints are wholly private. As a "judicial body" would hear both of Ms. Boston's grievances, however, they both qualify as "petitioning activities" in Massachusetts.⁴⁴ If Powerful, Inc. then responds by filing tort claims against Ms. Boston, she technically qualifies as a party entitled to file the anti-SLAPP special motion to dismiss Powerful, Inc.'s claims.

Under the SJC's ruling in *Duracraft*, in the absence of any statutory language that a "petition" must be substantively "in the public interest" or "of a public concern," Massachusetts courts may justifiably rule that many private complaints fall within the purview of the statute.⁴⁵ Even the mere filing of a lawsuit may qualify as a "petitioning activity" because a lawsuit is "action taken before a judicial body."⁴⁶ Courts have not, however, granted the special motion in all cases, even though a party's activities seemed to fit the broad definition of "petitioning

individual farmer on the basis that, even if there are general characterizations of parties and a typical type of mischief to which the anti-SLAPP remedy applies, the absence of the classic paradigm in this case does not "foreclose a special motion to dismiss pursuant to the statute.").

⁴² See, e.g., Paul D. Wilson, *Of Sexy Phone Calls and Well-Aimed Golf Balls: Anti-SLAPP Statutes in Recent Land-Use Litigation*, 36 URB. LAW. 375, 376 (Spring 2004) (discussing how broad language in an anti-SLAPP statute allows many parties to seek its protection).

⁴³ See *supra* Section I.

⁴⁴ *Duracraft*, 691 N.E.2d at 943 n.20.

⁴⁵ *Id.* at 941. See also *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 756-57 (Mass. 2002) (applying the anti-SLAPP statute to a private real estate transaction); *McLarnon v. Jokisch*, 727 N.E.2d 813, 817 (Mass. 2000) (applying the anti-SLAPP statute to a dispute between spouses); *Vittands v. Sudduth*, 730 N.E.2d 325, 336-38 (Mass. App. Ct. 2000) (applying the anti-SLAPP statute to a property dispute between private parties); *Donovan v. Gardner*, 740 N.E.2d 639, 641-44 (Mass. App. Ct. 2000) (applying the anti-SLAPP statute to a private dispute between neighbors); *Leslie v. Sciacca*, 2003 Mass. App. Div. 68 (Mass. App. Div. 2003) (applying the anti-SLAPP statute to an application for criminal process). *But cf.* GA. CODE ANN. § 9-11-11.1 (2006) (stating a public interest requirement as a condition to using the special motion in Georgia).

⁴⁶ See *supra* note 31 and accompanying text.

activity.”⁴⁷ The denial of the special motion in some lawsuits and not others casts doubt on the ability of judges to use consistent criteria in determining the applicability of the special motion.⁴⁸ The SJC has even conceded that a court properly granted the special motion in a private dispute that was not anticipated by the statute.⁴⁹

Regardless of where the SJC decides to draw the line of eligibility, in the absence of a public concern requirement, an increasing number of parties can use the special motion. Also, because success under the special motion entitles the moving party to force the opposing, non-moving party to pay the attorney and court fees, more litigants will want to use the special motion.⁵⁰ Therefore, judges will frequently be faced with the choice whether to grant or deny a special motion, and the concern becomes how the use of special motions impacts pre-existing features of judicial proceedings.⁵¹

The *Duracraft* decision has the effect of expanding the definition of “petitions” to include actions that involve *private* issues, whether or not they involve other issues of public concern.⁵² This SJC decision is consistent with the language in the

⁴⁷ For example, courts have found that certain actions fall outside of protected “petitioning activity” when a petitioner fails to show that his or her “statement [is] reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding.” *Kalter v. Wood*, 855 N.E.2d 421, 429 (Mass. App. Ct. 2006) (citing MASS. GEN. LAWS ch. 231, § 59H) (arguing that the court should not read the anti-SLAPP statute so broadly as to immunize actions as “petitioning activity” that were not contemplated by the legislature; in this case, a patient’s letter was not considered “petitioning activity” and thus the anti-SLAPP statute was inapplicable).

⁴⁸ See, e.g., *Kalter*, 855 N.E.2d at 427 (Brown, J., concurring in part and dissenting in part) (citing *Wynne v. Creigle*, 825 N.E.2d 559, 565 (Mass. App. Ct. 2005) (arguing that the majority erroneously decided in this case that a patient’s letter did not constitute “petitioning activity,” despite the fact that a sufficiently analogous set of statements in *Wynne* would have been deemed to be protected “petitioning activity”); *Kobrin v. Gastfriend*, 821 N.E.2d 60, 76-77 (Mass. 2005) (Sosman, J., dissenting) (arguing that the majority of the court has “arbitrarily” decided that an expert witness can make a special motion to dismiss claims “based on” the contents of his affidavit only if the expert witness is being paid by the government; otherwise, an expert witness against a party is not exercising a “right of petition under the constitution” within the meaning of the statute).

⁴⁹ *Baker v. Parsons*, 750 N.E.2d 953, 960-61 n.16 (Mass. 2001) (citing *McLarnon*, 727 N.E.2d at 818) (holding that *McLarnon* addressed custody protective orders, which is “not the typical case anticipated by the statute.”).

⁵⁰ See *Kobrin*, 821 N.E.2d at 75 n.3 (Sosman, J., dissenting) (arguing that even if a party has the option to claim protection under a different legal remedy, the party can invoke the more rigorous protections of the anti-SLAPP statute).

⁵¹ See Mendez, *supra* note 11.

⁵² *Commonwealth v. Chatham Dev. Corp.*, 6 Mass. L. Rptr. 76 (Mass. Super. Ct. 1996) (holding that a housing development manager’s refusal to rent based on a prospective tenant’s race involved a public issue of discrimination). Cf. *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 756 (Mass. 2002) (addressing the denial of a purchase and sale of

statute, but inconsistent with the policies underlying the concept of anti-SLAPP statutes, namely, to remove legal impediments on citizens seeking to speak out on matters of public concern.⁵³ Thus, the *Duracraft* decision highlights an important nuance in the Massachusetts anti-SLAPP statute as compared to its anti-SLAPP counterparts in other states.⁵⁴

B. *The Petitioner's Burden of Proof*

After establishing the near limitless eligibility to be a "petitioner," the *Duracraft* Court then needed to examine the anti-SLAPP statute's special motion itself, specifically the motion's *modus operandi* in judicial proceedings.⁵⁵ The court's analysis therefore continued from the premise that a party ("petitioner") took action in a manner that could be deemed "petitioning activity" (i.e., requested a license or permit from a government agency, gave testimony in court, or filed a lawsuit) and another party subsequently decided to take action against this "petitioner."⁵⁶ Once the petitioner surmised that a "nuisance" suit was filed against him because of his earlier petitioning activity, the petitioner became a defendant in a legal action.⁵⁷ As a defendant who believed that he should not be "punished" with a lawsuit on account of his earlier petitioning activity, he then sought to use the anti-SLAPP special motion to dismiss the claims against him. To clarify, the former "petitioner" became the current defendant who moved to dismiss a plaintiff's lawsuit under the theory that the plaintiff's lawsuit was a "SLAPP," filed in retaliation for the defendant's petitioning activity.

Thus, the petitioner became a defendant and is now a "party"⁵⁸ whom the Massachusetts Legislature intended to immunize from claims "based on" the party's petitioning activity. The SJC's holding in *Duracraft* interpreted "based on" to exclude "meritorious claims with a substantial basis other than or in addition to the petitioning activities implicated."⁵⁹ That is, the SJC's ruling recognized that not

condominiums to a company based on parking restrictions and displacement of commercial tenants, arguably a "wholly private transaction").

⁵³ See First Amendment Project, *supra* note 2.

⁵⁴ See *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 n. 12 (Mass. 1998) (noting that "other than [the Massachusetts anti-SLAPP Statute, the Massachusetts court is not] aware of [another] anti-SLAPP statute that fails to include 'public concern' as an element of the petitioning activity").

⁵⁵ *Id.* at 942-43.

⁵⁶ *Id.* at 943 (noting that the anti-SLAPP statute next focuses on whether the plaintiff's claim is "based on" the petitioning activity).

⁵⁷ See, e.g., *Donovan v. Gardner*, 740 N.E.2d 639, 641 (Mass. App. Ct. 2000) (discussing a plaintiff's legal theories of abuse of process, invasion of privacy, civil conspiracy, intentional interference with advantageous business relations, civil rights violations and intentional infliction of emotional distress).

⁵⁸ The Massachusetts anti-SLAPP statute labels this petitioning party as the "moving party." MASS. GEN. LAWS ch. 231, § 59H (2005).

⁵⁹ *Duracraft*, 691 N.E.2d at 943.

every lawsuit filed against someone claiming to be a “petitioner” should be dismissed as a SLAPP.⁶⁰ Rather, a “petitioning” party may use the anti-SLAPP statute’s special motion to dismiss as long as this “moving party” can demonstrate the following burden of proof:

The special movant who “asserts” protection for its petitioning activities would have to make a threshold showing through the pleadings and affidavits that the claims against [the moving party] are “based on” [the moving party’s] petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities.⁶¹

The *Duracraft* court did not need to further address the statute’s burdens of proof because in that case, the court determined that even though the expansive definition of “petition” included the “private” activities of the defendant, the defendant failed to meet his burden of proof as the “moving party.”⁶² Specifically, the defendant failed to show that *Duracraft* had sued him “on the basis” of his petitioning activity because *Duracraft*, when filing its own suit of contractual breach of confidentiality, produced documentation to indicate that its suit did have a substantial basis other than the defendant’s (moving party’s) petitioning activity.⁶³ Thus, the SJC remanded the case.⁶⁴

C. *The Baker Decision: The Non-moving Party’s Burden of Proof*

Suppose the moving party (defendant) in *Duracraft* had met his burden of proving that *Duracraft* had brought its suit solely due to his “petitioning activities.” It was not until three years later, in *Baker v. Parsons*,⁶⁵ that the SJC had the opportunity to further the analysis it began in *Duracraft*. The SJC had not yet clarified what would happen to a claim under a special motion to dismiss after a moving party meets its burden of proof to show that the suit brought against it is

⁶⁰ *State Street Corp. v. Barr*, 11 Mass. L. Rptr. 191, 192 (Mass. Super. Ct. 2000) (citing *Duracraft*, 691 N.E.2d at 943 n.20) (holding that “based on” does not mean “in response to”).

