UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

3M COMPANY,	:	**Civil Action No. 1:11-CV-01527-RLW**
Plaintiff,	:	
- v -	:	**ORAL HEARING REQUESTED**
HARVEY BOULTER, PORTON CAPITAL TECHNOLOGY FUNDS, PORTON CAPITAL, INC., LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC and **DAVIS-BLOCK LLC,**	:	
Defendants.	:	

3M COMPANY'S MOTION TO STRIKE DEFENDANTS' SPECIAL MOTION TO DISMISS AND CROSS-MOTION FOR DISCOVERY AND CONTINUANCE

Plaintiff 3M Company, by and through undersigned counsel, respectfully moves this Court to strike the Special Motion to Dismiss filed by Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC (the "Davis Defendants"). In the alternative, Plaintiff respectfully requests that the Court permit Plaintiff to conduct discovery so that Plaintiff can adequately respond to the Davis Defendants' assertion that Plaintiff is not likely to succeed on the merits of its claims. The bases for this Motion are fully set forth in the Memorandum of Points and Authorities, which is incorporated by reference herein.

Respectfully submitted,

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October 31, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of October, 2011, I caused a true and correct copy of the foregoing 3M COMPANY'S MOTION TO STRIKE DEFENDANTS' SPECIAL MOTION TO DISMISS AND CROSS-MOTION FOR DISCOVERY AND CONTINUANCE to be served on counsel for Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC by filing an electronic copy of this Motion with the Court's ECF system, which will send notification of the filing to all counsel of record registered with that system.

/s/ David I. Ackerman

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Defendants.	:	

3M COMPANY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 3M COMPANY'S MOTION TO STRIKE DEFENDANTS' SPECIAL MOTION TO DISMISS AND CROSS-MOTION FOR DISCOVERY AND CONTINUANCE

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Plaintiff 3M Company ("3M") respectfully submits its Motion to Strike Defendants' Special Motion to Dismiss (the "Special Motion"), filed by Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC (together, "Davis" or "Defendants") and, in the alternative, its Cross-Motion for Discovery and Continuance of its time to respond to the Special Motion on the merits,[1] as follows:

I.

PRELIMINARY STATEMENT

Davis's Memorandum in Support of Special Motion To Dismiss ("Special Motion") is notable for its glaring lack of substance. Although its purple prose and factual liberties might be typical press kit fare, the Special Motion is simply wrong on the legal issues and misleading at best as to the allegations and facts actually before this Court.

This Court need not sift through Davis's retelling of the facts, however, but should instead strike the Special Motion because the enactment of the Anti-SLAPP Act of 2010 (the "Act") by the Council of the District of Columbia (the "Council") was *ultra vires* in the first instance. Moreover, even if the Council had the requisite authority to pass the Act, it cannot be enforced by a federal court sitting in diversity, such as this Court, because the Act's special motion procedure conflicts with the Federal Rules of Civil Procedure.

If, in the alternative, this Court does not strike the Special Motion, then 3M cannot adequately respond to Davis's contention that it is not likely to succeed on the merits of its claims without first being given the opportunity to obtain certain limited and specific discovery. No discovery whatsoever was conducted in this matter before the Special Motion was filed, and

[1] As of October 18, 2011, 3M has effected service on defendants Porton Capital Technology Funds and Porton Capital, Inc. 3M is informed by counsel for the remaining defendant, Harvey Boulter, that Boulter has not authorized counsel to accept service in this matter. 3M is effecting service on Boulter, who resides or has his principal place of business in a foreign country, pursuant to the Hague Convention and applicable law.

Davis refused 3M's request to agree to limited discovery without this Court's intervention.[2] This Court has frequently affirmed plaintiffs' rights to obtain adequate discovery before defending the merits of their claims against a dispositive motion. Other federal courts have also consistently held that discovery must be granted to parties responding to motions to dismiss under state anti-SLAPP laws, even where such laws purport to provide more restricted discovery rights for non-movants.[3]

II.

RELEVANT FACTUAL AND PROCEDURAL HISTORY[4]

3M is a global consumer products and technology company best known for its Scotch® Tape and Post-It® products.[5] The Porton Defendants[6] are investors that specialize in developing

[2] *See* Ex. A (letter from Raymond G. Mullady, Jr. to William A. Brewer III, dated October 11, 2001, refusing to provide requested discovery).

[3] *See infra* Section IV(B).

[4] Events relevant to 3M's action are still developing, and where possible, citations are to 3M's complaint. 3M also includes, however, citations to recent news articles that have published newly-discovered facts about the issues raised in this lawsuit, including public statements by relevant parties. This Court may take judicial notice of facts generally known that are reported in newspaper articles. *See CSX Transp. v.Williams*, 2005 U.S. Dist. LEXIS, * 2-3 (D.D.C. Apr. 22 2005) (taking judicial notice of testimony of U.S. government official quoted in *The Washington Post*); *see also The Washington Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991) (citing *Agee v. Muskie,*629 F.2d 80, 81 n. 1, 90 (D.C. Cir. 1980), *r'vd on other grounds*, *Haig v. Agee*, 453 U.S. 280 (1981) (taking judicial notice of facts published in newspaper). Even if this Court were to decline to take judicial notice of such facts, they are evidence supporting 3M's contention that it requires further discovery before it can respond to the Special Motion because, if true, the cited facts would contradict Defendants' claims that the defamatory statements and conduct identified in the Complaint were: (i) made solely in further of advocacy on issues of the public interest; (ii) substantially true; (iii) not made with actual malice; (iv) not intended to further an illegal act; and/or (iv) were otherwise privileged.

[5] Compl. ¶ 16.

[6] Herein, "Porton Defendants" means Harvey Boulter, Porton Capital Technology Funds, and Porton Capital, Inc. Boulter is the Chief Executive Officer of Porton Capital, Inc., and a director of Porton Capital Technology Funds. The Porton Defendants are foreign entities upon whom 3M has served process pursuant to the Hague Convention. However, counsel for the Porton Defendants has not yet entered an appearance in this case. 3M has also initiated service on Boulter in the U.K. through the Hague Convention.

certain technologies, one of which 3M purchased from them.[7] The Davis Defendants are purported legal, public relations, and lobbying specialists with their principal place of business in Washington, D.C.[8]

A. The Underlying Controversy: The Litigation In London

This litigation arises directly from an action originally brought by the Porton Defendants – except for Harvey Boulter ("Boulter") personally – and others (collectively the "Claimants") against 3M in the High Court of the United Kingdom ("U.K.") in London (the "London Litigation").[9] A bench trial in that action occurred in June and July 2011, and final arguments concluded on October 4, 2011.[10] The London Litigation arose from Claimants' disappointment that a medical diagnostic device it had sold to 3M did not generate the sales, and thereby the earn out payments, they had expected.[11] The device, BacLite, was a clinical test for a dangerous form of antibiotic-resistant bacteria called MRSA.[12] On February 14, 2007, Porton and its partners (one of whom, Ploughshare Innovations, Ltd. ("Ploughshare"), is a private company whose stock was ultimately by the U.K. government) sold to 3M their interests in the entity (called Acolyte) that created and owned BacLite, hoping that BacLite would fill a niche market between the fast-but-expensive molecular MRSA tests, and the slow-but-cheap culture-based ones.[13]

As is common for unproven devices like BacLite, 3M and Acolyte's shareholders (which included the Porton Defendants) agreed to a contingent "earn out" structure under which 3M

[7] Compl. ¶¶ 23, 36.

[8] *Id.* ¶¶ 8-10, 26.

[9] Compl. ¶ 55.

[10] *Id.* ¶ 56.

[11] *Id.*

[12] *Id.* ¶ 36.

[13] *Id.* ¶ 37.

made an up-front payment of approximately $17.5 million in cash and promised to pay the former Acolyte shareholders a contingent earn out payment for a period of time.[14] The actual amount of the earn out payment depended on BacLite's success in the marketplace, and the parties expressly agreed that it was not guaranteed.[15] This earn out structure would compensate the Porton Defendants (as former holders of 47.6% of the shares in Acolyte), but only *if* BacLite proved to be a success.[16] It was also intended to relieve 3M of having to speculate as to the appropriate price to pay for a new technology.[17]

3M was also required under the parties' agreement to "actively market" BacLite, and to diligently seek regulatory approval in the United States, Canada, and Australia.[18] However, as the Court in the London Litigation has already held, as a matter of fact and law, 3M had no obligation to improve the BacLite product.[19]

Although 3M devoted substantial resources to marketing BacLite, it proved to be a commercial disaster.[20] Prior to 3M's acquisition, Acolyte had secured a total of only three BacLite customers; after the acquisition, there were only six additional sales despite 3M's best efforts.[21] For example, 3M spent on BacLite, in the U.K. and European Union ("E.U.") during the first quarter of 2008, more than what 3M spent on all other commercial products in its

[14] *Id.* ¶ 39.

[15] *Id.*

[16] *Id.* ¶ 39.

[17] *Id.*

[18] *Id.* ¶¶ 39-40.

[19] *See* Ex. B (copy of Judgment issued by Mr. Justice David Steel in connection with the London Litigation).

[20] *Id.* ¶¶ 40-49.

[21] *See* Ex. C (excerpt of Witness Statement of Mark Whitworth, ¶70).

Medical Diagnostics Division, combined.[22] In fact, 3M spent an average of $800,000 per month on BacLite.[23] The company, however, still realized *only* $654,365 in net sales for all of 2008 in the U.K. and E.U. In the United States ("U.S."), the situation was even worse. BacLite failed nine clinical tests in connection with the FDA approval process and, consequently, netted no sales at all.[24] Although the parties dispute why the U.S. tests failed, the reality was that, even if it had obtained FDA approval, BacLite's middle-market niche had collapsed by the end of 2008.[25] The faster, and more elegant, molecular tests were getting cheaper, and the less expensive, but slower, chromogenic culture tests were getting faster.[26] In sum, the operating, financial, and performance characteristics of BacLite proved to make it more expensive and time-consuming for hospital customers to use than similar devices sold by 3M's competitors.[27]

Because there was no realistic hope in sight for BacLite's commercial success, pursuant to the parties' agreement 3M asked Porton and the other Acolyte shareholders for their consent to stop marketing BacLite.[28] As part of this request, 3M also offered to pay the former shareholders a sum that 3M believed was a reasonable estimate of the gross sales it expected

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[22] *See* Ex. C (excerpt of testimony given by Mark Whitworth on Day 14 of the London Litigation, 2186:3-16).

[23] *See* Ex. D, ¶¶ 23(i), 53(a) (excerpt of Re-Amended Defence of First Defendant and Defence of Second Defendant, submitted in connection with the London Litigation); Ex. E, ¶ 32E (excerpt of witness statement given by James Ingebrand); Ex. F, ¶¶ 144, 149 (excerpt of expert report of Brian Stammers, submitted in connection with the London Litigation).

[24] *See* Ex. G, ¶ 40 (excerpt of supplemental witness statement of Cassie Jacobson).

[25] Compl. ¶¶ 44, 46.

[26] *Id.*

[27] *Id.* ¶¶ 37, 43-49.