⁶¹ *Duracraft*, 691 N.E.2d at 943. For an example of how tort claims of defamation and interference with business activities can derive from petitioning activities, see *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 n.14 (describing citizen protest “in the form of statements at open meetings that [a company] was a ‘sleazy operation’ of ‘dubious character’ [and also citizen protest by way of] a leaflet . . . that listed, in explicit detail, [damaging information on the company’s business practices]”). See also *McLarnon v. Jokisch*, 727 N.E.2d 813, 817 (Mass. 2000) (interpreting “based on”); *Wynne v. Creigle*, 825 N.E.2d 559, 565 (Mass. App. Ct. 2005) (interpreting “based on”).

⁶² *Duracraft*, 691 N.E.2d at 943-44.

⁶³ *Id.* at 944. Because *Duracraft* produced a written contract between the company and its former employee that *Duracraft* needed to authorize the former employee’s disclosure of trademark secrets, it had a legitimate suit based on a breach of a contract, which required resolution by a court on its merits. *Id.* at 943-44.

⁶⁴ *Id.* at 944.

⁶⁵ *Baker v. Parsons*, 750 N.E.2d 953 (Mass. 2001).

“based on” a petitioning activity.

The relevant facts of *Baker* are as follows. Baker was a property owner on an island, who applied for both a federal and state license to construct a pier on his property.⁶⁶ A scientist named Parsons then wrote to public officials regarding her concerns about Baker’s use of his land in this manner and the detrimental impact that such use would have on the natural habitat of migratory birds.⁶⁷ Baker then brought a claim against Parsons, alleging that Parsons had defamed Baker in those letters.⁶⁸ Parsons subsequently filed the anti-SLAPP special motion to dismiss: she used pleadings and affidavits to argue that Baker’s claims against her were “based on” her (Parsons’) petitioning activities.⁶⁹

Since Parsons filed the special motion, the SJC did not immediately consider the merits of Baker’s defamation claim. Rather, the court had to first consider Parsons’ special motion.⁷⁰ The SJC determined that Parsons’ activities fit within the scope of “petitioning” (i.e., communicating with a government entity about her environmental concerns) and that Parsons had sufficiently shown that Baker’s claim was “based on” her petitioning activity (since Baker alleged a “smear campaign” that derived directly from the content of Parsons’ communications to the environmental agency).⁷¹

Once the SJC found that Parsons met her burden as the moving party, the court needed to determine what burden of proof rested upon Baker in order for him to persist in bringing his claim forward. According to the Massachusetts anti-SLAPP statute, after the moving party demonstrates that the lawsuit filed against the moving party was “based on petitioning activity,” the burden then shifts to the non-moving party to prove that the moving party’s underlying petition (1) “was devoid of any reasonable factual support or any arguable basis in law”⁷² and (2) has “caused actual injury to the [non-moving] party.”⁷³

In *Duracraft*, the SJC interpreted the phrase “devoid of any reasonable factual support” to be the functional equivalent of arguing that a petition is a “sham.”⁷⁴ The SJC expounded on this idea of detecting “sham” petitioning in its *Baker* decision, determining that the special motion requires the non-moving party to show “by a preponderance of evidence that the [moving party] lacked any

⁶⁶ *Id.* at 955-56.

⁶⁷ *Id.* at 956.

⁶⁸ *Id.* at 956-57.

⁶⁹ *Id.* at 957.

⁷⁰ MASS. GEN. LAWS ch. 231, § 59H (2005) (stating that the “court shall advance any such special motion so that it may be heard and determined as expeditiously as possible”).

⁷¹ *Baker*, 750 N.E.2d at 958 (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 940 (Mass. 1998)).

⁷² See MASS. GEN. LAWS ch. 231, § 59H. See, e.g., *Fabre v. Walton*, 781 N.E.2d 780, 786 (Mass. 2002) (citing *Baker*, 750 N.E.2d at 961).

⁷³ MASS. GEN. LAWS ch. 231, § 59H. See, e.g., *Vittands v. Sudduth*, 730 N.E.2d 325, 337 (Mass. App. Ct. 2000).

⁷⁴ *Duracraft*, 691 N.E.2d at 943 (stating that the anti-SLAPP statute protects a party’s petitioning activity, “unless it can be shown to be sham petitioning”).

reasonable factual support for [its] petitioning activity.”⁷⁵ Importantly, the SJC labeled this burden as a “heightened summary judgment standard.”⁷⁶ The court specified that the special motion’s heightened summary judgment review could implicate “multiple [other] considerations,” including whether “the primary purpose [of the petition was] . . . to harass . . . or effectuate some other improper objective.”⁷⁷ In a post-*Baker* case, the Massachusetts Appeals Court adopted the SJC’s definition of “sham” petitioning before a judicial body.⁷⁸ As applied by the Appeals Court, in order to be a “sham” petition, “the lawsuit must be objectively baseless [such that] no reasonable litigant could realistically expect [to succeed] on the merits.”⁷⁹

Thus, Baker’s burden as the non-moving party was to show that Parsons was engaged in “sham” petitioning when she submitted her letters about the harmful effects of Baker’s land use activities to bird populations. “The judge found that Baker failed to meet this burden, reasoning that Parsons, a biologist who had [conducted many environmental studies] was not without a factual basis in projecting that [Baker’s activities on his land] would adversely affect the bird

⁷⁵ *Baker*, 750 N.E.2d at 962 n.20 (holding that “[i]t is not enough for [the plaintiff] to show that [the defendant’s] alleged petitioning activity, requesting broad environmental review, was based on an error of law; he must show that no reasonable person could conclude that there was [a basis in law] for requesting that review”) (emphasis added).

⁷⁶ *Id.* at 553 (citing *Duracraft*, 691 N.E.2d at 942 n.16) (citing *Protect Our Mountain Env’t, Inc. v. County of Jefferson*, 677 P.2d 1361, 1368-69 (Colo. 1984)) (holding that where the citizens “assert a motion to dismiss predicated on the First Amendment right to petition the government for redress of grievances . . . the court should give the parties a reasonable opportunity to present all material pertinent to the motion and should treat the motion as one for summary judgment . . . to be resolved under the heightened standard we herein adopt”). *Cf.* *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (holding that judges evaluate competing facts by assuming the facts in favor of the plaintiff, and requiring the defending party moving for summary judgment to prove that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law).

⁷⁷ *Baker*, 750 N.E.2d at 961 (citing *Duracraft*, 691 N.E.2d at 942 n.16) (citing *Protect Our Mountain Env’t, Inc.*, 677 P.2d at 1369). Although the court suggests that a petitioner’s motive may be considered under the “sham” test, the court did not provide any guidance as to how this type of evidence could be revealed, pre-discovery, under the special motion’s procedures. *See infra* note 112.

⁷⁸ *Donovan v. Gardner*, 740 N.E.2d 639, 643 n.10 (Mass. App. Ct. 2000) (citing *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)) (citations omitted).

⁷⁹ *Id.* Despite the court’s attempt to more clearly define the statute’s burden of proof for the plaintiff seeking to defeat a special motion, the resulting “sham” test is itself vague and therefore the test is susceptible to inconsistent results in its application. *See, e.g., Donovan*, 740 N.E.2d at 645 (Brown, J., dissenting) (citing *Vittands*, 730 N.E.2d at 336-38) (arguing that the majority granted the special motion to dismiss in this case, but the motion should have been denied under *Vittands*, because the non-moving party in *Donovan* similarly met his burden of proving that the petitioning activity lacked merit).

population.”⁸⁰ The court further clarified the burden of proof for the non-moving party in this case:

It is not enough for Baker to show that Parsons’ alleged petitioning activity, requesting broad environmental review, was based on an error of law; he must show that no reasonable person could conclude that there was [a basis in law] for requesting that review. Baker has not made this showing.⁸¹

D. The Special Motion’s Impact on Motions to Dismiss and Summary Judgment

Notice how a defendant’s use of the special motion to dismiss a claim alters traditional civil procedure. Without the option of filing a special motion, a defendant would have to file a motion to dismiss⁸² or a motion for summary judgment.⁸³ In either of these motions, the defendant carries a burden of persuasion when the plaintiff’s complaint is viewed in the light most favorable to permitting the claim to go forward.⁸⁴ Under the special motion, however, the defendant merely demonstrates that he (the defendant) was engaged in “petitioning activity,” and it is the plaintiff who carries the burden of proof in demonstrating the defendant’s “sham” petitioning.

The special motion’s burdens of proof focus on the validity of the petitioning activity to decide whether the claim brought against the petitioner is a meritless SLAPP that should be dismissed. This method greatly differs from the court’s usual method of evaluating the merit of a claim or counterclaim based on “whether there is support for the facts and contentions of law put forward.”⁸⁵ By removing the favorable inference that a complaint should come forward, the law has forced plaintiffs to demonstrate a higher burden of proof, while permitting defendants to dismiss claims under a lower burden of proof. When claims are more easily dismissed, more plaintiffs will lose the opportunity to have their day in court.

The special motion technically presumes a dismissal of the plaintiff’s claim (by granting the special motion whenever a defendant “petitioner” has any factual basis for the petitioning activity), while a rule 12(b)(6) motion presumes a denial of the

⁸⁰ *Baker*, 750 N.E.2d at 960. “The judge further noted that neither Baker’s allegations that other factors contributed to changes in the bird population, nor his contentions that Parsons wrongfully accused him of harming the bird habitat, would establish that Parsons’ statements were without any factual basis.” *Id.* at 960 n.15.