[28] *Id.* 47.

from BacLite through December 31, 2009, the end of the agreement's earn-out period.[29] The Porton Defendants were required by that agreement not to unreasonably withhold such consent.[30]

Unfortunately, instead of negotiating an end to the agreement, the former shareholders demanded that 3M pay them approximately $38 million, an amount far in excess of BacLite's true commercial value.[31] When 3M refused this exorbitant request, in December 2008 certain of the shareholders (the "Claimants") sued 3M in the U.K. High Court in London, seeking damages in excess of $50 million—a figure far divorced from the reality that few, if any, hospitals or other potential customers needed, wanted, or desired BacLite.[32]

The bench trial in the London Litigation took place in June and July, 2011, and closing arguments were conducted on September 29, October 3, and October 4, 2011.[33] The High Court indicated that it expects to deliver a detailed written decision in the London Litigation by early November 2011.

B. Defendants' Conceive A Multi-Pronged Conspiracy To Coerce 3M Into Making A Windfall Payment To Settle The London Litigation, Including: (1) Threats To Artificially Depress 3M's Stock Price; (2) A Public Smear Campaign; (3) Buying Access To British Officials In Order To Directly Interfere With 3M's Existing And Prospective Business with The U.K. Government; And (4) Overt Blackmail.

Even the limited facts that have recently emerged as a result of the public outcry and inquiry in the U.K. over Defendants' actions in connection with the London Litigation have helped shine a light on Defendants' truly malicious intentions toward 3M. Those facts,

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[29] *Id.*

[30] *Id.*

[31] *Id.*48.

[32] *Id.* ¶¶ 48, 54-55. At trial, 3M's experts "showed their work," and looking at actual market data and recorded sales estimated potential damages to be no more than approximately $1.7 million. *See* Ex. H, ¶¶ 23-27, 242, 273 (excerpt of 3M's Written Closing Submissions in the London Litigation); Ex. I, ¶¶ 369-70 (excerpt of Claimants' Written Closing Submissions in the London Litigation); Ex. F, ¶¶ 144, 149 (Expert Report of Brian Stammers, submitted in connection with the London Litigation).

[33] *Id.* ¶ 56.

combined with evidence obtained through discovery in this matter, will establish that Boulter and Davis joined forces to implement a multi-pronged conspiracy whose object was to coerce 3M into an unwarranted and unreasonable settlement of the London Litigation. Defendants' illegal scheme had four parts, often carried-out on parallel tracks: (i) threats to artificially depress 3M's stock price; (ii) a multimedia international smear campaign designed to falsely portray 3M as having put MRSA victims lives at risk by lying to the FDA; (iii) paying Tetra Strategy for access to high-level British officials in order to directly interfere with 3M's significant existing and prospective business relationships with the U.K. government, all of which were designed (iv) to put Defendants in a position to blackmail and intimidate 3M into settling the London Litigation on terms disproportionately advantageous to themselves.

1. Boulter orchestrates threats to 3M's stock price if the company refused to pay former Acolyte shareholders tens of millions of dollars.

When 3M first approached the former Acolyte shareholders for permission to stop marketing BacLite, Boulter immediately realized the tenuous nature of the former shareholders' position, given BacLite's commercial failure in the market.[34] Boulter was nevertheless determined to save face with his co-investors in Acolyte, many of whom he had brought to the table.[35] To that end, he enlisted outside help to exert pressure on 3M to pay out tens of millions of dollars to the former shareholders in return for their permission for 3M to stop selling BacLite.[36] Specifically, Boulter arranged for Robert Hamburger ("Hamburger"), one of Porton's agents, to send threatening e-mails to 3M's CEO, Buckley.[37]

[34] Compl. ¶¶ 50-53.

[35] *Id.*

[36] *Id.*

[37] *Id.*

In what we now know was the beginning of Defendants' extortion campaign, on August 30, 2008, Hamburger sent an e-mail to Buckley, which contained in its text a copy of an e-mail from Boulter to Hamburger.[38] The e-mail alleged that "one investor group" Boulter's investment fund, Porton Capital, Inc, "control[led] a very material position of 3M stock," which they estimated to be in the "high multiples" of $100 million.[39] It stated further that Hamburger and Boulter had "informed" these investors of 3M's proposal as to BacLite, and they had "taken a view that 3M is a dishonest party and have threatened to sell their entire position."[40]

Boulter and Hamburger then noted that the unnamed investors were "propping up various U.S. sectors right now," and could not be relied on to decide matters "in a western rational way," and that, as a result, the 3M's current situation could "get a lot worse rapidly" because "3M's actions [in discontinuing BacLite] have created one hell of a storm."[41] In no uncertain terms, Boulter and Hamburger were threatening Buckley with a massive sell-off of 3M's stock, likely to lead to a drop in its price, if 3M did not accede to the former shareholders' outrageous valuation of BacLite's commercial value through the end of 2009.

Later that same day, Boulter sent a second e-mail to Buckley reiterating his threat to use his fund's investors to trigger an artificial deflation in 3M's stock price.[42] In that e-mail, Boulter stated that it was "essential that 3M do nothing to further escalate this situation" because its actions has already "triggered a rather unexpected chain of events" because the investors were "understandably not very happy" and were "simple people of vast means."[43] Boulter ended by

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

exhorting Buckley to do something to "help me [Boulter] buy some time" with the investors and, thus, forestall the threatened stock sell-off.[44] 3M ignored these threats, but Boulter had demonstrated to 3M his preferred method of operation.

2. Davis joins Defendants' scheme to coerce 3M to capitulate to Claimants' unreasonable settlement demands in the London Litigation.

After Boulter's gambit with Hamburger failed, he decided to up the ante against 3M. In early 2010, Boulter hired Tetra Strategy—a British lobbying and public relations firm which describes itself as having expertise in "the process of exerting influence"—and began paying it £10,000 per month in connection with the London Litigation.[45] Tetra Strategy has publicly described its engagement as "provid[ing] litigation PR assistance to the Porton Group [the Boulter Defendants] in connection with its ongoing High Court claim in England against 3M [the London Litigation]"[46] Next, in late 2010 or early 2011, Boulter brought-on Davis, a self-proclaimed media relations specialist, to plan and implement the next two prongs of Defendants' tortious conspiracy.[47]

Specifically, beginning in early 2011, Boulter and Davis joined forces with Tetra Strategy to embark on a disparaging media blitz that spread deliberately false and defamatory statements about 3M's decision to cease marketing BacLite.[48] As discovery will prove, this campaign had nothing to do with advocacy on issues of public interest, but instead was crafted solely to advance Defendants' own commercial agenda of coercing 3M into a significant settlement in the

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[44] *Id.*

[45] Rupert Neate, The Guardian (Oct. 9, 2011), *Revealed: How Lobbyists Were Paid To Set Up Meeting With Fox*, http://www.guardian.co.uk/politics/2011/oct/09/liam-fox-meeting-lobbyists-werritty-boulter, a copy of which is attached at Ex. J-13; *see also* http://www.tetra-strategy.co.uk/about.

[46] *Id.*

[47] Compl. ¶ 57. At the time, Davis was a partner in McDermott, Will & Emery, LLP, the firm then heading Claimants' prosecution of the London Litigation.

[48] *Id.*

London Litigation. In addition, as shown below, in parallel with their defamation campaign and entirely unbeknownst to 3M, Boulter and Davis successfully put into motion a plan to directly interfere with 3M's significant existing and prospective business interests with the U.K. government, including the Ministry of Defence. They did so by "buying" access to high-level Ministry of Defence officials, including former U.K. Minister of Defense, Dr. Liam Fox ("Fox"), through Tetra Strategy.

3. Defendants' malicious and defamatory media campaign against 3M.

By March 2011, Defendants' defamatory media campaign was in full swing.[49] In numerous press releases, on websites, twitter feeds, blogs, and manufactured "news" articles, Davis and Boulter kept up a steady drumbeat of knowing lies, false innuendo, and half-truths about 3M—all designed to put 3M into a false and disparaging light in the public's eye.[50] They were assisted in this endeavor by Tetra Strategy, which is listed as a point of contact "for further information" on the press releases that Davis and Boulter published.[51]

For example, Boulter and Davis accused 3M of having lied to the FDA (a criminal act, if it were true) about a "secret report" that supposedly disclosed failures in 3M's clinical trial methods, even though they knew that 3M had never hidden any information from the FDA, and never had any obligation to provide the report—which Boulter, and possibly Davis, had already

[49] *Id.* ¶¶ 57-64.

[50] *Id.*

[51] *See* Lanny J. Davis, Reuters (May 10, 2011, 2:43 p.m.), *International Press Conference Advisory — Allegations Against 3M Corporation of Possible "Negligence and Recklessness" in Testing of Proven "Superbug"/Staph ("MRSA") Infection Detection Device — U.S. FDA Investigation and Public Hearings Sought*, http://www.reuters.com/article/2011/05/10/idUS224289+10-May-2011+PRN20110510 (listing Catherine Nicholls of Tetra Strategy as contact person), a copy of which is attached at Ex. J-1.

seen—to the FDA.[52] They also maliciously and falsely told the public that 3M had purchased Acolyte with the intention of abandoning BacLite in favor of another MRSA-related technology that 3M was developing.[53] They made these statements even though they knew that Claimants (including Boulter's companies) had already abandoned this claim in the London Litigation because discovery had proven it completely unsupported by the evidence.[54]

In an especially malicious and defamatory *per se* allegation, Davis and Boulter repeatedly and publicly asserted that 3M had endangered "thousands and thousands" of people by taking BacLite off the market, even though they knew that the reason BacLite was a commercial failure was the ready availability of other MRSA test that were preferred by all categories of potential clients for BacLite.[55] Davis, Boulter, and Tetra Strategy continued this cynical exploitation of legitimate MRSA victims by organizing public demonstrations in the U.S. and U.K. that were attended by individuals hired and paid by Defendants.[56]

Ploughshare, and its CEO Pete Hotten, were also enlisted by Davis and Boulter to participate in Defendants' defamatory media blitz. Ploughshare is a corporation owned entirely by the Ministry of Defence that works with private investors, like Porton Capital, to commercialize technologies originally developed by the ministry—in this case, BacLite. As Ploughshare claims on its website, it wields considerable "industry influence." Attempting to

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[52] *Id.* ¶ 62. Davis began his improper efforts to use the FDA to push his and Boulter's wrongful scheme on January 19, 2011, when he filed an Application in the United States District Court for the District of Maryland seeking document discovery from the FDA about BacLite's regulatory approval process, as well as the deposition testimony of FDA Commissioner Margaret Hamburg. *See* https://ecf.mdd.uscourts.gov/doc1/09313471946 [Doc. #1]. This request was immediately opposed by the FDA as baseless in both law and fact, and has gone nowhere. *See https://ecf.mdd.uscourts.gov/doc1/09313471946* [Doc. # 10].

[53] *Id.*¶ 58.

[54] *Id.* ¶¶ 60-62.

[55] *Id.* ¶¶ 57, 60.

[56] Compl. ¶ 64.

capitalize on this influence, and Ploughshare's status as a government-connected entity, Davis used Ploughshare to put the British government's imprimatur on their false and disparaging media campaign. Specifically, on March 11, 2011, Hotten agreed to Davis and Boulter's request to issue a public statement blaming 3M for mistakes that prevented BacLite from obtaining FDA approval. At a press conference later that same month, Davis used Hotten's statement as evidence that the "British government" was "angry with" 3M.[57]

A more detailed description of Davis and Boulter's knowing false and intentionally disparaging statements can be found in 3M's Complaint.[58] In addition, for the Court's convenience, an annotated summary of the myriad defamatory statements and actions made and taken by Defendants is detailed in Appendix A to this memorandum.

4. Defendants' initially covert scheme to tortiously interfere with 3M's significant business interests with the U.K. government by "buying" access to key British officials through Tetra Strategy.

At the same time that they were conducting a malicious and intentionally defamatory media campaign against 3M, Davis and Boulter were also—entirely without 3M's knowledge—embarking on an ambitious scheme to conspire with others to illegally interfere with 3M's existing and prospective business with the U.K. Government. As certain government and media investigations in the U.K., which were begun after 3M first brought its claims against Defendants, have now revealed—and discovery in this case will confirm—the lynchpin of this scheme was Davis's and Boulter's plan to "buy" access and influence with the highest levels of the British government through Tetra Strategy.

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[57] *See* Special Motion, Ex. 6.

[58] *See id.* ¶¶ 57-64.

[60] Rupert Neate, The Guardian (Oct. 9, 2011), *Revealed: How Lobbyists Were Paid To Set Up Meeting With Fox*, http://www.guardian.co.uk/politics/2011/oct/09/liam-fox-meeting-lobbyists-werritty-

Specifically, Davis and Boulter took full advantage of the £10,000 per month being paid to Tetra Strategy to enlist its help in their plan to blackmail and intimidate 3M into paying them a settlement in the London Litigation they knew was far in excess of what the actual merits of the case warranted.[60] Davis and Boulter knew that Tetra Strategy had an expertise in "influencing" government officials and action, and wanted its assistance in obtaining a private meeting with then Minister of Defence Fox.[61] Tetra Strategy did not disappoint, recommending that it arrange for Boulter to meet with Adam Werrity ("Werrity").[62] Emails reportedly seen by British newspaper *The Guardian* establish that Tetra Strategy began working to arrange a meeting between Boulter and Fox or Werrity as early as March 25, 2011.[63] Werrity is a close personal friend of Fox.[64] The two had been business associates prior to Fox's appointment as Defence Minister, and had even lived together for a period of time.[65] Although it was later revealed that Werrity had not been approved to act as an official adviser to Fox, he nevertheless distributed business cards describing himself as "Advisor to the Rt. Hon. Dr. Fox MP."[66]

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boulter ("Indeed, . . . Tetra introduced its client to Adam Werrity in March 2011 . . . . The purpose of the introduction was to brief the MoD on the litigation."), a copy of which is attached at Ex. J-13.

[61] *Id.*; *see also* http://www.tetra-strategy.co.uk/about ("Tetra Strategy — Bringing the Science of influence and opinion to the Art of strategic communications.").

[62] Rupert Neate, The Guardian (Oct. 9, 2011), *Revealed: How Lobbyists Were Paid To Set Up Meeting With Fox*, http://www.guardian.co.uk/politics/2011/oct/09/liam-fox-meeting-lobbyists-werritty-boulter ("Indeed, . . . Tetra introduced its client to Adam Werrity in March 2011 . . . . The purpose of the introduction was to brief the MoD on the litigation."), a copy of which is attached at Ex. J-13.

[63] Rupert Neate, The Guardian (Oct. 8, 2011), *Emails and Video Footage Pile Pressure on Beleaguered Liam Fox*, http://www.guardian.co.uk/politics/2011/oct/08/ emails-video-footage-liam-fox, a copy of which is attached at Ex. J-11.

[64] Rupert Neate, The Guardian (Aug. 18, 2011), *Liam Fox's Friend Set Up Crucial Legal Meeting*, http://www.guardian.co.uk/politics/2011/aug/18/ liam-fox-friend-set-up-crucial-legal-talks, a copy of which is attached at Ex. J-5.

[65] *Id.*

[66] *Id.*

There is no doubt that Tetra Strategy introduced Boulter to Werrity so that Boulter could gain private access to Fox. Boulter himself has admitted as much, stating:

> Tetra suggested a meeting with Adam Werrity because he was an adviser to Mr. Fox . . . It was: meet the adviser. If you get through the adviser, you get to see the boss . . . .[67]

The connection was finally made in early April 2011, when Boulter and Werrity exchanged e-mails about the London Litigation.[68] In those communications, Werrity told Boulter that he would "push along as discussed" Boulter's issue and that Werrity hoped Fox would "want to make an issue out of this."[69]

Davis, Boulter, and Tetra Strategy's efforts finally paid-off on June 16, 2011, when Fox and Werrity met with Boulter at a restaurant in the Shangri-La Hotel in Dubai.[70] It was disclosed by the Ministry of Defence that "no government officials were present at the 16 June meeting and no minutes were taken, which is against protocol."[71]

5. Defendants implement the next phase of their illegal conspiracy—blackmail and intimidation.

Boulter's private, off-the-record meeting with Fox finally allowed Defendants' to implement the next phase of their wrongful scheme to force 3M into settling the London Litigation for tens of millions dollars more than they knew it was actually worth. Almost

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[67] Oliver Wright, Independent (Oct. 8, 2011), *Fox Feels Heat As New Claim Casts Doubt On MoD Denial*, http://www.independent.co.uk/news/uk/politics/fox-feels-heat-as-new-claim-casts-doubt-on-mod-denial-2367349.html, a copy of which is attached at Ex. J-8.

[68] Rupert Neate, The Guardian (Oct. 9, 2011), *Revealed: How Lobbyists Were Paid To Set Up Meeting With Fox*, http://www.guardian.co.uk/politics/2011/oct/09/liam-fox-meeting-lobbyists-werritty-boulter, a copy of which is attached at Ex. J-13.

[69] *Id.*

[70] Rupert Neate, The Guardian (June 27, 2011), *Government Weighs Into "Blackmail" Row Over 3M and MRSA Test*, http://www.guardian.co.uk/business/2011/jun/27/ government-3m-blackmail-row-mrsa, a copy of which is attached at Ex. J-3.

[71] James Kirkup, Telegraph (Oct. 9, 2011), *Liam Fox on Adam Werritty: I Was Wrong and I Am Sorry*, http://blogs.telegraph.co.uk/news/jameskirkup/100109702/liam-fox-on-adam-werritty-i-was-wrong - and-i-am-sorry, a copy of which is attached at Ex. J-12.

immediately after the meeting, Davis, Boulter, and others put their illegal intimidation scheme against 3M into motion. First, 3M's legal counsel received a call from Davis on June 17, 2011, followed immediately by an e-mail, addressed to both 3M's counsel and Boulter, purporting to grant Davis's "permission" for counsel to speak directly to Boulter.[72] In that e-mail, Davis opines to Boulter that, "I know your meeting with UK Minister of Defense Dr Liam Fox has given you even stronger reason not to come down very [sic] in $34m position."[73]

Shortly thereafter, on that same date, Boulter called 3M's attorney.[74] During the conversation, Boulter stated that he was authorized to speak on behalf of all of the U.K. Claimants, including Ploughshare.[75] He also mentioned his Dubai meeting with Fox, and alleged that Fox had authorized him to speak on behalf of the Ministry of Defence.[76] Boulter then told 3M's counsel there would be "consequences" if 3M did not immediately settle the London Litigation, that Fox had indicated there would also be repercussions for Buckley's knighthood.[77] The conversation, however, ended abruptly because of a lack of cell service – before 3M's attorney was able to respond.[78]

As a result, Boulter followed-up with two e-mails, sent on June 18 and 19, 2011.[79] These communications unambiguously and directly threatened interference with 3M's business interests in the U.K. unless 3M paid Porton $30 million or more, ostensibly in settlement of the

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[72] Compl. ¶¶ 71-73; Rupert Neate, The Guardian (Oct. 9, 2011), *Revealed: How Lobbyists Were Paid To Set Up Meeting With Fox*, http://www.guardian.co.uk/politics/2011/oct/09/liam-fox-meeting-lobbyists-werritty-boulter, a copy of which is attached at Ex. J-13.

[73] Compl. ¶ 68; Ex. A.

[74] *Id.* ¶¶ 69-70.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

London Litigation.[80] In the mistaken belief that it would intimidate 3M's Chairman and CEO, Boulter also threatened Buckley's pending investiture as a Knight Bachelor by the Her Majesty Queen Elizabeth.[81] Specifically, Boulter declared in his e-mail of June 18th that:

> [A]s a result of my meeting today [with Fox] you ought to understand that [U.K. Prime Minister] David Cameron's Cabinet might very shortly be discussing the rather embarrassing situation of George's knighthood. It was discussed today. Governments are big and sometimes decisions in one part are not well coordinated.[82]

Boulter also demanded a settlement of the London Litigation of "$30 mn+."[83] At the same, Boulter conceded that this figure had no basis in the actual merits of the case, noting that it had "little to do with the case in the Court," but was instead "about losing face." He added that "[f]rom my side . . . whether this is $5mn or $35mn it is small beer. We manage $700mn and many of our investors call $5mn a rounding error."

Boulter then expressly articulated his threats to 3M's business interests with the British government.[84] Noting first that he was "being asked, and [had] been given the sole authority by the [British Ministry of Defence] to settle on behalf of them," he stated that "I had 45 minutes with Dr. Liam Fox, the British Defence Minister on our current favourite topic." Boulter then claimed that, while 3M might prevail on the merits in the London litigation, it will have won the battle, but lost the war, because the Ministry of Defence would likely react by taking steps to deprive 3M of its ability to pursue its business interests with the U.K. government. Specifically, Boulter asserted that 3M's trial victory in the London Litigation "might leave [the British government] quietly seething, with ramifications for a while – they have memories like

[80] *Id.* Compl. ¶¶ 71-75.

[81] Compl. ¶¶ 71-75.

[82] *Id.*

[83] *Id.*

[84] *Id.*

elephants." On the other hand, if 3M were to settle the case for "$30mn+ you will allow [the MoD] to internally save face."

Boulter imbued his threats with a sense of urgency, noting that "[f]rom next week [M]onday there are politics that will likely remove any further chance of settlement."[85] He underscored this urgency in a follow-up e-mail to 3M's counsel on June 19, 2011.[86] In that communication, Boulter pressed 3M for immediate capitulation to Defendants' demands that very day, claiming that he needed to "tell something to Dr. Fox's office on Sunday night."[87] He also again warned 3M of the "political consequences" that would occur beginning Monday. In addition, he warned against not responding — or as he put it, giving "a 'radio silence' message" — because Dr. Fox "is the Secretary of Defence and will not expect that."[88]

It is apparent from this record, and discovery will confirm, that Davis set up the communications between 3M's counsel and Boulter expressly so that Boulter could deliver his threats to 3M's business interests in the U.K. and Buckley's knighthood. Given Davis's express reference to the meeting in his e-mail to 3M's counsel of June 18, 2011, it is equally apparent that Davis and Boulter had discussed both what transpired at Boulter's meeting with Fox, and what Boulter would say about that meeting to 3M's attorney. The timing of the communications, on the eve of trial in the London Litigation, speaks volumes. Davis and Boulter knew that there was no chance that the High Court would award Claimants anything near the over $30 million return on investment that Boulter had promised both Acolyte's former shareholders and his own

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

investors in Porton Capital. Accordingly, Davis and Boulter decided to extort that amount out of 3M through blackmail and illegal intimidation.