⁸¹ *Id.* at 962 n.20.

⁸² MASS. R. CIV. P. 12(b)(6) (2006) (dismissing a claim when a party “fail[s] to state a claim upon which relief can be granted”). *But see* *Stuborn Ltd. P’ship v. Bernstein*, 245 F. Supp. 2d 312, 315 (D. Mass. 2003) (holding that the Massachusetts anti-SLAPP statute’s burden shifting procedures are trumped by the FED. R. CIV. P. 12(b)(6) in a diversity action in federal court).

⁸³ MASS. R. CIV. P. 56 (2006). Under a motion for summary judgment, the defendant alleges that, even after viewing the facts in the plaintiff’s favor, the defendant is entitled to judgment as a matter of law.

⁸⁴ *See, e.g., Johnson v. Cooke*, 17 Mass. L. Rptr. 517, 517 (Mass. Super. Ct. 2004).

⁸⁵ *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942 (Mass. 1998).

motion to dismiss.⁸⁶ Even though, in *Baker*, the SJC rejected this interpretation of the statute because of the extreme disadvantage to the plaintiff non-moving party trying to establish a claim,⁸⁷ the special motion does bestow on moving defending parties the benefit of a presumption that the plaintiff's suit lacks merit.⁸⁸

Furthermore, the defendant has a lower burden of proof because, as the moving party, the defendant can focus on the validity of his own petitioning activity and show how the plaintiff's claim appears to be "based on" the petition.⁸⁹ The non-moving plaintiff, however, must show that the moving defendant's petitioning activity was devoid of fact, or else the plaintiff's claim against the defendant is dismissed. The result is that defendants are more likely to succeed in dismissing plaintiffs' claims under the special motion than under other procedural mechanisms. In *Baker*, the SJC determined that Baker did not meet his burden of proving that Parsons's petitioning activity was without merit and consequently granted the special motion to dismiss Baker's claims against Parsons.⁹⁰ Notice that the merits of Baker's claim were never evaluated under the anti-SLAPP special motion.

Do not forget that the special motion was specifically designed to empower defendants in lawsuits by preventing "SLAPP" suits from coming forward. Baker's defamation claim was seeking to deter a concerned biologist from informing public officials about the potential extinction of a species; Parsons' free speech warrants protection. In order to empower petitioners like Parsons, all state anti-SLAPP statutes inevitably alter the traditional burdens of proof found in motions for summary judgment and motions to dismiss, the two most popular methods of disposing claims.⁹¹

The problem in Massachusetts is that, because the special motion has such a widespread applicability, the motion's displacement of traditional civil procedure will take place much more frequently. In other words, the "absence of a [narrower] public concern requirement . . . [allows many more] litigants . . . to circumvent the more substantial burdens imposed by the more traditional tools for relief, e.g. motion to dismiss for failure to state a claim."⁹²

To summarize, under *Duracraft*, whether a suit can be dismissed as a SLAPP is not dependent on the public or private nature of the petition; rather, courts can dismiss even wholly private suits as SLAPPs as long as the moving party was not

⁸⁶ *Baker*, 750 N.E.2d at 961.

⁸⁷ *Id.*

⁸⁸ MASS. GEN. LAWS ch. 231, § 59H (2005). The anti-SLAPP statute specifies that the court "shall" grant the special motion, "unless" the non-moving party makes a showing sufficient to defeat the motion. *Id.*

⁸⁹ See *Duracraft*, 691 N.E.2d at 943. "[T]he moving party . . . must make a prima facie showing of the applicability of 59H . . . That is, she must . . . present enough evidence to raise a presumption that the statute applies. This burden is minimal." *Weinberg v. Colon*, 11 Mass. L. Rptr. 82, 83 (Mass. Super. Ct. 1999) (citations omitted).

⁹⁰ *Baker*, 750 N.E.2d at 962.

⁹¹ *Mendez*, *supra* note 11.

⁹² *Id.*

engaged in “sham” petitioning. Other versions of anti-SLAPP statutes, although providing procedural benefits to the “petitioner,” generally permit the non-moving party to show its own claim has merit as opposed to solely proving the lack of merit in the moving party’s “petition.”⁹³ Thus, the *Baker* decision highlighted a second important nuance in the Massachusetts anti-SLAPP statute as compared to its counterparts in other states.⁹⁴

III. THE SPECIAL MOTION’S IMPACT ON ABUSE OF PROCESS & MALICIOUS PROSECUTION CLAIMS

The increased number of defendants who qualify as “petitioners” and the shifted and unequal burdens of proof under the statute already support the contention that the special motion should have a narrower application; limiting the special motion to dismiss only those suits regarding matters of public concern would lessen its disruption to traditional civil procedural tactics. However, even if the displacement of motions to dismiss and summary judgment does not raise enough doubt over the propriety of the special motion’s widespread use, then its perplexing procedural impact on two important types of tort claims—abuse of process and malicious prosecution—should also curb its use.

The SJC first evaluated a special motion seeking to dismiss a malicious prosecution claim in *McLarnon v. Jokisch*⁹⁵ and later evaluated a special motion seeking to dismiss an abuse of process claim in *Fabre v. Walton*.⁹⁶ In both cases, the moving party succeeded in dismissing the respective tort claim.⁹⁷ However, in neither case did the SJC sufficiently justify why anti-SLAPP movants should be able to use the special motion to dispose of these particular claims.⁹⁸ Given the significance of abuse of process and malicious prosecution claims to civil practice, the SJC should have engaged in a deeper analysis of whether to grant the special motion.⁹⁹ To appreciate the concern, one must first have a clear understanding of both the definitions of [and differences between] these two tort claims.

A party alleging abuse of process must demonstrate that “(1) ‘process’ was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage.”¹⁰⁰ For a

⁹³ See, e.g., CAL. CIV. P. § 425.16 (b)(1) (2004) (requiring moving party’s to prove that they will likely prevail on their claims); *Wilcox v. Superior Court of Los Angeles County*, 27 Cal. App. 4th 809, 823-25 (Cal. Ct. App. 1994) (requiring the non-moving party to show its own claim has a “reasonable probability” of success, a threshold that is lower than “substantial probability”).

⁹⁴ *Baker*, 750 N.E.2d at 962 n.19 (citing the anti-SLAPP statutes in fourteen different states and the various burdens of proof each statute delegates to moving and non-moving parties).

⁹⁵ *McLarnon v. Jokisch*, 727 N.E.2d 813 (Mass. 2000).

⁹⁶ *Fabre v. Walton*, 781 N.E.2d 780 (Mass. 2002).

⁹⁷ *Fabre*, 781 N.E.2d at 787; *McLarnon*, 727 N.E.2d at 818.

⁹⁸ *Fabre*, 781 N.E.2d at 785; *McLarnon*, 727 N.E.2d at 816.

⁹⁹ *Fabre*, 781 N.E.2d at 785; *McLarnon*, 727 N.E.2d at 816.

¹⁰⁰ *Gutierrez v. Mass. Bay Transp. Auth.*, 772 N.E.2d 552, 562-63 (Mass. 2002) (quoting

claimant to prevail on a malicious prosecution tort claim, “(1) the [opposing party] must have instituted criminal proceedings against the [claimant]; (2) the [opposing party] must have acted with malice; (3) the [opposing party] must not have had probable cause at the time the criminal proceedings were instituted; and (4) the criminal proceedings must have been terminated in favor of the claimant.”¹⁰¹ Although often casually interchanged, these two tort claims are separate and distinct:

Abuse of process presupposes the use of legal action for an ulterior purpose, i.e., to achieve some end other than the apparent end of the litigation process which has been launched. Malicious prosecution also involves perverse use of the litigation process, but the central idea is that the party charged with malicious prosecution lacked probable cause in launching the action complained of.¹⁰²

Despite the important differences between these tort claims, a plaintiff with either claim is alleging that the opposing party initiated a judicial proceeding against the plaintiff in bad faith, with purposes to annoy or harass.¹⁰³

Recall that, by definition, a “SLAPP” suit can be considered to be an “abuse of process” because it is vexatious litigation designed to curb petitioning activity.¹⁰⁴ Interestingly then, when a defendant is accused of “abusing the process” or of “malicious prosecution” and that same defendant proceeds to file the special

Datacomm Interface, Inc. v. Computerworld, Inc., 489 N.E.2d 185, 194-95 (Mass. 1986)). “More precisely the word ‘process’ in the context of abuse of process means causing papers to issue by a court ‘to bring a party or property within its jurisdiction.’” *Silvia v. Bldg. Inspector*, 621 N.E.2d 686, 687 n.4 (Mass. App. Ct. 1993) (quoting *Jones v. Brockton Public Markets, Inc.*, 340 N.E.2d 484, 486 (Mass. 1975)). See generally RESTATEMENT (SECOND) OF TORTS, § 674 (1977).

¹⁰¹ *Afrasiabi v. Rooney*, 9 Mass. L. Rptr. 654, 656 (Mass. Super. Ct. 1999) (citing *Correllas v. Viveiros*, 572 N.E.2d 7, 9-10 (Mass. 1991)). See generally RESTATEMENT (SECOND) OF TORTS, § 653 (1977).

¹⁰² *Silvia*, 621 N.E.2d at 687-88 (citations omitted). See generally RESTATEMENT (SECOND) OF TORTS, § 676 (1977). Besides the fact that malicious prosecution responds to criminal, not civil, proceedings, malicious prosecution claims are also distinguished by the fact that they can only be filed after the criminal suit terminated, whereas abuse of process is a counter-claim that must be filed at the initial stages of the legal proceedings. See MASS. R. CIV. P. 13 (stating that claims which arise out of the same transaction or occurrence as the subject matter of the opposing party’s claim are “compulsory” counter-claims that must be immediately claimed in the first response to a complaint or else waived). See *Franco v. Mudford*, 2002 Mass. App. Div. 63, 63-65 (Mass. App. Div. 2002) (for a judicial analysis of abuse of process and malicious prosecution claims in Massachusetts).