C. The U.K. Parliament Investigates, And Fox Resigns.

Davis asserts in the Special Motion that the notion that he, Boulter, or the other Defendants could conspire to influence the British officials to coerce 3M into a settlement by threatening 3M's business relationships with the U.K. government is "ridiculous on its face."[89] However, recent public disclosures that have been widely reported in the U.K. establish—and discovery in this matter will confirm—that that is exactly what Defendants did.

After 3M filed its original action in New York on June 19, 2011, the Ministry of Defence refused either to confirm or deny news inquiries about whether Fox had met with Boulter on June 17, 2011, then subsequently denied the London Litigation had been discussed at the meeting.[90] It later, however, reversed course, and admitted that Boulter and Fox had discussed the London Litigation, but denied that Buckley's knighthood had been discussed.[91]

In light of this fact, and other revelations about the professional relationship between Werrity to Fox, Parliament insisted on a formal inquiry,[92] and the Ministry of Defence's most senior official below Fox was tasked with conducting it.[93] Shortly thereafter Fox told a BBC

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[89] Special Motion at 38.

[90] Rupert Neate, The Guardian (June 20, 2011), *3M Countersues as MRSA Row Becomes Toxic*, http://www.guardian.co.uk/society/2011/jun/20/3m-countersues-mrsa-superbug-row, attached at Ex. J-2; Rupert Neate, The Guardian (June 27, 2011), *Government Weighs Into "Blackmail" Row Over 3M and MRSA Test*, http://www.guardian.co.uk/business/2011/jun/27/government-3m-blackmail-row-mrsa, a copy of which is attached at Ex. J-3.

[91] Jonathan Russell, Telegraph (Aug. 9, 2011, 5:45 a.m.), *Liam Fox Denies Involvement In Dispute Between 3M and Porton Capital*, http://www.telegraph.co.uk/finance/8689691/Liam-Fox-denies-involvement-in-dispute-between-3M-and-Porton-Capital.html, a copy of which is attached at Ex. J-4.

[92] Rupert Neate, The Guardian (Oct. 7, 2011), *Liam Fox, His Adviser, And An Irregular Meeting In Dubai*, http://www.guardian.co.uk/politics/2011/oct/07/liam-fox-adviser-meeting-dubai, a copy of which is attached at Ex. J-6.

[93] *Id.*

interviewer that his meeting with Boulter in Dubai was a chance event, which occurred when he and Boulter happened to be sitting at nearby restaurant tables.[94] That assertion, however, was immediately challenged by Boulter, who said:

> The fact that a meeting was going to happen was pre-arranged in April. A meeting with the MoD doesn't happen by chance. I'm sure I wouldn't have just got to meet him [Fox] unless I'd been pre-briefed.[95]

After that statement, Fox again flipped-flopped, telling the U.K. House of Commons that, "With respect to my meeting with Mr. Boulter in Dubai in June 2011, I accept that it was wrong to meet with a commercial supplier without the presence of an official."[96]

On October 14, 2011, as a result of the "influence peddling scandal" that had arisen when 3M's lawsuit had revealed that Boulter had met Fox in Dubai and based his extortion demands to 3M on the discussions held at that meeting, Fox was forced to resign as U.K. Minister of Defence.[97] In the days since Fox's resignation, Boulter has been attempting to revise history in an effort to obfuscate his role in this scandal. For example, Boulter recently stated, contrary to his e-mails to 3M's attorney, that he did not discuss Buckley's knighthood during his meeting

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[94] Rupert Neate, The Guardian (Oct. 8, 2011), *Businessman Met Fox's Friend Two Months Before "Chance" Dubai Meeting*, http://www.guardian.co.uk/politics/2011/oct/08/liam-fox-dubai-meeting-chance, a copy of which is attached at Ex. J-9.

[95] Rupert Neate, The Guardian (Oct. 8, 2011), *Emails and Video Footage File Pressure on Beleaguered Liam Fox*, http://www.guardian.co.uk/politics/2011/oct/08/ emails-video-footage-liam-fox, a copy of which is attached at Ex. J-11.

[96] James Kirkup, Telegraph (Oct. 9, 2011), *Liam Fox on Adam Werritty: I Was Wrong and I Am Sorry*, http://blogs.telegraph.co.uk/news/jameskirkup/100109702/liam-fox-on-adam-werritty-i-was-wrong- and-i-am-sorry, a copy of which is attached at Ex. J-12.

[97] Rupert Neate, The Guardian (Oct. 14, 2011), *How Adam Werritty's Role As Self-Styled Adviser to Liam Fox Unravelled*, http://www.guardian.co.uk/politics/2011/ oct/14/adam-werritty-liam-fox-unravelled, a copy of which is attached at Ex. J-16.

with Fox, but rather did so at another meeting he had on the same day with another, unnamed official.[98]

D. The Damage Done

While the full-extent of the harm Defendants' have inflicted on 3M awaits further discovery and factual development, it appears that Defendants have acted on their threats to interfere with 3M's existing business relationships with the U.K. government.[99] 3M's annual sales to the Ministry of Defense from 2009 to 2011 on annualized basis, have dropped a staggering 50%. 3M's annual sales to the U.K. "Central Government" have dropped an even more dramatic 65% over the same period. Thus, the still-developing evidence draws a straight line from Davis and Boulter, to the illicit meeting between Fox and Boulter in Dubai, to blackmail threats against 3M, and finally to recent and dramatic losses suffered by 3M in its existing business with the U.K. government. These facts, as discussed below, highlight 3M's need for further discovery to establish the scope and true purpose of Davis's, Boulter's and others' wrongful conduct toward 3M.

III.

3M'S MOTION TO STRIKE DEFENDANTS' SPECIAL MOTION TO DISMISS

A. Summary Of Argument

Davis moves for dismissal of the Complaint for two reasons: (i) the Act protects the defamatory statements and conduct identified in the Complaint because they were all made in furtherance of advocacy on issues of public interest; and (ii) under the Act's burden shifting

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[98] *See* http://www.guardian.co.uk/society/2011/jun/20/3m-countersues-mrsa-superbug-row (last visited, Oct. 22, 2011), a copy of which is attached at Ex. J-2.

[99] *See* Declaration of Lorna Manning in Support of 3M Company's Motion to Strike Defendants' Special Motion to Dismiss and Cross-Motion for Discovery and Continuance, dated Oct. 31, 2011 ("Manning Dec."), Ex. Q.

provisions, 3M cannot show that it is likely to succeed on its claims because the challenged statements were substantially true, not made with actual malice, or otherwise privileged. The Special Motion, however, should be stricken because enactment of the Act by the Council was in violation of the Home Rule Act.

B. Arguments And Authorities

1. The Home Rule Act prohibits the Council from enacting legislation "with respect to" the courts.

Article I, Section 8 of the United States Constitution reserves to Congress the exclusive power to enact legislation governing the District of Columbia.[100] In 1973, Congress passed the District of Columbia Home Rule Act ("Home Rule Act"), delegating to the D.C. municipal government (the "Council") certain powers to legislate local concerns, while retaining for itself ultimate legislative authority.[101] Notably, one power that Congress did *not* cede to the Council under the Home Rule Act was control of the D.C. local courts.[102] Specifically, as stated in the D.C. Code itself, Congress expressly prohibited the Council from "enact[ing] any act, resolution, or rule with respect to any provision of Title 11 of the District of Columbia Code," which governs both the federal and local courts in the District of Columbia.[103] This constraint on the Council's power is as broad as it is absolute. Title 11 prescribes all aspects of judicial civil

[100] *See* U.S. CONST., art. I, § 8 ("The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States").

[101] *See* Pub. L. 93-198, 87 Stat. 774, *passim* (now referred to as D.C. Code § 1-201.01 *passim*; D.C. Code § 1-201.01(a) (expressing "the intent of Congress [to] delegate certain legislative powers to the government of the District of Columbia . . . . Subject to the retention by Congress of the ultimate legislative authority . . . granted by article I § 8, of the Constitution."). The D.C. Code, of which the District of Columbia Home Rule Act is Title I, Chapter 2, was first compiled and enacted by Congress in 1901.

[102] *See* D.C. Code § 1-206.02(04).

[103] *Id.*

procedure in the District of Columbia, including the establishment of federal and local court systems, and the delineation of the jurisdiction of those courts.[104]

In particular, Congress directed the D.C. Superior Court ("Superior Court") to "conduct its business according to the Federal Rules of Civil Procedure."[105] Moreover, it is the Superior Court, and not the Council, that is the body designated to adopt civil procedure rules for the court that may supplement or modify, but not conflict with, the Federal Rules of Civil Procedure.[106] The Superior Court has exercised this authority under Title 11, adopting several rules for civil actions that supplement the Federal Rules, including rules dealing with discovery,[107] motions to dismiss,[108] and other dispositive motions.[109] In the past, the Council's attempts to impinge on the D.C. Courts' exclusive power as to such matters have been struck down as violative of the Home Rule Act.[110]

2. <u>The Act plainly establishes new procedures "with respect to" the District of Columbia Courts.</u>

It is plain that the Act attempts to modify the manner in which both the Superior Court and this Court conduct their affairs. Absent the Anti-SLAPP Act, Defendants in this case would have been required to file Answers under Fed. R. Civ. P. 12(a)(1), make a motion under Rule 12,

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[104] D.C. Code § 11-101, *et seq.* (providing for the organization and jurisdiction of courts in the District of Columbia).

[105] D.C. Code §11-946.

[106] *See id.* § 11-946 ("Rules which modify the Federal Rules shall be submitted for the approval of the [D.C. Court of Appeals] and they shall not take effect until approval by that court. The Superior Court may adopt and enforce other rules as it may deem necessary . . . if such rules do not modify the Federal Rules.").

[107] *See, e.g.*, D.C. Super. Ct. R. Civ. P. 26-37 (Superior Court civil procedure rules for discovery and depositions).

[108] *Id.* § 12(c) (Superior Court civil procedure rule on motions for judgment on the pleadings).

[109] *See id* § 56 (Superior Court civil procedure governing summary judgment practice).

[110] *See, e.g., Stuart v. Walker*, 6 A.3d 1215, 1219 (D.C. 2010) (striking down D.C. Council attempt to change the definition of "final order" as outside the Council's authority under the Home Rule Act).

or respond pursuant to some other Rule, such as a Rule 56 summary judgment.[111] Discovery would not be stayed, but instead proceed according to the provisions of Rule 26.[112] In addition, the parties would be obligated to make their initial disclosures pursuant to Rule 26(a). If Davis had filed a motion for summary judgment, instead of the potentially dispositive Special Motion, 3M would be entitled to denial of that motion as premature or, in the alternative, discovery under Rule 56(d).[113] In addition, but for the Act's burden-shifting provision, 3M could defeat a motion for summary judgment by proving only that there exists a "genuine issue as to any material fact," as opposed to the heavier burden of demonstrating that its claims were "likely to succeed on the merits."[114] Finally, whereas Rule 54 awards costs to the prevailing party, the Act purports to award the costs of defending against a special motion only to a plaintiff who shows that the special motion was "frivolous or is solely intended to cause unnecessary delay."[115]

Indeed, the Council itself has acknowledged that the Act "adds *new provisions* in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation."[116] Those provisions, in effect, abolish Superior Court's existing procedures

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[111] *See* Fed. R. Civ. P. 12; *accord*, *Blumenthal v. Drudge*, 2001 WL 587860, at *1 (D.D.C. Feb. 13, 2001) (finding that California's anti-SLAPP statute, upon which the D.C. Act is modeled, is "a procedural rule").

[112] *Compare* Fed. R. Civ. P. 26(d) (permitting all discovery allowed under the Rules after the parties have conducted a Rule 26(f) conference, obtained leave of court to do so without the conference, or stipulated otherwise) *and* D.C. Code § 16-5502(c)(1)-(2) (automatically staying all discovery until the motion has been decided, unless opposing party makes a showing that "targeted" discovery will enable it to defeat the motion).

[113] *See* Fed. R. Civ. P. 56(d) (formerly, Rule 56(f), authorizing discovery where a party cannot, for specified reasons, otherwise present facts).

[114] *Compare* Fed. R. Civ. P. 56(c) *and* D.C. Code § 16-5502(b).

[115] *Compare* Fed. R. Civ. P. 54(d) *and* D.C. Code § 16-5504.

[116] *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report, dated November 18, 2010 (emphasis added); *id.* ("The actions that typically draw a SLAPP [strategic lawsuit against public participation] are often . . . the kind of grassroots activism that should be hailed in our democracy.").

governing discovery and dispositive motions as to any lawsuit arguably falling with the Act's ambit. It replaces them with a new system of rules that is solely of the Council's creation In short, there is no doubt that the Act imposes on litigants, like 3M, requirements and burdens that have no analogue in either the Federal Rules of Civil Procedure or the D.C. Superior Court Rules of Civil Procedure.

3. Because the Act is legislation "with respect to" the courts, it was beyond the Council's power to enact, and is thus void.

Just as the Superior Court is not bound by an unauthorized act of the Council, so too Federal courts will not enforce a law that was improperly enacted.[117] Here, the Act is *ultra vires* because Congress, in the Home Rule Act, expressly barred the Council from modifying the D.C. Superior Court Rules of Civil Procedure, or any other aspect of the Superior Courts' organization, jurisdiction, and rules that are covered by Title 11.[118] Accordingly, because it defies this prohibition by modifying the Superior Court's rules and imposing "new provisions" in order to create "an expeditious process" for certain civil cases, the Act improperly encroaches on an area delegated, under Title 11, exclusively to the Superior Court.[119]

In fact, the D.C. Attorney General put the Council on notice that the Act was flawed before its passage.[120] In a letter to the Council, he advised that the Act "may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of

[117] *See Nixon v. Haag*, 2009 WL 2026343, *3 (S.D. Ind. July 7, 2009) (observing that the validity of the Indiana anti-SLAPP law was "not clear" and opining that "if the stay [provision of the anti-SLAPP law] likewise conflicts with the [state court civil procedure rules], the stay is a 'nullity'" and therefore unenforceable.).

[118] *See* D.C. Code § 1-201.01(a).

[119] *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report, dated November 18, 2010.

[120] *See* Ex. K (Peter Nickles letter, dated Sept. 17, 2010).

procedure free from interference by the Council."[121] Thus, even if the Act did not create new rules governing the D.C. Courts—which it does—it is undoubtedly a law "with respect to" Title 11, and thus barred by the Home Rule Act.[122] In addition, it is undisputed that the Act's new provisions governing "special motions to dismiss," burden shifting as to evidentiary proof, and discovery were not submitted to the D.C. Court of Appeals for approval. For that reason, too, the Act violates the Home Rule Act.[123] Accordingly, this Court should deem the Act to be in direct violation of the Home Rule Act, deny the Special Motion, and permit this lawsuit to proceed in the manner prescribed by the Federal Rules of Civil Procedure.

IV.

3M'S CROSS-MOTION FOR DISCOVERY AND CONTINUANCE

A. Summary Of Argument

Even if this Court finds the Act was validly enacted under the Home Rule Act, 3M is nevertheless entitled to discovery before responding to the Special Motion. First, the discovery provisions of the Act, found at D.C. § 16-5502(c), are inapplicable in this Court under the *Erie* doctrine because they are in "direct collision" with Federal Rules of Civil Procedure governing discovery in federal courts. Second, even if this Court were to find the Act's discovery provisions can be applied to this lawsuit, it must interpret those provisions as allowing 3M the same discovery that would otherwise be available to 3M under Fed. R. Civ. P. 56(d), which includes the opportunity to obtain evidence demonstrating that it is likely to prevail on its claims because the defamatory statements and conduct at issue were: (i) not made in furtherance of

[121] *Id.; see* 602(a)(4) of the Home Rule Act is codified as D.C. § 1-206.02(04), which prohibits the Council from promulgating any act with respect to Title 11.

[122] *Jackson*, 999 A.2d at 95; *see also* D.C. Code § 1-206.02(4).

[123] D.C. Code § 11-976 (requiring that any proposal to "modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that Court.").

issues of public interest, but were intended solely to further Davis's and his clients' purely commercial interests; (ii) made with knowledge not only that they were not "substantially true," but that they were false; (iii) made with actual malice; (iv) were intended to further an illegal purpose and scheme; and (v) are, therefore, not privileged.

B. Before Responding To The Motion, At A Minimum, 3M Is Entitled To All Discovery It Would Otherwise Be Entitled To Under Fed. R. Civ. P. 56(d).

1. Under the *Erie* Doctrine, the Act's discovery provisions should not be applied in federal court.

The *Erie* doctrine[124] requires federal courts exercising diversity jurisdiction to apply the substantive law of a state when deciding state law claims, but federal law with regard to procedural matters.[125] Here, the Act, at D.C. Code 16-5502(c), has provisions that govern discovery once a special motion to dismiss had been filed under the Act. These provisions indisputably and significantly alter the discovery rights a plaintiff would otherwise enjoy under the Federal Rules of Civil Procedure by, among other things: (i) imposing an automatic stay on all discovery until the special motion is resolved; (ii) permitting very limited "specialized" discovery only upon court order, and only after the plaintiff proves that the discovery is necessary and will not unduly burden the defendant.[126] This Court, therefore, is faced with the special category of *Erie* question that arises when a conflict exists between the Federal Rules of Civil Procedure and the potential application of a state statute that purports to govern practices in that state's courts.[127] To determine whether there is an irreconcilable conflict between a Federal Rule of Civil Procedure and a state law, federal courts ask if the Rule is "sufficiently broad to

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[124] *See Burlington N. R.R. v. Woods*, 480 U.S. 1 (1987); *Walker v. Armco Steel Corp*., 446 U.S. 740 (1980); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[125] *See KBI Transp. Servs. v. Med. Transp. Mgmt.*, 679 F. Supp. 2d 104 (D.D.C. 2010); *Capitol Med. Ctr., LLC v. Amerigroup Md., Inc.*, 677 F. Supp. 2d 188, 190 (D.D.C. 2010); *see also Hemphill v. Washington Metro. Area Transit Auth.*, 982 F.2d 572, 575-76 (D.C. Cir. 1993); *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) ("federal courts [sitting in diversity] are to apply state substantive law and federal procedural law."). Laws enacted by the D.C. Council are considered state laws for *Erie* purposes. *Burke v. Air Serv. Int'l, Inc.*, 775 F. Supp. 2d 13, 18-10 (D.D.C. 2011) (*citing Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 907, 371 U.S. App. D.C. 526 (D.C. Cir. 2006) (stating that the *Erie* doctrine applies to the District of Columbia as well as to the states); *KBI Transp. Servs. v. Med. Transp. Mgmt.*, 679 F. Supp. 2d 104 (D.D.C. 2010).

[126] *See* D.C. Code § 16-5502(c).

[127] *Compare Erie*, 304 U.S. 64, *with Hanna v. Plumer*, 380 U.S. 460 (1965).

control the issue" on which the state law purports to govern.[128] If so, then the Rule *must* be given effect despite the existence of the competing state law.[129] The Rule will be deemed sufficiently broad to control the issue raised by the competing state law if there is a potential conflict, or "direct collision," between the Rule and the state law.[130]

Here, the Act's discovery provisions are in clear conflict with Fed. R. Civ. P. 26(b) and 56(d). First, the default rule under the Act is that all discovery is stayed until the motion has been decided.[131] Second, while discovery is ostensibly allowed under the Act, it is: (i) discretionary; (ii) only permitted after court order, and upon a showing that discovery will enable the plaintiff to demonstrate a likelihood of success on the merits of its claim; (ii) limited to "targeted" or "specialized" targets; and (iii) not "unduly burdensome."[132] Finally, a court's order permitting any discovery under the Act may be conditioned upon the plaintiff paying the expenses incurred by a defendant in responding to discovery requests.[133] Under the Federal Rules of Civil Procedure, on the other hand, there is no automatic stay of discovery in response to any responsive or dispositive motion, and a party's general duty to respond to discovery is not conditioned on the requesting party's payments of related costs; the right to discovery is

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[128] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1413, 1451 (2010) (Stevens, J., concurring) (quoting *Walker*, 446 U.S. at 749-50); *see also id.* at 1437.

[129] *See Id.*; *see also id.* at 1437 (majority opinion) ("We must first determine whether [the Rule] answers the question in dispute. If it does, it governs — [state] law notwithstanding . . . . We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable . . . .").

[130] *See id.* at 1440-42 (majority opinion); *see also id.* at 1451 (noting that there is a "direct collision" between a Rule and a state law when the Rule, in and of itself, "is sufficiently broad to control the issue.").

[131] D.C. Code § 16-5502(c)(1).

[132] D.C. Code § 16-5502(c)(2).

[133] *Id.*

automatic and broad.[134] Discovery under the Rules need not be "targeted" or "specialized," but may be had as to any information that is "reasonably calculated to lead to the discovery of admissible evidence."[135] While the scope of discovery may be limited if "less burdensome" means of obtaining the requested information are available, that limitation is imposed by the Court only after a showing by the responding party, after receiving a discovery request, of such burden.[136] The Act, on the other hand, requires the requesting party to initially prove a lack of undue burden to the receiving party before even serving a discovery request.[137]

The Act also directly conflicts with Fed. R. Civ. P. 56. In the situation where a non-movant must respond to a dispositive motion that raises issues of potentially disputed fact—such as the Special Motion—Rule 56(d) *mandates* discovery far broader than the Act's. Specifically, Rule 56(d) provides that:

> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or *to* take discovery; or (3) issue any other appropriate order.[138]

Although Rule 56 is phrased permissively, the Supreme Court has "restated the rule as *requiring*, rather than merely permitting, discovery where the moving party has not had the opportunity to discover information that is essential to its opposition."[139] The Act, to the contrary, does not

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[134] *See* Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .").