¹⁰³ See, e.g., *Clift & Hensler, Inc. v. Marks*, 19 Mass. L. Rptr. 392, (Mass. Super. Ct. 2005) (plaintiffs allege both abuse of process and malicious prosecution); *Millennium Equity Holdings, LLC, v. Mahlowitz*, 2006 Mass. Super. LEXIS 276, *38 (defendant brings counterclaims of both abuse of process and malicious prosecution).

¹⁰⁴ See *Pring*, *supra* note 1, at 5-6, 9. See, e.g., N.M. STAT. ANN. § 38-2-9.1 (2004) (stating that SLAPPs “can be an abuse of the legal process and can impose an undue financial burden on those having to respond to and defend such lawsuits”).

motion to fend off either of these tortious “SLAPPs,” he or she requests a judge to rule in a situation where each party is accusing the other party of undertaking a legal action in bad faith and with purposes to annoy and harass the opposing party.¹⁰⁵

In filing the special motion, the moving party may therefore inhibit the non-moving party’s ability to engage in its own “petitioning activity.” The SJC has held that “[t]he filing of a complaint [including one alleging an abuse of process or malicious prosecution claim] . . . and the submission of supporting affidavits are petitioning activities encompassed with the protection afforded by [the anti-SLAPP statute].”¹⁰⁶

Suppose that a plaintiff files “Lawsuit A” against a defendant, and the defendant counterclaims with one of these two tort claims (“Lawsuit B”). The plaintiff then files a special motion to dismiss Lawsuit B, arguing that this tort claim is interfering with the plaintiff’s “petitioning activity” (“Lawsuit A”) filed against the defendant. Thus, a plaintiff who files the special motion to dismiss is now “interfering” with the defendant’s “petitioning activity” (the tort claim of Lawsuit B).

To more clearly demonstrate the procedural difficulties that arise when a special motion is filed to dismiss either of these two tort claims, the following section will provide a step by step analysis of how to address each tort claim when facing a special motion to dismiss.

A. *The Abuse of Process Claim*

Consider the following hypothetical case of *Rogers v. Industrious*. Suppose Ms. Industrious owns property in a residential neighborhood in Massachusetts which has zoning laws that do not prevent commercial development. Ms. Industrious’ property has long stood vacant, but now she wants to develop her property and rent to businesses. Her neighbor Mr. Rogers, however, opposes any construction on her land. Ms. Industrious believes that Mr. Rogers opposes her construction because his children love to play there, and she can foresee how her actions would negatively impact the quiet, friendly atmosphere of the neighborhood. Mr. Rogers

¹⁰⁵ Consider that, in general, a defendant who prevails on an anti-SLAPP motion can subsequently file a malicious prosecution or abuse of process claim against the unsuccessful plaintiff from the first suit, and this second suit is now subject to dismissal under an anti-SLAPP motion filed by the former plaintiff, now defendant. Rochelle L. Wilcox, Davis Wright Tremaine LLP, *California Legislature Amends Anti-SLAPP Statute Again*, available at http://www.dwt.com/related_links/adv_bulletins/12-05_FALL_Anti-SLAPP.htm (last visited Jan. 24, 2007). See, e.g., *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 281-82 (Cal. 2006). This phenomenon, called a plaintiff’s “SLAPPback” under California law, see *id.*, besides being wholly unrelated to furthering a public interest, results in the additional (and unnecessary) consumption of judicial resources, which provides yet another reason why state legislatures should limit the scope of an anti-SLAPP statute.

¹⁰⁶ *Fabre v. Walton*, 781 N.E.2d 780, 785 (Mass. 2002). See *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 n.20 (Mass. 1998).

has yelled angry words to Ms. Industrious and expressed his distaste with Ms. Industrious' choice of plans for her property, but to no avail; Ms. Industrious follows through with her construction plans. Upon sighting big ditches and dangerous construction equipment strewn about the yard, Mr. Rogers files suit against Ms. Industrious for an injunction, alleging that Ms. Industrious' construction on her yard has not been properly "contained" and thus has created an attractive nuisance for children.¹⁰⁷

In court, Ms. Industrious counterclaims the injunction with an abuse of process claim, alleging that Mr. Rogers has a purpose to take judicial action "as a form of coercion to obtain a collateral advantage."¹⁰⁸ She believes that Mr. Rogers filed suit to harass her, knowing that as long as Ms. Industrious needs to battle the injunction against him in court, potential builders will not be interested in her property. Furthermore, the time and money she will spend defending the claim will distract her from her building plans. Thus, she has likely met the requirements of an abuse of process claim because she can show the opposing party's process (the injunction filed against her), improper motive (thwarting her building attempts), and infliction of damages (loss of money and contractors).

In response to this abuse of process counterclaim, Mr. Rogers files the special motion to dismiss under the anti-SLAPP statute, arguing that Ms. Industrious is attempting to quash his "petitioning activity" (the attractive nuisance lawsuit) with a SLAPP (her abuse of process tort claim).

According to the anti-SLAPP statute, before the court can even consider the merits of Ms. Industrious' abuse of process claim (the alleged "SLAPP"), the judge must first consider Mr. Rogers' special motion. The court temporarily shelves Ms. Industrious' abuse of process claim and refers back to Mr. Rogers' "petitioning activity" to determine if, regardless of Mr. Rogers' motive, he undertook judicial proceedings based on facts that could substantiate his claim. Mr. Rogers can make a *prima facie* case that the extensive construction on Ms. Industrious' yard poses a hazard to the neighborhood children, who are accustomed to using her property to get to and from school. Mr. Rogers need only prove that Ms. Industrious' tort counterclaim is "based on" this lawsuit, a burden easily satisfied for an abuse of process claim, which, by definition, specifically relates to the "process" that was used in the "petitioning activity."¹⁰⁹ That is, Ms. Industrious is clearly filing a suit against Mr. Rogers "based on" his petitioning activity because she believes that the activity itself is an illegitimate abuse of process.

As previously discussed, once Mr. Rogers makes his *prima facie* showing that

¹⁰⁷ See MASS. ANN. LAWS ch. 231, § 85Q (2005) (the Massachusetts attractive nuisance law).

¹⁰⁸ *Vittands v. Sudduth*, 730 N.E.2d 325, 332 (Mass. App. Ct. 2000). "It is immaterial that the process was properly issued, [or] that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed" *Id.* (quoting *Kelley v. Stop & Shop Cos.*, 530 N.E.2d 190, 191 (Mass. App. Ct. 1988) (quoting from RESTATEMENT (SECOND) OF TORTS § 682 cmt. a (1977)).

¹⁰⁹ See *supra* note 101 (citing RESTATEMENT (SECOND) OF TORTS, § 674 (1977)).

the suit against him is based on his attractive nuisance lawsuit, the burden then shifts to Ms. Industrious, the non-moving party.¹¹⁰ Massachusetts law requires her to demonstrate that (1) Mr. Rogers' actions against her are "devoid of fact," and (2) Mr. Rogers' acts caused injury to her.¹¹¹ The law does not, however, provide Ms. Industrious with the opportunity to show that Mr. Rogers filed the injunction against her with an improper motive.¹¹² To the detriment of Ms. Industrious, as the SJC noted, "[t]he Massachusetts statute makes no provision for a plaintiff to show that its own claims are not frivolous."¹¹³ Rather, Ms. Industrious must evaluate the merit of Mr. Rogers' injunction against her, even though by filing her abuse of process claim, she has already expressed an argument that Mr. Rogers' claim against her lacks merit.¹¹⁴ If she cannot show that Mr. Rogers has no factual basis for his actions, the judge may then dismiss her abuse of process claim without evaluating any of its substantive merits. Therefore, even though she can easily show that Mr. Rogers' activities have "injured" her with quantifiable damages, fulfilling the statute's first requirement to avoid dismissal is not only burdensome but seemingly impossible.

The basis of Ms. Industrious' abuse of process claim is the theory that Mr. Rogers' "petitioning activity" (in the form of an injunction) has an improper purpose.¹¹⁵ She believes that Mr. Rogers filed the injunction, a "SLAPP-like" suit, to annoy her. Ironically, the target of her abuse of process claim, Mr. Rogers, may seek to dismiss the claim (as it is "based on" his petitioning activity), even if he did have less than good faith (and, in fact, ulterior motives) in his "petitioning activity" of taking legal action against her.¹¹⁶ Because the anti-SLAPP statute does not require that one's petitioning activity be made in "good faith,"¹¹⁷ the Legislature did

¹¹⁰ MASS. GEN. LAWS ch. 231, § 59H (2005). See *Baker v. Parsons*, 750 N.E.2d 953, 960-61 (Mass. 2001).

¹¹¹ ch. 231, § 59H; *Baker*, 750 N.E.2d at 961. See also *supra* Section II. C.

¹¹² See *infra* note 139 and accompanying text. Although the SJC held in *Baker* that the special motion's heightened summary judgment ("sham") review could take account of whether the primary purpose of a petitioning activity was to harass, see *supra* note 77 and accompanying text, the *Baker* Court did not expound upon how the court was to conduct a motive inquiry in instances where the plaintiff's claim itself is that the defendant's petitioning activity was driven by ill purpose. Furthermore, the *Baker* Court did not consider how, practically, a plaintiff is to demonstrate, pre-discovery, that the petitioner had *primarily* ill motives to the exclusion of other (legitimate) motives, but rather only directed future courts to grant special motions where the defendant's petitioning activity stood a reasonable chance of a successful outcome for the petitioner. See *supra* note 79 and accompanying text.

¹¹³ *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 942 (Mass. 1998).

¹¹⁴ See *supra* notes 103-05 and accompanying text.

¹¹⁵ *Id.*

¹¹⁶ See *Fabre v. Walton*, 781 N.E.2d 780, 785 (Mass. 2002).