[135] *Id.* ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

[136] *See* Fed. R. Civ. P. 26(b)(2)(C))(i).

[137] *See* D.C. § 16-5502(c)(2).

[138] Fed. R. Civ. P. 56(d).

[139] *Metabolife Int'l v. Warnick*, 264 F.3d 832, 846 (9th Cir. 2001) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)) (emphasis in original) (finding that a plaintiff in federal court

require discovery under any circumstances.[140] The conflict between the Act and Rule 56 is also illustrated by the fact that a non-movant can avoid summary judgment under Rule 56 by proffering evidence of a "genuine issue of material fact" as to its claims, whereas the Act imposes the higher burden of requiring the plaintiff to demonstrate that it is "likely to succeed" on its claims.[141]

Because the Act has only been in effect for a few months, this Court has not yet had the opportunity to determine whether, as a result of these conflicts, the Act's discovery provisions run afoul of the *Erie* doctrine. Nevertheless, other federal courts looking at analogous discovery provisions in other state anti-SLAPP statutes have concluded that such provisions directly collide with the Federal Rules of Civil Procedure, and thus cannot apply in federal court.[142] These courts require that a "special motion" to strike a complaint in federal court under a state anti-SLAPP act be treated as a motion for summary judgment under Rule 56, and that the plaintiff consequently must be allowed discovery—to the same extent it would allowed under Ruled 56(d)—before responding to the special motion.[143] These holdings are in accord with this Court's long tradition

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responding to a motion to strike under California's anti-SLAPP act must be permitted discovery to the extent it would be entitled to discovery in responding to a summary judgment motion under Rule 56(f)).

[140] *See* D.C. Code § 16-5502(c)(2).

[141] Compare Fed. R. Civ. P. 56(c)(2) *and* D.C. Code § 16-5502(b).

[142] *Rodgers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973, 981 (C.D.Cal. 1999) ("Because the discovery-limiting aspects of [the California anti-SLAPP law] collide with the discovery-allowing aspects of Rule 56, these aspects of [the anti-SLAPP law] cannot apply in federal court."); *Nixon v. Haag*, 2009 WL 2026343, *3 (S.D.Ind. July 7, 2009) (refusing to apply Indiana anti-SLAPP law that conflicted with Rule 26 on ground that "the federal procedural rule supersedes the conflicting state-law procedural rule restricting the scope of discovery; no 'statutory' stay of discovery applies to this case.").

[143] *See, e.g., In re Bah*, 321 B.R. 41, 45 n.6 (9th Cir. 2005) ("[I]f a defendant makes a motion to strike under the anti-SLAPP statute based on a failure of proof or evidence, the motion must be treated as though it is a motion for summary judgment and discovery must be developed sufficiently to permit summary judgment under Rule 56."); *Rogers.*, 57 F. Supp. 2d at 981(same); *Metabolife*, 264 F.3d at 846 (affirming that federal courts "should not scrutinize Plaintiff's evidence of facts uniquely within the Defendants' control before ordering discovery to enable Plaintiff to meet its burden of opposing Defendants' anti-SLAPP motions").

of affording a party the "reasonable opportunity to complete discovery" before responding to a dispositive evidentiary motion.[144]

Accordingly, because the Act's discovery provisions, found at D.C. Code § 16-5502(c), are in "direct collision" with the Federal Rules of Civil Procedure, this Court should find that they do not apply to this matter, deny or continue the Special Motion, and order that 3M, before responding to the Special Motion, be permitted to take all written and deposition discovery of Defendants that it would be otherwise permitted pursuant to Rules 26(b)(1), 30, 31, 33, 34, 35, and 36.[145]

In the alternative, the Court should order that 3M be granted discovery pursuant to Rule 56(d).[146] 3M is entitled to this discovery even if it not does make the typical showing required by Rule 56(d) as to the need for such evidence,[147] because that requirement presupposes that a movant has had *some* opportunity for discovery prior to the filing of a motion to summarily dispose of a lawsuit, which is not the case here.[148]

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[144] *Kahn v. Parsons Global Servs., Ltd.*, 428 F.3d 1079, 1087 (D.C. Cir. 2005) ("The court has long recognized that a party . . . needs a 'reasonable opportunity' to complete discovery before responding to a summary judgment motion and that 'insufficient time or opportunity to engage in discovery' is cause to defer decision on the motion."), *quoting Martin v. Malhoyt*, 830 F.2d 237, 256 (D.C. Cir. 1987); *see also Elliott v. Fed. Bureau of Prisons*, 2006 U.S. dist. LEXIS 93258, *14 (D.D.C. Dec. 27, 2006) ("[T]he Court is cognizant that a party opposing summary judgment needs a reasonable opportunity to complete discovery before responding to a summary judgment motion and that insufficient time or opportunity to engage in discovery is cause to defer decision on the motion."); *Dyson v. Winfield*, 113 F. Supp. 2d 35, 42 (D.D.C. 2000) (extending discovery "is inappropriate when a party has had ample time for discovery or when it has failed to immediately bring the discovery problem to the court").

[145] *See Haag*, 2009 WL 2026343, at * 3.

[146] *Rogers*, 57 F.Supp.2d at 981-82 ("A special motion to strike premised on an alleged lack of evidence . . . must comport with federal standards . . . . [S]imply bringing a special motion to strike in federal court does not create a conflict with the Federal Rules . . . only if the federal court applies the usual federal standards regarding discovery and the timing of motions seeking judgments on the facts.").

[147] *See McWay v. LaHood*, 269 F.R.D. 35, 38 (D. D.C. 2010) (outlining the movant's burden under Fed. R. Civ. 56(f), which has been redesignated without substantive change as 56(d)).

[148] *See Aeroplate Corp. v. Arch Ins. Co.*, CV- F 06-1099 AWI SMS, 2006 U.S. Dist. LEXIS 82180, at *24-25 (E.D. Cal. Nov. 8, 2006) (denying special motion to dismiss under California's anti-

2. Even if this Court finds the Act's discovery provisions are applicable to this matter, their scope must be interpreted to give 3M at least the discovery that would otherwise be available to it under Fed. R. Civ. P. 56(d).

Even those few federal courts that have held that the discovery provisions of particular states' anti-SLAPP acts were not in conflict with the Federal Rules of Civil Procedure have done so only after first determining that the discovery allowed under those statutes is the same as would be permitted under Rule 56.[149] Thus, should this Court find that the Act's discovery provisions apply to this lawsuit, it should also order that, before responding to the Special Motion, 3M be allowed to take the same written and deposition discovery that it would otherwise be entitled to under Rule 56(d).[150]

C. 3M Is Entitled To Discovery Of Evidence Establishing That Davis's Defamatory Statements And Actions Were Not Made While Advocating On Behalf Of Issues Of Public Interest, Were Knowingly Or Recklessly False, Were Made With Actual Malice, And Were Not Otherwise Privileged.

Davis's motion is replete with self-serving factual assertions that his statements defaming 3M, as well as his actions to further the conspiracy to intimidate and extort 3M into paying tens of millions of dollars to settle the London Litigation, were either "substantially true," not made with "actual malice," were made in advocacy on behalf of an issue of public interest, or were

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SLAPP statute before non-movant had any opportunity for discovery, even though opposing party had not shown with particularity what evidence discovery would make available, because "the Supreme Court's holding in *Liberty Lobby* makes clear that, where there has been no discovery—as is the case here—then the court is required to grant the request of the nonmoving party to stay or continue the [dispositive] motion to allow for discovery.").

[149] *See Godin v. Schenks*, 629 F.3d 79, 90-91 (1st Cir. 2010) (finding no conflict between Maine anti-SLAPP statute and the Federal Rules because the state law required a court applying it to grant discovery equivalent to that which would have been allowed under Rule 56); *Bulletin Displays, LLC v. Regency Outdoor Adver., Inc.*, 448 F. Supp. 2d 1172, 1180 (C.D. Cal. 2006) ("If a defendant makes an anti-SLAPP motion based on the plaintiff's failure to submit evidence to substantiate its claims . . . discovery must be developed sufficiently to permit summary judgment under Rule 56."); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009) (affirming application of Louisiana anti-SLAPP law by the district court because the law "permits the Court to order specified discovery where necessary to the plaintiff's opposition (similar to the relief afforded by [former] Rule 56(f)).").

[150] *Id.*; *see also Metabolife*, 264 F.3d at 846; *In re Bah*, 321 B.R. at 45.

otherwise privileged.[151] Few, if any, of these assertions are supported by citations to any sources verifying their validity, other than to the parties' pleadings in this case and the London Litigation, as well as transcripts of media statements made by Davis and others working with him.[152] As a result, 3M needs discovery in order to address Davis's erroneous factual assertions, and to prove that it is likely to succeed on the merits of its claims.

1. Discovery will show that Davis's and Boulter's communications to 3M's counsel were for an improper purpose.

Statements and actions are protected under the Act—even if they are purportedly "in connection with an issue under consideration or review by . . . a judicial body" – only if they are made "in furtherance of the right of advocacy on issues in the public interest."[153] Moreover, while the Act covers speech and conduct connected with "an issue related to health or safety," it also expressly provides that the "term 'issue of public interest' shall not be construed to include . . . statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance."[154] 3M, therefore, needs discovery to establish that Boulter's communications to 3M's legal counsel on June 18 and 19, 2011,[155] were aimed primarily at protecting Boulter's commercial interests, and not to further advocacy on issues of public interest.

[151] *See* Special Motion at 21-40.

[152] *Id.*

[153] D.C. Code § 16-5501(1)(A)(i).

[154] D.C. Code § 16-5501(3).

[155] *See* Complaint at Exs. A-B.

In addition, "[e]xtortion is not a constitutionally protected form of free speech."[156] Even if Davis were correct in asserting that the British government had a "sovereign prerogative to revoke Buckley's knighthood," and "every right to either reduce or cease doing future business with 3M,"[157] it was improper for Defendants to attempt to *procure* such acts for wrongful purposes by buying access, through Tetra Strategy, to then U.K. Minister of Defence Fox.[158] 3M thus needs discovery to establish that: (i) Boulter's and Davis's acted in concert to make the challenged communications for an illegal purpose (*i.e.,* to extort, intimidate and blackmail 3M); (ii) Defendants sought access to Fox in order influence the British government to coerce 3M into settling the London Litigation on favorable terms to Claimants in the London Litigation; (iii) at the Dubai meeting, Boulter discussed with Fox, or his representative, threats to 3M's business interests with the British government and/or Buckley's knighthood; and (iv) Movants and other Defendants acted on their threats to interfere with 3M's existing and future business relationships with the U.K. government.[159]

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[156] *Flately v. Mauro*, 139 P. 3d 2, 21 (Cal. 2006) (denying special motion to dismiss under California's anti-SLAPP statute) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 420 (1992) (conc. opn. of Stevens, J.), which noted that "[T]he First Amendment . . . does not protect the right to . . . 'extort.'"; *cf. Gen. Serv. Employees Union v. NLRB*, 578 F.2d 361, 369 (D.C. Cir.) ("Furthermore, that the Act specifically protects speech in some instances is irrelevant to the question of whether or not it was intended to regulate threats to picket. To maintain otherwise would be no more convincing than to argue that as the Constitution protects some forms of speech, it must also protect threats and extortion.").

[157] Special Motion at 37.

[158] *See* "Timeline: Events That Led To Fox Resignation," *SkyNewsHD*, found at http://news.sky.com/home/politics/article/16089239, a copy of which is attached at Ex. J-17 (noting public and political fallout over revelations about Fox's meeting with Boulter). Tetra Strategy arranged Boulter's meeting through Werrity, whom Boulter believed was a "Special Advisor" to Fox in an official capacity with the U.K. Ministry of Defence. *See* excerpts from the Certified Transcript of Interview with Harvey Boulter ("BBC Transcript"), found at http://www.bbc.co.uk/news/uk-politics-15263284, at 2-3, 4-6, a copy of which is attached as Ex. J-14.

[159] *See id.* ("Questions were . . . raised about whether Werritty was representing groups . . . seeking to curry favor with the British defense establishment."). That Davis might not have been a party to the telephone conversation between 3M's counsel and Boulter, or copied on Boulter's e-mail of June 18 e-mail, is irrelevant, because 3M alleges that Davis conspired with and assisted Boulter to plan, devise, and communicate those threats to 3M. Compl. ¶¶ 68-76, 108-118; *see also Flately*, 139 P. 3d at

2. Discovery will show Davis knew that his allegations that 3M sabotaged BacLite and thus killed thousands of people were false.

Discovery is also required for 3M to disprove Davis's claims that 3M sabotaged BacLite in favor of FastMan/Simplexa was "substantially true" and "essentially undisputed," and thus not actionable as defamatory.[160] Davis inexplicably fails to tell this Court that his own clients previously advanced the same theory in the London Litigation, but were compelled to amend their Particulars of Claim to drop the allegation after their review of relevant disclosure documents proved that it was completely unsupported by the evidence.[161] As a result, the U.K. High Court awarded 3M the costs it incurred in conducting discovery about, and defending, that allegation.[162] 3M, therefore, needs discovery to prove that Davis was aware of these facts when, ten months later, he filed the "citizen's petition," and thus either actually knew his allegations about FastMan were false, or recklessly disregarded their truth or falsity.[163]

Davis also asserts that 3M "cannot possibly prove [as] . . . false" his scurrilous assertion that "thousands of people" died of MRSA-related causes because of 3M's decision to end the sale of BacLite.[164] 3M, therefore, needs discovery to establish that, when he made that statement,

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21 (noting conduct not covered by anti-SLAPP statute where shown to be illegal); *See also* Hickox Decl. ¶ 7.

[160] Special Motion at 24, 29-33. "'Substantially true' means that the 'gist' of the statement is true or that the statement is substantially true, as it would be understood by its intended audience." *Benic v. Reuters Am.*, 357 F. Supp. 2d 216, 221 (D. D.C. 2004).

[161] *See* Judgment, [2010] EWHC 1615 (Comm), dated Jun. 16, 2010, a copy of which is attached at Ex. R, ¶ 5 ("However, [3M's legal counsel] is also right that the original theme of the claim has rather taken a sea change. The rather tentative suggestion that the defendants had deliberately decided to breach the contract in order to favour another product has effectively disappeared from the claim.").

[162] *See* Order, dated Jun. 16, 2010, a copy of which is attached at Ex. R, ¶¶ 2-3, 9.

[163] Hickox Decl. ¶¶ 7-8. It is undisputed that, at this time, Davis was a partner in the Washington, D.C., office of McDermott, which was Claimants' then solicitors in the London Litigation. Also resident in that office was McDermott partner Anthony Soccarras, then a key member of Claimants' litigation team.

[164] *Id.* at 31.

Davis knew that it was false, or was willfully blind to its truth or falsity. 3M also needs discovery to obtain evidence that Davis was aware of, or was willfully blind to, the fact that not a single potential customer of BacLite failed to conduct MRSA screening because it could not buy the device, and that not a single MRSA-related death was caused by BacLite's unavailability.[165]

3. 3M is entitled to discovery to prove that Davis acted with malice.

Davis further contends that the "actual malice" standard will apply to 3M's defamation, and asserts that 3M cannot succeed under this standard as to any of Davis's defamatory statements because it cannot prove by clear and convincing evidence that, when Davis made them, he either knew that they were false or uttered them with "reckless disregard" for the truth or falsity.[166] The need for granting a request for discovery in relation to a dispositive motion is especially important when the "motion raises latent fact issues such as motive, intent, knowledge, or credibility and the moving party has exclusive control over those facts."[167] Indeed, the United States Supreme Court has noted that, because a finding of malice implicates a defendant's state of mind, it "does not readily lend itself to summary disposition" in any circumstance.[168] Accordingly, without discovery, 3M cannot effectively respond to Davis's bare assertions in the Motion that he was not actually aware that any defamatory statement attributed

[165] Hickox Decl. ¶ 8.

[166] Special Motion at 28 (citing *McFarlan v. Sheridan Square Press*, 91 F.3d 1501, 1515 (D.C. Cir. 1996)). The test for "actual malice" is a subjective one, requiring evidence that Davis "in fact entertained serious doubts" as to the truth of his statements, or acted "with a high degree of awareness of . . . [their] probable falsity." *Id.* (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

[167] *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 981 (C.D. Cal. 1999) (citing Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Civil Practice & Procedure,* § 2741, at p. 422 (3d ed. 1988)).

[168] *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979).

to him in 3M's complaint was actually false, and/or that he did not make them with reckless disregard for their truth or falsity.[169]

4. Discovery will demonstrate that Davis may not invoke any of the privileges he claims to assert.

Davis seeks to invoke four separate privileges — the fair comment privilege, the common interest privilege, the general privilege covering statements to law enforcement authorities, and the First Amendment's right to petition – as proof that 3M cannot succeed on its defamation claims.[170] The fair comment privilege, however, protects only opinions, not misstatements of fact.[171] 3M needs discovery to prove that Davis knew that the challenged statements were false, or acted with reckless disregard to their truth or falsity, and/or made them maliciously in order to further Defendants' joint scheme to intimidate and coerce 3M into settling the London Litigation, and thus not covered under the fair comment privilege.[172] Even to the extent that Davis's defamatory statements were combined with actual opinions, they are not "fair comment" because the privilege does not shield statements that "contain[] a mixture of opinions and 'numerous statements of fact which are susceptible to proof as to their accuracy.'"[173]

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[169] *See* Special Motion at 30-33; *see also* Hickox Decl. ¶¶ 7-8.

[170] Special Motion at 33-35.

[171] *See Jankovic v. Int'l Crisis Group*, 593 F.3d 22, 29 (D.C. Cir. 2010) ("a conclusion based on a misstatement of fact is not protected by the privilege") (citing *Washington Times Co. v. Bonner*, 86 F.2d 836, 841 n.4 (D.C. Cir. 1936); *see Klayman v. Judicial Watch, Inc.*, 2007 U.S. Dist. LEXIS 3197, at *60-*61 (D.D.C. Jan. 17, 2007) ("fair comment defense goes only to opinions expressed by the writer and does not extend to misstatements of fact") (internal citations and quotation marks omitted); *see also Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 87 (D.C. 1980) (quoting *De Savitsch v. Patterson*, 81 U.S. App. D.C. 358, 360, 159 F.2d 15 (1946) ("Misdescriptions of conduct . . . only leads to the one conclusion detrimental to the person whose conduct is misdescribed and leaves the reader no opportunity for judging himself for [sic] the character of the conduct condemned, nothing but a false picture being presented for judgment.").

[172] *Jankovic*, 593 F.3d at 29; *Klayman*, 2007 U.S. Dist. LEXIS 3197, at *60-*61 (malicious comments or opinions are not protected by the fair comment privilege) (citing *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. 1965)); Hickox Decl. ¶ 7.

[173] *See Rueber v. United States*, 1982 U.S. Dist. LEXIS 18382, 20-21 (D.D.C. Aug. 25, 1982).

Likewise, Davis cannot invoke the protections of the common interest privilege if his defamatory statements were published in bad faith, which is the equivalent of malice.[174] Nor is the privilege applicable if Davis's defamatory statements were made without regard to whether the listener shared Davis's interest in the purported public matter at issue.[175] 3M needs discovery to establish that Davis tactically published the false statements to numerous media outlets, and trumpeted them on a website he developed, for the purpose of reaching the broadest audience possible and placing the maximum amount of undue pressure on 3M, thus vitiating any right to invoke the common interest privilege.[176] For similar reasons, 3M needs discovery to prove that Davis's defamatory statements made in relation to the "citizen's petition" were made in bad faith, and thus not protected by the privilege set forth in *Restatement (Second) of Torts* § 598, dealing with statements made to law enforcement authorities.[177] Finally, 3M requires discovery to prove that Davis's claim to the protection of the First Amendment's right to petition as to defamatory statements made in the FDA "citizen's petition" is unavailing, because when Davis

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[174] *El-Hadad v .United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007) ("In the context of a defamation claim, bad faith vitiates the common interest privilege under District of Columbia law."); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 858, 371 U.S. App. D.C. 68 (D.C. Cir. 2006) (bad faith is the equivalent of malice and means "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the right or feelings of others as to constitute ill will.").

[175] *Armenian Assembly of Am., Inc. v. Cafesjian*, 692 F. Supp. 2d 20, 49 (D.D.C. 2010) (rejecting application of common interest privilege where "publication [was] not reasonably calculated to protect or further the interest.")

[176] *See* Compl. ¶¶ 57-65; Hickox Decl. ¶¶ 7-8.

[177] *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995) (qualified privilege exists only when a statement about suspected wrongdoing is made in good faith to law enforcement authorities). In typical fashion, Davis puts his own spin on the Restatement by claiming it protects statements made to "someone who may act in the public interest." That is incorrect. The privilege covers only statements "to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true." Restatement (Second) of Torts § 598. Davis's contention that the First Amendment protects his challenged statements is unavailing, because the First Amendment has never protected defamatory or libelous utterances and writings. *Solers, Inc. v. Doe*, 977 A.2d 941, 951 (D.C. 2009) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no Constitutional protection.") (citation omitted)).

filed the petition, he knew that it contained false and intentionally disparaging allegations about 3M, and that he was motivated to file the petition by a desire to intimidate and coerce 3M into paying a large settlement in the London Litigation.[178]

5. The Act does not apply to 3M's claims for tortious interference, and, in any event, 3M can demonstrate that it is likely to succeed on the merits of those claims.