¹¹⁷ MASS. GEN. LAWS ch. 231, § 59H (2005). The court does not read in a "good faith" requirement for the party engaging in petitioning activity; moving parties need not have been successful in the outcome of their petition as long as the petition raised timely concerns with the proper authorities. See *Donovan v. Gardner*, 740 N.E.2d 639, 642 (Mass. App. Ct. 2000). See, e.g., *Adams v. Whitman*, 822 N.E.2d 727, 733 n.11 (Mass. App. Ct. 2005)

not direct the courts on how to evaluate a special motion to dispose of a claim of abuse of process, which is a counterclaim specifically “based on” proceedings alleging that the moving party lacked good faith.¹¹⁸

B. *The Malicious Prosecution Claim*

The special motion’s operation against an abuse of process claim similarly occurs when made in response to a claim for malicious prosecution. As with abuse of process, a claim of malicious prosecution is designed to reveal a litigant’s improper motive.¹¹⁹ Additionally, the claim centers around a prior action that, because it would be heard before a judicial body, is considered to be “petitioning activity.”¹²⁰ To analyze the procedural operation of the special motion as a response to a malicious prosecution claim, consider the facts of *McLarnon v. Jokisch*.¹²¹

Edward McLarnon and Virginia Jokisch divorced and were awarded joint custody of their son, Ian.¹²² Jokisch filed a petition in court to request an abuse protection order to restrict contact between McLarnon and Ian.¹²³ In support of that request, she and her new husband each filed affidavits.¹²⁴ McLarnon denied abusing their son and submitted his own affidavits, including one from a

(holding that “our decision [to grant or deny the special motion] deals only with the pleadings and affidavits placed on the record for the anti-SLAPP motion. It does not indicate anything as to the likelihood of success of the . . . underlying [petition].”); compare MASS. GEN. LAWS ch. 231, § 59H with NEV. REV. STAT. § 41.637, 41.650 (2004) (stating a “good faith” requirement).

¹¹⁸ Other tort claims, like breach of confidentiality, can have a substantial basis outside of the petitioning activity. See *Duracraft*, 691 N.E.2d at 943-44. Legal actions such as abuse of process and malicious prosecution, like Rule 12(b) motions to dismiss and motions for summary judgment, however, inherently challenge the legitimacy of the claim(s) being brought by the moving party.

¹¹⁹ In Massachusetts, parties may file a malicious prosecution tort claim in response to a wrongful initiation of *criminal* proceedings. See generally *Wynne v. Rosen*, 464 N.E.2d 1348, 1349-50 (Mass. 1984). Recall that both abuse of process and malicious prosecution tort claims are *civil* claims that can be dismissed under the anti-SLAPP statute. Depending on whether the petitioning activity was a civil or criminal proceeding, an opposing party may file an abuse of process or malicious prosecution claim, respectively. See *supra* note 103 and accompanying text.

¹²⁰ See *Baker v. Parsons*, 750 N.E.2d 953, 960-61 (Mass. 2001).

¹²¹ 727 N.E.2d 813 (Mass. 2000). For another case between a husband and wife which raises similar arguments, see *Franco v. Mudford*, 802 N.E.2d 129 (Mass. App. Ct. 2004) (unpublished), available at http://www.fatherhoodcoalition.org/cpf/newreadings/2004/MF_Appellate_ruling040124.htm (last visited February 19, 2007). See generally *Franco v. Mudford*, 2002 Mass. App. Div. 63 (Mass. App. Div. 2002).

¹²² *McLarnon v. Jokisch*, 727 N.E.2d 813, 814 (Mass. 2000).

¹²³ *Id.*

¹²⁴ *Id.* at 815.

physician.¹²⁵ In the end, Jokisch prevailed and received the protective order.¹²⁶

McLarnon later brought a civil action against Jokisch.¹²⁷ He made a *prima facie* showing for a claim of malicious prosecution by alleging that (1) his ex-wife instituted criminal proceedings (the abuse protection order) against him; (2) she acted with malice (alleging that her purpose was to cause McLarnon to carry a criminal record); (3) she did not have probable cause to file her allegations of abuse, and (4) the criminal proceedings were terminated in her favor.¹²⁸ In response to this tort claim, Jokisch filed a special motion to dismiss, claiming that McLarnon filed this civil suit “based on” her petitioning activity (obtaining the protective order).¹²⁹ Before the court could consider McLarnon’s claim, the court reviewed Jokisch’s special motion to dismiss.¹³⁰ Thus, McLarnon had the burden to prove that Jokisch’s petitioning had no reasonable factual support or basis in law.¹³¹

C. The Unresolved Dilemma

In the hypothetical lawsuit, *Rogers v. Industrious*,¹³² no court has yet determined who should prevail between the party claiming an abuse of process (Ms. Industrious) and the party seeking to dismiss the claim under the special motion (Mr. Rogers). The legal analysis indicates that Mr. Rogers has an easier burden of proof, making him likely to prevail,¹³³ but it is not clear why Ms. Industrious should not have her claim heard, and furthermore, why she should be left to pay the court costs for Mr. Rogers to defend against her claim. To the contrary, she had hoped to prevail on her abuse of process claim and have Mr. Rogers pay the court fees. It is important to note here that if a “petition” had a statutory public interest requirement, neither Mr. Rogers’ attractive nuisance suit nor Jokisch’s abuse protective order would fall within the purview of the statute, and neither plaintiff would be entitled to use the special motion to dismiss the claims responding to their “petitions.”¹³⁴

In *McLarnon v. Jokisch*, the SJC ultimately decided to grant the special motion and dismiss McLarnon’s claim.¹³⁵ The SJC concluded that the special motion

¹²⁵ *Id.* at 818 n.9.

¹²⁶ *Id.* at 815.

¹²⁷ *Id.*

¹²⁸ See generally RESTATEMENT (SECOND) OF TORTS, § 653 (1977). The court in *McLarnon* did not specifically address the criteria for bringing a malicious prosecution claim. See *McLarnon*, 727 N.E.2d at 815 (Mass. 2000).

¹²⁹ *Id.* at 813.

¹³⁰ *Id.* at 817.

¹³¹ *Id.* at 813.

¹³² See *supra* Section III. A.

¹³³ See *supra* notes 110-14 and accompanying text.

¹³⁴ See *supra* notes 26, 27, and 32 accompanying text.

¹³⁵ *McLarnon*, 727 N.E.2d at 818-19.

would not preclude malicious prosecution claims;¹³⁶ however, like abuse of process claims, these claims seem to confront an uphill battle for success.¹³⁷ Yet, it is unclear why a court should uphold one party's "petitioning activity," which is a tort claim itself (e.g. the attractive nuisance claim as in *Rogers v. Industrious*), over the other party's abuse of process claim, which is also a "petitioning activity." After all, both Ms. Industrious and McLarnon are claiming to have evidence, via affidavits, to show that the moving parties used the legal process for an ulterior motive.¹³⁸

In the anti-SLAPP statute, however, "[t]he definition of 'a party's exercise of its right of petition' contains no reference to the motives or affiliations of the person making the 'statement . . . to a legislative, executive, or judicial body'"¹³⁹ Accordingly, the SJC has held that "[n]otwithstanding [a plaintiff's] allegations concerning the motive behind [the defendant's] conduct, the fact remains that the *only* conduct complained of is [the defendant's] petitioning activity."¹⁴⁰ "[T]he motive behind the petitioning activity is irrelevant at this initial stage."¹⁴¹ Thus, the plaintiff cannot hold the defendant liable for abuse of process "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions."¹⁴²

The Massachusetts Legislature should be concerned that, "[b]y protecting one party's exercise of its right of petition . . . the statute [might] impinge[] on the adverse party's exercise of its right to petition . . ."¹⁴³ Even though the SJC assured litigants that the special motion applies "only to SLAPPs and not to suits

¹³⁶ *Id.* at 817 (stating that the SJC does not "believe that claims for malicious prosecution will be precluded by the statute" because "[t]he non[-]moving party . . . has the opportunity to overcome the movant's showing and preserve the claim").

¹³⁷ The SJC similarly allowed the special motion to dismiss an abuse of process claim. See *Fabre v. Walton*, 781 N.E.2d 780, 785-86 (Mass. 2002).

¹³⁸ *Cf. Fabre*, 718 N.E.2d at 785. See *Mendez*, *supra* note 11 (analyzing the failure of courts to address "the issue of mixed motives in filing the lawsuit, i.e. a legitimate claim that is filed to retaliate against petitioning activity").

¹³⁹ *Kobrin v. Gastfriend*, 821 N.E.2d 60, 77 (Mass. 2005) (Sosman, J., dissenting) (quoting MASS. GEN. LAWS ch. 231, § 59H (2005)).

¹⁴⁰ *Fabre*, 718 N.E.2d at 786.

¹⁴¹ *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 (Mass. 2002) (citing *Fabre*, 718 N.E.2d at 785-86). The SJC relied on *Fabre*, even though *Office One* did not involve an abuse of process claim.

¹⁴² *Cohen v. Hurley*, 480 N.E.2d 658, 660 (Mass. App. Ct. 1985) (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 898 (W. Page Keeton ed., West Publ'g Co. 5th ed. 1984)).

¹⁴³ *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 939 (Mass. 1998). *But see Mendez*, *supra* note 11 (noting that the *Office One* court rejected plaintiffs' argument, "relying on the *Duracraft* opinion . . . that the defendants' right to petition could not trump a plaintiff's right to petition, i.e. to file a suit lawsuit to vindicate rights . . . because such an interpretation of *Duracraft* . . . would result in the nullification of the anti-SLAPP Act 'since defendants would no longer be entitled to protection against suits based on their petitioning activity.'" (citing *Office One, Inc.*, 769 N.E.2d at 756-57)).

arising in wholly different circumstances,”¹⁴⁴ the SJC has done little to clarify where the line-drawing will occur. While the SJC declined to provide any specific information as to how malicious prosecution claims (or abuse of process claims) are to prevail in the future, we do know that the statute does not preclude them.¹⁴⁵ Thus, the lower courts lack guidance on how to analyze a special motion when a non-moving party seeks to protect its own “petitioning activity” in the form of an abuse of process or malicious prosecution claim.