Defendants' assertion that this Court must dismiss 3M's claims for tortious interference with prospective advantageous business relationships and economic advantage is wrong on the facts and the law.[179] The conduct at the core of 3M's tortious interference claims are Davis's and Boulter's intentional efforts to influence Fox, and other officials and employees of the British government, not to do business with 3M. These actions included Boulter's personal contacts with key civil servants within the Ministry of Defence, as well as the steps taken by Davis and Boulter to use Tetra Strategy to obtain a private meeting with Fox.[181] The Act cannot, by definition, apply to such efforts because they were not "acts in furtherance of the right of advocacy on issues of public interest."[182] Nor were they conducted "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official

[178] A person's First Amendment right to petition the government does not immunize tortious conduct purportedly done in the course of exercising that right. *See Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (opining that a defendant could be liable for "a publicity campaign, ostensibly directed toward influencing governmental action, [but] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor[.]"). Although the *Noerr* doctrine originally contemplated anti-trust allegations, the Supreme Court has acknowledged that it applies to other types of torts and claims. *See, e.g.*, *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that right to petition did not immunize violent boycotters from liability for conduct not protected by the freedom of speech); *accord United States v. Stover*, 650 F.3d 1099, 1114 (8th Cir. 2007) ("[T]he First Amendment does not protect commercial speech which promotes an illegal activity or transaction.").

[179] *See* Special Motion at 38-40.

[181] *See*, *supra*, Sec. IV(B)(4).

[182] D.C. Code § 16-5501(1).

proceeding authorized by law;" or taken "in a place open to the public or a public forum in connection with an issue of public interest."[183]

Moreover, the Act does not apply to "statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance."[184] Whatever attempts Davis might make to wrap his false and disparaging statements about 3M in the media with the cloak of "public interest," no such interest was served by paying Tetra Strategy to arrange a private meeting with Fox, in order to advance Defendants' illegal scheme to intimidate 3M into an unreasonable settlement of the London Litigation.

The Special Motion's contention that "there are no factual allegations in the Complaint that even so much as suggest that *Davis* communicated with the U.K. Government," misses the point.[185] The Complaint's allegations, taken in a light most favorable to 3M, allege that Davis conspired with Boulter to both arrange his private meeting with Fox for the purpose of soliciting Fox's assistance in threatening 3M's business interests with the U.K. government, and to communicate these threats to 3M's attorney.[186] Thus, to the extent that Davis is asking this Court to treat his Special Motion as a Rule 12(b)(6) motion, the motion should be denied.[187]

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[183] D.C. Code § 16-5501(1)(A)(i)-(ii).

[184] D.C. Code § 16-5501(3).

[185] Special Motion at 38 (emphasis added).

[186] Compl. ¶¶ 67-77.

[187] In the Special Motion, Davis specifically invokes only the Act, and makes no reference to Fed. R. Civ. P. 12(b)(6). Indeed, he has subsequently filed a Motion to Stay his obligation to respond to the Complaint via an Answer or to submit Rule 12(b) motion to dismiss. *See* D.I. 13 (Motion to Stay Proceeding) filed Oct. 27, 2011.

Finally, Davis argues that 3M has not sufficiently pleaded the existence of a valid business relationship or expectancy, termination of that relationship, or resulting harm.[188] Even assuming *arguendo* that the Court would find these contentions valid, because Defendants have neither answered 3M's Complaint, nor sought to dismiss the Complaint pursuant to Rule 12(b), (e), or (f), 3M may amend its Complaint as a matter of right to correct any pleading deficiencies.[189] In any event, as noted above, even at this early stage of the lawsuit 3M has presented evidence that it has lost significant existing business with Ministry of Defence and U.K. "Central Government" sector in 2011—all of which, when considered in a light most favorable to 3M, is sufficient to defeat a Rule 12(b)(6) motion as to the company's tortious interference claims.[190] Nonetheless, 3M expects that further discovery and factual development in this matter will enable it to bring forth further evidence that prove each of the elements of its tortious interference claims.

6. <u>Specific discovery needed by 3M to respond to the Special Motion.</u>

In light of the above facts and law, and if this Court does not grant 3M's Motion to Strike, in whole or in part, 3M asks that the Special Motion be denied, or a determination on its merits be continued, until such time as 3M has had a reasonable opportunity to obtain the written and deposition discovery that is has generally identified herein, and which is more specifically detailed in Declaration of Kenneth N. Hickox , Jr. In Support of 3M Company's Cross-Motion to for Discovery and Continuance, which is being filed contemporaneously with this motion.[191]

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[188] Special Motion at 38-40.

[189] *See, e.g., Baker v. D.C. Pub. Schs*, 720 F. Supp. 2d 77, 81 (D.D.C. 2010) (noting a party may amend its complaint once as a matter of course within twenty-one days after service of an answer or Rule 12(b) motion).

[190] *See* Manning Dec.; Maloney Dec.

[191] *See* Hickox Dec. ¶ 8.

The Special Motion was filed before a conference under Fed. R. Civ. P 26(f) was conducted in this matter. Accordingly, neither party has yet engaged in any discovery in this lawsuit.[192] In addition, after the Special Motion was filed, 3M made a reasonable attempt to obtain relevant discovery by requesting that Davis agree to provide limited discovery aimed at responding to the motion without the need to petition the Court, but that request was refused.[193] 3M has also requested that relevant documents relating to communications between and among Davis, Boulter, Fox, Werrity, and Tetra Strategy be disclosed in the London Litigation.[194] Claimants, however, have not yet committed to providing the requested documents.[195]

As detailed in the Hickox Declaration, 3M requires the opportunity to: (i) serve interrogatory requests, requests for production, and requests for admission on Davis, other Movants, Boulter, Porton Capital, Werrity, Hotten, Ploughshare, and Tetra Strategy. 3M also seeks to take the depositions of Davis, Boulter, Werrity, Hotten, a corporate representative of Ploughshare, and a corporate representative of Tetra Strategy.[196] 3M needs the requested discovery to obtain evidence that establishes, or raises a genuine issue of material fact, that 3M is likely to succeed on the merits of its claims in this lawsuit because the defamatory statements

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[192] *Id.* ¶¶ 4-5.

[193] *See* Letter from W. Brewer to R. Mullady, dated Oct. 10, 2011, a copy of which is attached at Ex. N; Letter from R. Mullady to W. Brewer, dated Oct. 11, 2011, attached at Ex. A; *see also* Hickox Dec. ¶ 8.

[194] *See* Letter from Dorsey & Whitney, LLP to DLA Piper UK LLP, dated Oct. 12, 2011, attached at Ex. U; Letter from DLA Piper UK LLP to Dorsey & Whitney, LLP, dated Oct. 25, 2011, a copy of which is attached as Ex. V; *see also* Hickox Dec. ¶ 5.

[195] *See id.*

[196] Discovery from Boulter and Porton Capital will apparently have to be taken in accordance with procedures established by the Hague Convention. Although Porton Capital has been served in this case under the Hague Convention, its legal counsel has not yet appeared in this matter. Boulter has not yet been served, although 3M has initiated service of process on him in the U.K. under the Hague Convention. Hague Convention procedures must also be used to obtain deposition discovery from third-parties Werrity, Hotten, Ploughshare, and Tetra.

and actions identified in the Complaint were: (i) not protected by the Act because they were not made or taken furtherance of the right of advocacy on issues of public interest;[197] (ii) not protected by the Act because they were directed primarily toward protecting the speaker's commercial interests;[198] (iii) knowingly false when made, not substantially true, and/or made with reckless disregard for their truth or falsity;[199] (iv) made with actual malice;[200] and/or (iii) not

[197] Movants assert that "there can be no serious dispute that the statements about which 3M complains qualify as 'act[s] in furtherance of the right of advocacy on issues of public interest.'" *See* Special Motion at 21-23. They fail to cite to the Act's further definition excluding from its purview statements and conduct "directed primarily toward protecting the speaker's commercial interests . . . ." D.C. Code § 16-5501(3). 3M is entitled to discovery establishing that all of Davis's wrongful conduct and statements were made primarily in furtherance of his, his clients', and/or others' commercial interests, and thus not protected by the Act. *See* Hickox Dec. ¶ 7.

[198] *Id.*

[199] Movants repeatedly state that the facts and contentions being challenged in the Complaint are "indisputable," incapable of "serous dispute," not in "doubt," "essentially undisputed," or "substantially true." *See id.* at 11, 21-22, 29, 31. They do not cite any evidentiary support for these claims, but simply assert that "3M cannot possibly prove [Davis's] statements" are false, or not substantially true. *See id.* at 31. 3M is entitled to discovery of facts establishing that Davis that, to as each of challenged statements, Davis knew that there actually false and/or materially false. 3M is also entitled to discovery showing that the statements were not true, and their falsity went beyond "technicalities." *See* Hickox Dec. ¶ 7.

[200] Movants assert, without citation, that the "facts establish" that Davis did not utter the defamatory statements – "just the opposite." *See id* at 30. 3M is entitled to discovery of facts proving that Davis, when he made the defamatory statements identified in the Complaint, subjectively knew that they were false, made with the with reckless disregard for their truth or falsity, made no attempt to confirm their truth or falsity, and made them with the subjective intent to cause harm to 3M.

otherwise privileged.[201] Finally, the requested discovery is in the possession of Movants, other Defendants, or named third-parties, such as Werrity and Tetra Strategy.[202]

V.

CONCLUSION

For all the above-stated reasons, 3M respectfully asks this Court to direct the parties to appear for an oral hearing and: (i) grant 3M's Motion to Strike Davis's Special Motion to Dismiss because the D.C. Anti-SLAPP Act as an *ultra vires* act of the Council; (ii) in the alternative, to hold that D.C. Code § 16-5502(c) of the Act is in conflict with the Federal Rules of Civil Procedure, stay consideration of or deny it without prejudice, and enter a scheduling order that permits 3M all of the discovery it is otherwise permitted under the Federal Rules of Civil Procedure; or (iii) grant 3M's Cross-Motion for Discovery and Continuance, deny the Special Motion without prejudice or stay its consideration, and enter a Scheduling Order that permits 3M to obtain that discovery it has requested pursuant to Fed. R. Civ. P. 56(d); and (iv) grant 3M all other relief to which 3M is entitled at law or equity.

[201] Movants assert that: (i) the fair comment privilege applies because Davis's defamatory statements were merely expressions of his own views, entirely supported by "facts," and about a matter of legitimate public concern; (ii) protected by the common interest privilege because those same statements were made in good faith, and Davis honestly believed that he was speaking to another person on a subject to which he and the other person shared an interest; and (iii) are privileged under the *Restatement (Second) of Torts* § 598, protecting statements made to law enforcement authorities, because Davis filed the citizen's petition with the FDA. *See* Special Motion at 33-35. According to Davis, 3M is not even entitled to prove these assertions are inaccurate *See id.* at 35 ("3M cannot possibly prove that any statements made by Davis were made in bad faith."). 3M is entitled to discovery to demonstrate that Davis's defamatory statements—including those made within the FDA filing—were made in bad faith, with the intention to harm 3M, not made to advance any public interest, and were not intended to be made on behalf of any person or entity other than Davis and his clients. *See* Hickox Dec. ¶ 7.

[202] *Se* Hickox Dec. ¶ 8.

Respectfully submitted,

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