D. *The Lower Courts’ Solution*

While the SJC has yet to clarify how the special motion should operate when responding to either of these two claims, the Superior Courts have been forced to decide numerous cases, keeping in mind that

the anti-SLAPP statute cannot be applied in such a way as to effectively abolish all claims for malicious prosecution (whether they are brought by a plaintiff or a plaintiff in a counterclaim). [Furthermore, *Duracraft’s* two-part test] for evaluating special motions . . . cannot be applied in such a way that the non-moving party is effectively deprived of an opportunity to preserve its claim.¹⁴⁶

Thus, in the absence of a statutory public interest limitation on the use of the special motion and its consequential widespread applicability, the courts needed to find an interpretation of the statute that would not preclude abuse of process or malicious prosecution claims.

One of the first cases to highlight the issue in the trial court was *Adams v. Price*,¹⁴⁷ which was later heard before the Massachusetts Appeals Court as *Adams v. Whitman*.¹⁴⁸ The trial court and appeals court offered competing ways to resolve the statute’s apparent bar on these two claims.¹⁴⁹ The relevant facts of *Adams* are as follows: Adams was a homeowner who brought a civil action for damages against the corporation that engineered an allegedly defective septic system and the owner (“principal”) of the company, Whitman, in his individual capacity based on the installation of the system.¹⁵⁰ In response, defendant Whitman filed an abuse of process counterclaim, alleging that he (Whitman) had acted within his scope of employment and Adams’ “naming him individually was done with [an] illegitimate or ulterior purpose [to harass and] caus[ed] him [(Whitman)] real damage.”¹⁵¹

¹⁴⁴ *Duracraft*, 691 N.E.2d at 941.

¹⁴⁵ *McLarnon v. Jokisch*, 727 N.E.2d 813, 816 (Mass. 2000).

¹⁴⁶ *Katz v. Carriage Hill*, 20 Mass. L. Rptr. 29, 31 (Mass. Super. Ct. 2005) (citing *McLarnon*, 727 N.E.2d at 815-17).

¹⁴⁷ *Adams v. Price*, 14 Mass. L. Rptr. 633 (Mass. Super. Ct. 2002).

¹⁴⁸ *Adams v. Whitman*, 822 N.E.2d 727 (Mass. App. Ct. 2005).

¹⁴⁹ *Adams*, 822 N.E.2d at 729-33; *Adams*, 14 Mass. L. Rptr. at 634.

¹⁵⁰ *Adams*, 14 Mass. L. Rptr. at 633.

¹⁵¹ *Id.*, at 634 (citing *Kelley v. Stop & Shop Cos.*, 530 N.E.2d 190, 191 (Mass. App. Ct. 1988)).

Adams filed a special motion, along with accompanying affidavits, to dismiss Whitman's abuse of process claim.¹⁵²

The Superior Court ruled that the special motion was operating so as to preclude the court from evaluating the merits of Whitman's abuse of process tort claim and punishing him with court fees.¹⁵³ The court, rather than undertaking any complicated analysis for evaluating the competing burdens of proof when the special motion seeks to dismiss an abuse of process claim, instead simply assumed that the petitioning activity needed to concern a matter of public interest, or else the special motion was inapplicable.¹⁵⁴ In this negligence case between two private parties disputing the installation of a septic tank, the lawsuit lacked any conventional matters of public concern.¹⁵⁵ Because the "petitioner's" negligence claim was not an action related to a "public concern," the court found that permitting the abuse of process counterclaim to go forward would not have the effect of curbing the type of "petitioning activity" anticipated by the statute.¹⁵⁶ The court further ruled that, "[e]specially in the context of a compulsory counterclaim," a Mass. R. Civ. P. 12(b)(6) motion "provides sufficient protection against defendants in an abuse of process claim arising from a purely private grievance."¹⁵⁷ Thus, the court denied "petitioner" status to Adams, and consequently denied the special motion.¹⁵⁸

On appeal, the lower court's reasoning was declared erroneous under *Duracraft*, which held that "an issue of public concern [is] not a prerequisite for applying the anti-SLAPP statute."¹⁵⁹ The Appeals Court then had the arduous task of finally making the decision as to which party prevails between the moving party claiming to be engaged in "petitioning activity" and the non-moving party filing an abuse of process or malicious prosecution claim in response to the "petitioning activity."¹⁶⁰ The court managed to come up with an approach, albeit a highly tedious legal analysis, to help resolve the dilemma.¹⁶¹

¹⁵² *Id.*

¹⁵³ *Id.* (recalling the traditional policies that give rise to anti-SLAPP legislation, and denying the special motion as both inapplicable to this private complaint and as procedurally unfair to the party alleging an abuse of process tort claim).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Adams v. Whitman*, 822 N.E.2d 727, 729 (Mass. App. Ct. 2005) (citing *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 941 (Mass. 1998)).

¹⁶⁰ *Adams*, 822 N.E.2d at 852. That is, the Appeals Court needed to determine if the Ms. Industriouses and McLarnons of the world have any possibility of overcoming the special motion to dismiss with an abuse of process or malicious prosecution claim.

¹⁶¹ *Id.* at 733 n.9. The court adhered to the "rule of statutory construction that '[a] statute is not to be interpreted as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed.'" *Id.* (citing *Queler v. Skowron*, 780 N.E.2d 71, 77 (Mass. 2002)).

The Appeals Court first established that “[i]t is immaterial to an abuse of process claim that the process was properly issued, that it was obtained in connection with a proceeding brought with probable cause, or that the proceeding terminated in favor of its proponent.”¹⁶² It follows then, a fortiori, that subjecting an abuse of process claim to the analysis of whether the petitioning activity has merit is futile; the abuse of process claim is necessarily dismissed in every encounter it has with the special motion.¹⁶³ To avoid preclusion, the court recommends using only the “first test in the special motion protocol:” determine whether a claim is solely “based on” the petitioning activity, as opposed to alleging “conduct on the part of the special movant, beyond the petitioning activity.”¹⁶⁴

Thus, even if the moving party’s claim is “based on” the non-moving party’s petitioning activities (as inevitably it would be in an abuse of process claim), it might also have a “substantial basis.”¹⁶⁵ This language reflects the SJC’s opinion in *Fabre*, where the court held that “[a] special motion to dismiss will not succeed against a ‘meritorious claim[]’ with a substantial basis other than or in addition to the petitioning activities implicated.”¹⁶⁶

In *Whitman*, the court inquired as to whether Whitman had a “substantial basis” for his abuse of process claim.¹⁶⁷ Upon finding that Adams’ negligence claim alone could not “provide the legal basis for a trier of fact to sustain an abuse of process claim,” the court determined that Whitman’s abuse of process claim was solely “‘based on’ [Adams’] petitioning activity of filing suit and had no other basis (such as an actionable misuse of that process). The case would be different if [Adams’] negligence claim alone provided viable grounds for an abuse of process claim.”¹⁶⁸

¹⁶² *Id.* at 730 (citing *Gutierrez v. Mass. Bay Transp. Auth.*, 772 N.E.2d 552,563 (Mass. 2002)).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 731 n.6.

¹⁶⁵ Despite the fact that the statute’s current language still specifies that a moving party must show a petition is “devoid of fact,” courts permit a non-moving party’s claim to survive a special motion to dismiss when it has a “substantial basis.” See *In the Matter of the Discipline of an Attorney*, 815 N.E.2d 1072, 1082-83 (Mass. 2004) (denying the special motion to a lawyer who claimed the bar counsel was sanctioning him for his “petitioning activity” because the bar counsel had a “substantial basis” for bringing disciplinary action against him for his unethical conduct); *Taylor v. Armour*, No. 040344, 2005 Mass. Super. LEXIS 228, at *4-*5 (Mar. 10, 2005) (granting a special motion when defendants “provided no ‘substantial basis’ other than the plaintiff’s complaint for their counterclaims”). The “substantial basis” inquiry was foreshadowed in *Duracraft*. See *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 n.18, 944 (Mass. 1998).

¹⁶⁶ *Fabre v. Walton*, 781 N.E.2d 780, 785 (Mass. 2002) (quoting *Duracraft*, 691 N.E.2d at 943) (holding that there was “no ‘substantial basis’ for the [abuse of process] claim other than [the] petitioning activity”). See *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 757 (Mass. 2002) (quoting *Fabre*, 781 N.E.2d at 785) (where “the only conduct complained of is petitioning activity, then there can be no other ‘substantial basis’ for the claim”).

¹⁶⁷ *Adams v. Whitman*, 822 N.E.2d 727, 730-31 (Mass. App. Ct. 2005).

¹⁶⁸ *Id.* at 733. Sometimes “initiating process can simultaneously constitute abuse of that process.” *Id.* at 732 (citing a number of cases where “initiating the process alone [was] so

Therefore, the Appeals Court reversed the Superior Court and upheld the dismissal of the abuse of process counterclaim under the anti-SLAPP statute.¹⁶⁹ As a lesson to future litigants and judges, the court held that

the key to survival of a party's abuse of process claim seems to be whether the party relies on some other conduct by the special movant, apart from merely obtaining the process, that amounted to an affirmative, subsequent misuse of the process to further the special movant's alleged ulterior purpose.¹⁷⁰

While the Appeals Court in *Adams v. Whitman* used creative statutory interpretation to decide whether to grant the special motion, the Superior Court in *Adams v. Price* avoided such complicated analysis by concluding that the claims did not implicate public concerns and denying the special motion on that ground.¹⁷¹ Inserting a "public interest" requirement was an easy, although obviously legally incorrect, way to decide the case.¹⁷² Importantly, both the trial court and Appeals Court recognized that the lack of a public interest requirement causes the special motion to conflict with traditional common law procedure.¹⁷³ The Appeals Court noted,

[b]y interpreting the reach of the [anti-SLAPP] statute to include litigants whose private interests were equally at stake . . . the [SJC] reserved for future resolution the potential conflicts between the statute and accepted common-

coercive and promoting of an ulterior advantage that it supports an abuse of process claim").

¹⁶⁹ *Id.* at 733-34.

¹⁷⁰ *Id.* at 731 (citations omitted). For a brief synopsis of *Adams* and an explanation of its implications, see generally Charles P. Kindregan, Looney & Grossman LLP, The Anti-SLAPP Statute: Painful Medicine For Those Who Are Not Careful, <http://www.lglp.com/Database/cpkalertapril2005-anti-slapp.pdf> (last visited Mar. 1, 2006). Interestingly, only one subsequent lower court decision has closely followed the Appeals Court's analysis in *Adams* by addressing (and ultimately acknowledging) the merits of an abuse of process claim that encountered a special motion. See, e.g., *Katz v. Carriage Hill*, 20 Mass. L. Rptr. 29, 31 (Mass. Super. Ct. 2005) (denying a special motion to dismiss an abuse of process claim under *Adams* analysis). Because the SJC has yet to weigh in on the issue (and judges are therefore not bound by the *Adams* analysis), other lower court decisions have, ad hoc, resorted to evaluating the strength of the evidence (or "substantial basis") presented in support of either of the two tort claims facing a special motion; unsurprisingly, these courts have ultimately dismissed the claims under the special motion in every instance. See *Lepore v. LaFauci*, 2006 Mass. Super. LEXIS 141, at *5 (Mass. Super. Ct. Mar. 10, 2006) (granting a special motion to dismiss an abuse of process claim under *Adams* analysis); *O'Connell v. Stover*, 20 Mass. L. Rptr. 267 (Mass. Super. Ct. 2005) (granting a special motion to dismiss a malicious prosecution claim under *Adams* analysis); *Clift & Hensler, Inc. v. Marks*, 19 Mass. L. Rptr. 392 (Mass. Super. Ct. 2005) (granting a special motion to dismiss both an abuse of process and malicious prosecution claim under *Adams* analysis).

¹⁷¹ See *supra* notes 153-58 and accompanying text.

¹⁷² See *supra* note 159 and accompanying text.

¹⁷³ See *Adams v. Price*, 14 Mass. L. Rptr. 633, 634 (Mass. Super. Ct. 2002).

law principles.¹⁷⁴

The Superior Court reasoned in *Price* that special motions based on purely private issues should be denied, because without the “crucial element of public concern, the [moving party’s] assertion [that the non-moving party’s] counterclaim is a prohibited SLAPP suit adds procedural hurdles which would operate to destroy abuse of process as an independent tort.”¹⁷⁵ The Appeals Court evidently found a way to preserve abuse of process and malicious prosecution claims by avoiding the “meritlessness” analysis in the second part of the statute, but it remains to be seen whether future courts, particularly the SJC, will evaluate these claims in a similar manner or find other innovative ways to resolve the dilemma.

IV. REMEDIES FOR LESSENING THE DISPLACEMENT OF CIVIL PRACTICE AND PROCEDURE

A. Changing the Procedure: The Legislative Response

Massachusetts state senator Pamela P. Resor introduced Bill No. 1038, entitled “An Act to Strengthen the Protection of the Massachusetts ‘anti-SLAPP’ Statute,” on February 28, 2005.¹⁷⁶ The Legislature seems to be responding to criticism made by the former Governor of Massachusetts at the time the bill was drafted: “The bill . . . sets up a special rule of law and a special procedure different than that in effect for any other type of litigation . . . [and] would not only shift the normal burden of proof, but erect a nearly insurmountable barrier to a suit.”¹⁷⁷

The amended version of the statute includes the same set of burdens as the original, but also includes the option for the non-moving party to show that its claim against the moving party has a “substantial basis other than or in addition to the moving party’s . . . petition.”¹⁷⁸ The revised statute permits a non-moving party

¹⁷⁴ *Adams*, 822 N.E.2d at 729.

¹⁷⁵ *Adams*, 14 Mass. L. Rptr. at 634.

¹⁷⁶ S.B. 1038, 184th Gen. Ct. (Mass. 2005), available at <http://www.mass.gov/legis/bills/senate/st01/st01038.htm> (last visited Jan. 25, 2007) [hereinafter “Proposed Amendment”]. After a hearing before the Judiciary Committee on February 28, 2005, the Committee sent the Proposed Amendment to “study” on July 10, 2006. Telephone Interview with Shannon Ames, Legislative Aide to Senator Pamela Resor, in Boston, Mass. (Feb. 16, 2007).

¹⁷⁷ *Baker v. Parsons*, 750 N.E.2d 953, 961 n.17 (Mass. 2001) (quoting 1994 House Doc. No. 5604).

¹⁷⁸ Mass. S.B. 1038, § 1. The Proposed Amendment states:

The court shall grant such special motion, if the party making the special motion demonstrates that the claims against it arise from it’s exercise of the right to petition unless the party against whom such special motion is made shows either that: (1) the claims against the moving party are based on a substantial basis or other than or in addition to the exercise of the moving parties constitutionally protected right to petition or (2) (a) that the moving party’s exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (b) the moving party’s acts

to be able to show that his own claim has merit, *even if* the claim is “based on” the moving party’s “petition.”¹⁷⁹ However, the amended statute merely reflects what the Massachusetts courts have already implemented in their analysis of whether a claim is “based on” a petitioning activity.¹⁸⁰

Specifically, the amended statute reflects the courts’ decisions to equalize the burden between the moving and non-moving parties, as in *Baker*,¹⁸¹ and the need to separate a party’s conduct from the motive behind the conduct, as in *Whitman*.¹⁸² The non-moving party’s newfound ability to show a “substantial basis” for its own claim as an alternative to showing that the moving party’s claim is “devoid of fact” would clearly lessen the non-moving party’s burden and more closely resemble the burden imposed in other states.¹⁸³

If passed, the amendment will further require the courts to determine what satisfies the “substantial basis” test and if this alternative burden of proof adequately accommodates abuse of process and malicious prosecution claims. In this regard, Massachusetts courts can look to the New York courts’ interpretation of a similar provision of their state’s anti-SLAPP statute.¹⁸⁴ New York case law suggests that the “substantial basis” test will permit the Massachusetts courts to evaluate the merits of those particular tort claims by determining if the parties satisfied the elemental criteria of these claims as opposed to basing their merit on the merit of the petitioning activities.¹⁸⁵

Although the alternative burden of proof might lessen the disruption to traditional civil procedure, the Massachusetts Senate Bill No. 1038 does not address the fundamental problem that creates much judicial uncertainty in

caused actual injury to the responding party.

Id. Note that the bill would also amend other provisions of the anti-SLAPP statute, including the addition of more specific requirements for awarding attorney’s fees and costs. *See id.* § 2.

¹⁷⁹ *See id.* § 1.

¹⁸⁰ *See, e.g., Baker*, 750 N.E.2d at 961-62; *Adams*, 14 Mass. L. Rptr. at 634.

¹⁸¹ *See supra* notes 77-81 and accompanying text.

¹⁸² *See supra* notes 167-70 and accompanying text.

¹⁸³ *See Baker*, 750 N.E.2d at 962 n.19 (citing the burdens placed on non-moving parties in the anti-SLAPP statutes of fourteen other states). Recall that the *Duracraft* court adopted the substantial basis test when defining which claim should be excluded as not being “based on” petitioning activity. *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998).

¹⁸⁴ *See Duracraft*, 691 N.E.2d at 943 n.18. New York’s anti-SLAPP statute “grants motions to dismiss SLAPP suits, ‘unless the party responding to the motion demonstrates that the cause of action has a *substantial basis* in law or is supported by a substantial argument for an extension, modification or reversal of existing law.’” (emphasis added). *Id.* (quoting N.Y. C.P.L.R. § 3211(g) (McKinney Supp. 1997)).

¹⁸⁵ *See, e.g., Niagara Mohawk Power Corp. v. Testone*, 272 A.D.2d 910, 913 (N.Y. App. Div. 2000) (holding that “the proposed counterclaims [of malicious prosecution and abuse of process] fail to allege interference . . . through the use of a provisional remedy, a necessary element of causes of action for both [claims]”).

adjudicating the special motion: the statute's broad definition of "petitioning activity." By not narrowing this definition, too many defendants will still qualify as "petitioners" for the purposes of filing a special motion. While the amended statute might effectively curb "sham" petitions, the statute does not discern which types of petitioning activities render a party eligible to use the special motion.

B. Curbing the Use of the Special Motion: Narrowing "Petitioning Activity"

The Massachusetts Legislature should consider the type of party entitled to file the special motion under the anti-SLAPP statute. In a classic SLAPP suit that implicates the public interest, the anti-SLAPP statute enhances the legal system's receptivity to "petitions" by quickly suppressing retaliatory tort claims that merely seek to thwart the right to petition the government for grievances. However, when a legal dispute does not directly implicate the public interest, the Legislature has fewer reasons to presume that a petitioner requires the special motion to forego the traditional methods of disposing with claims—the motion to dismiss and the motion for summary judgment—and their accompanying burdens of proof.

As the *Duracraft* Court noted, the statute's legislative history forecloses a proactive judicial interpretation to limit the special motion to protect only parties in cases involving public concerns, revealing the Legislature's specific intent to create a broadly applicable statute.¹⁸⁶ If the Massachusetts legislature wanted the special motion to apply only to "public interest" claims, it could have included that requirement in the statute.¹⁸⁷ The Legislature, however, intentionally and specifically struck the phrase from the Senate version of the Bill, which read "be connected with matters of public concern" so as to enact very broad protection for petitioning activities.¹⁸⁸ The statute was passed over the veto of former Governor William Weld, who also criticized the Bill for its burden allocation and disapproved of the bill applying "to a broad group of potential claims, sweeping in cases that are far beyond the types of lawsuits which the bill's proponents wish to control."¹⁸⁹

An inherent tension exists between the Legislature's duty to produce effective

¹⁸⁶ *Duracraft*, 691 N.E.2d at 940. In light of the *Duracraft* opinion, subsequent courts have emphasized in their holdings that the language of the anti-SLAPP statute should be strictly adhered to. See, e.g., *Kobrin v. Gastfriend*, 821 N.E.2d 60, 72-73 (Mass. 2005) (Sosman, J., dissenting) (stating that "[g]iven the attention that was paid to the [definition of petition] at the time of [the statute's] enactment, we should be even more inclined to interpret the definitions consistent with their literal wording—their breadth is not some drafting error that we need to correct to make the statute comport with the Legislature's ostensible intent").

¹⁸⁷ See, e.g., GA. CODE ANN. § 9-11-11.1(b) (2002) (Georgia's anti-SLAPP statute) (requiring that a petition must be "in connection with an issue of public interest or concern."). See generally First Amendment Center, *supra* note 5.

¹⁸⁸ *McLarnon v. Jokisch*, 727 N.E.2d 813, 816-17 (Mass. 2000) (citing *Duracraft*, 691 N.E.2d at 941).

¹⁸⁹ 1994 House Doc. No. 5604, quoted in *Duracraft*, 691 N.E.2d at 941.

legislation and the reliance upon courts to resolve its ambiguities. Thus, while judges recognize the benefits of a statutory interpretation which limits the special motion to cases encompassing a public interest, the SJC has refused to “reinsert the rejected condition that the moving party’s activity must involve a matter of public concern.”¹⁹⁰ The SJC reasons that “[c]ourts are not free to read unwarranted meanings into an unambiguous statute even to support a supposedly desirable policy not effectuated by the act as written.”¹⁹¹

Despite contradictory legislative intent, the legislation was given the “anti-SLAPP” title, and according to the widely-accepted SLAPP theory, the law should be understood as a safeguard to protect the public against those who seek to impede the right to petition the government for grievances.¹⁹² Yet, even if the Legislature were to include the phrase “in connection with a public concern,” distinguishing public from private disputes can be impracticable. As the *Duracraft* court acknowledged:

We recognize that distinguishing matters of public from matters of private concern is not always clear-cut. Such a consideration is reflected in Justice Thurgood Marshall’s objection to creating a conditional constitutional privilege for defamation published in connection with an event that is found to be of “public or general concern”: “assuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject,” even though courts “are not anointed with any extraordinary prescience.”¹⁹³

Interestingly, the federal courts have confronted an analogous problem in defining “public concern.”¹⁹⁴ Under federal law, government employees retain a right to speak freely and openly, but only when commenting on matters of public concern.¹⁹⁵ In addition to state constitutional provisions that support anti-SLAPP

¹⁹⁰ *Duracraft*, 691 N.E.2d at 941 (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 678 N.E.2d 1196, 1201 (Mass. App. Ct. 1997)).

¹⁹¹ *Kobrin v. Gastfriend*, 821 N.E.2d 60, 72 (Mass. 2005) (Sosman, J., dissenting) (quoting 2a N.J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:1, 129 (6th ed. 2000)).

¹⁹² See *supra* note 11 and accompanying text. Perhaps the Massachusetts legislature should have simply labeled 59H differently (i.e. “Special Motion to Dismiss Frivolous Claims”), so that the law could have applied like an anti-SLAPP statute, but without any preconceived expectations. *E.g.*, 12 OKLA. STAT. § 1443.1 (2004). “While [the Oklahoma] statute is not explicitly an anti-SLAPP statute, it does exempt from prosecution a wide range of communications made in a ‘proceeding authorized by law’ which can be applicable in an anti-SLAPP case.” First Amendment Center, *supra* note 5.

¹⁹³ *Duracraft*, 691 N.E.2d at 941 n.14 (citing *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)).

¹⁹⁴ See, *e.g.*, *Rankin v. McPherson*, 483 U.S. 378 (1987); *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979); *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412 (7th Cir. 1988); *Scott v. Goodman*, 961 F. Supp. 424 (E.D.N.Y. 1996).

¹⁹⁵ *Rankin*, 483 U.S. at 384 (1987) (quoting *Connick v. Myers*, 461 U.S. 138, 140 (1983)).

legislation, “the First Amendment protects [a public employee’s] right to bring a lawsuit based on matters of public concern”¹⁹⁶ and also protects them against a retaliatory suit.¹⁹⁷ The Supreme Court has not yet ruled on the issue, and the circuit courts are split as to “whether the subject matter of the employee’s lawsuit itself must undergo the public-concern analysis” [or if] “the filing of a civil rights lawsuit is *per se* a matter of public concern.”¹⁹⁸

While the federal courts’ interpretation of federal law¹⁹⁹ has no binding effect upon a state court’s interpretation of its own state law, the circuit court split does provide a useful foil for Massachusetts legislators and judges to consider in making a public-private distinction. Like the drafters of the Massachusetts statute, the Supreme Court has broadly defined “public concern” as “any matter of political, social, or other concern to the community.”²⁰⁰ To apply this vague standard when evaluating a government employee’s communications, the federal courts will consider “[t]he manner, time, and place of the employee’s expression.”²⁰¹ Analogously, the Massachusetts courts could consider the longevity of a dispute and the extent to which the surrounding community, as opposed to the individual parties, has been involved.²⁰²

The Massachusetts Legislature may have considered that making the distinction between public and private disputes is a more arduous and formidable task that,

¹⁹⁶ *Scott*, 961 F. Supp. at 436.

¹⁹⁷ *Smith*, 441 U.S. at 465.

¹⁹⁸ *Scott*, 961 F. Supp. at 437 (noting that the “subject matter of Scott’s threatened lawsuit was and is a matter of public concern,” and thus the Court “need not resolve the merits of a blanket rule”); compare *Greenwood v. Ross*, 778 F.2d 448, 450 (8th Cir. 1985) (holding that “the filing of an EEOC charge and a civil rights lawsuit are activities protected by the First Amendment”) with *Yarvin*, 840 F.2d at 420 (holding that “the First Amendment status of a lawsuit depends on the particulars of the suit rather than on the bare assertion that every lawsuit (or even just every discrimination suit) is a form of speech or petition encompassed by the amendment”) and *Rice v. Ohio Dep’t of Transp.*, 887 F.2d 716, 720 (6th Cir. 1989) (holding that “not every job-related grievance of a public employee is a matter of public concern”).

¹⁹⁹ The federal law being interpreted by the courts is 42 U.S.C. § 1983.

²⁰⁰ *Connick*, 461 U.S. at 146.

²⁰¹ *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

²⁰² New York law also provides a good starting definition of a public petition. The New York Legislature has stated:

[a]n action involving public petition and participation is an action . . . that is “brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission”[:] “Public applicant or permittee” shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

like evaluating primary and secondary motives of a party filing a suit, consumes unnecessary judicial resources. Also, parties with predominantly private interests can appear to pursue issues aside from their own by petitioning a government body, as opposed to taking an opponent directly to court.²⁰³ While acting in the “public interest” is a fluid concept, boundaries do and should exist.

VI. CONCLUSION

Criticism of anti-SLAPP statutes for imposing an increased burden of proof upon a party seeking to defeat a special motion is misplaced. The non-moving party should have a high burden to dismiss a special motion when the special motion is protecting a petitioning activity that is beneficial to society. Rather, an anti-SLAPP statute’s lack of a public interest requirement for the petitioner using the special motion is a shortcoming. Such a requirement would lead to more sparing use of the special motion and curtail the conflicts with pre-existing law.

Resolving the special motion’s problematic widespread application in Massachusetts requires additional legislative amendment and coordinated judicial interpretation. Because the legislative history weighs against reading a public interest requirement into the statute, the SJC will wait for the Legislature to amend the statute to include a public concern requirement before considering any rule to distinguish public from private suits. Thus, the Legislature should further amend the statute to narrow the definition of “petitioning activity” to comport with the underlying policy behind the statute.²⁰⁴ With a narrower definition, courts can grant the special motion as a protective measure without allowing too many defendants to circumvent traditional methods of dispensing with claims.

This Note highlighted the importance of modifying the Massachusetts anti-SLAPP statute to comport with policy of many states to protect petitions filed in the public interest. As the Legislature has taken longer than a decade to amend the law, the amended version is not likely to pass in the near future.²⁰⁵ Furthermore, because the amended version does not alleviate the problem of a broad definition of “petitioning activity,” courts will continue to face uncertainty as to how and when they should grant a special motion. More extensive amendments are therefore necessary to resolve the conflict between the Massachusetts anti-SLAPP statute and

²⁰³ See, e.g., *Adams v. Price*, 14 Mass. L. Rptr. 633, 634 (Mass. Super. Ct. 2002) (proposing that the moving party has not “framed an issue that implicates any public concern [but they could have] with [for example] allegations that the local Board of Health acted improperly”).

²⁰⁴ See, e.g., 10 DEL. CODE § 8136 (2004) (addressing “action[s] involving public petition and participation”); MINN. STAT. § 554.02 (2003) (addressing “an act of the moving party that involves public participation”); R.I. GEN. LAWS § 9-33-1 (2004) (addressing “citizens who have participated in matters of public concern”).

²⁰⁵ See S. 1038, 184th Sess. (Mass. 2005), available at <http://www.mass.gov/legis/bills/senate/st01/st01038.htm>. The bill remains under “study” and was not re-filed in the most recent 2007 session. Telephone Interview with Shannon Ames, Legislative Aide to Senator Pamela Resor, in Boston, Mass. (Feb. 16, 2007).

common law principles because, as one Massachusetts judge noted, “[i]f it doesn’t make sense, it can’t be the law.”²⁰⁶

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²⁰⁶ *Donovan v. Gardner*, 740 N.E.2d 639, 645 (Mass. App. Ct. 2000) (Brown, J., dissenting) (quoting Memorial of Justice Reuben Goodman, 16 Mass. App. Ct. 1111, 1125 (June 25, 1983)).