UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

3M COMPANY, Plaintiff, -v- HARVEY BOULTER, et al. Defendants.	Civil Action No. 1:11-CV-01527-RLW

MEMORANDUM OF DEFENDANTS LANNY DAVIS, LANNY J. DAVIS & ASSOCIATES, PLLC AND DAVIS-BLOCK LLC IN SUPPORT OF SPECIAL MOTION TO DISMISS

Dated: October 6, 2011

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LANNY J. DAVIS &ASSOCIATES, PLLC
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Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC (collectively "Davis") submit this memorandum in Support of their Special Motion to Dismiss this action under the District of Columbia Anti-SLAPP Act.

INTRODUCTION

In this action, plaintiff 3M Company, a $27 billion dollar international conglomerate, has sued Davis for purportedly defaming 3M and conspiring to "intimidate and blackmail" 3M and to intentionally interfere with 3M's prospects for conducting business with the U.K. Government. Davis's alleged defamatory statements were made in a May 2011 petition he filed on behalf of his clients Porton Capital, Inc. and Porton Capital Technology Funds (collectively with defendant Harvey Boulter, "Porton") requesting that the Food and Drug Administration investigate how 3M—according to 3M's own internal report—botched the clinical trials for FDA approval of BacLite, a new life-saving technology, and then holding a press conference to announce the petition's filing and to request that 3M publicly release the report setting forth 3M's errors. 3M alleges that Davis made additional defamatory statements in press releases and media reports, but the alleged acts of defamation involved Davis's commentary on 3M's failure to obtain FDA approval for BacLate and failure to release the report. Davis's "conspiratorial conduct" with respect to 3M's "intimidation and blackmail" and intentional interference claims consisted of allowing 3M's attorney to speak directly with Harvey Boulter, Porton's principal, in what Davis and Boulter believed (mistakenly) was a good-faith attempt by 3M to settle ongoing litigation in London regarding BacLite between 3M on the one hand, and Porton and

Ploughshare Innovations Limted ("Ploughshare"), a unit of the United Kingdom's Ministry of Defence, on the other.

As the above makes clear, this action is nothing more and nothing less than a Strategic Lawsuit Against Public Participation, more commonly known as a SLAPP. In the typical SLAPP, a large, wealthy corporation (such as 3M) files a lawsuit against a small but vocal critic, thus initiating a war of attrition whose cost will eventually shut the critic up. Such lawsuits abuse the court system and are the antithesis of the fundamental principals of freedom of speech, freedom of conscience, freedom of association, and here also, freedom to petition the government, upon which this nation was founded.

Accordingly, the District of Columbia and more than 25 U.S. states have enacted "Anti-SLAPP" statutes that protect persons against SLAPPs. Davis thus moves the Court, pursuant to the D.C. Anti-SLAPP Act's special motion to dismiss provisions, for an order dismissing this action against Davis, and awarding him his costs and attorneys' fees for filing the motion.

STATEMENT OF FACTS

On the surface, one might well consider laughable that 3M would file a lawsuit claiming that Davis "intimidated" a multi-billion dollar corporate giant such as 3M and that Davis, along with an investment fund manager, somehow successfully interfered with 3M's prospects to do business with the entire British Government. Equally preposterous is 3M's assertion that Davis was able to accomplish this through what the Complaint describes as a "public relations effort" (Compaint, ¶ 65) to shed light on 3M's failure to obtain FDA approval for BacLite. Unfortunately, 3M's own conduct with respect to the underlying facts and the grave implications of that conduct, and its decision to file a SLAPP against an attorney for representing his client, are no laughing matter.

A. The Relevant Players

1. 3M Company

Plaintiff 3M Company is a multi-billion dollar multi-national corporation headquartered in St. Paul Minnesota. 3M organizes its 35 business units into six operating divisions employing 80,000 persons globally, with operations in more than 65 countries. Complaint, ¶ 18. According to its annual report for the year ended December 31, 2010 on SEC Form 10-K, 3M had net income of $4.2 billion on sales revenue of $27 billion, placing the company within the Fortune-100. Since 1976, 3M has been one of the so-called "Dow 30 companies" whose stock price is used to compute the bellwether Dow Jones Industrial Average.

The Complaint boasts that "[t]he engine that drives 3M's long-term success is its commitment to innovation." Complaint, ¶ 17. Such innovations have included waterproof sandpaper, Scotch® Tape, Scotch-Brite® Cleaning Pads and Post-it® Notes, the latter of which "changed people's communication and organizational behavior forever." Complaint, ¶ 17.

The management of 3M is largely concentrated in Sir George William Buckley, who serves as Chairman of 3M's Board of Directors, its Chief Executive Officer and its President, positions he has held since 2005. In a section entitled "George W. Buckley, 3M's Visionary Chairman/CEO," the Complaint extols Sir George as a "visionary" who "overc[a]me extreme poverty as a child … [to] become a success in both his business and life." Complaint, ¶ 21. It also notes that Sir George is a citizen of both the United Kingdom and the United States, and was, on June 11 of this year, knighted by Her Majesty Queen Elizabeth. Complaint, ¶¶ 21-22. The allegations are somewhat odd—Sir George is not even a party to the lawsuit—but are probably relevant in providing the Court with a glimpse into the personality that appears to be driving this lawsuit.

2. Lanny J. Davis and Lanny J. Davis & Associates, PLLC

Defendant Lanny Davis is a Washington, D.C. lawyer who is perhaps best known as an advisor to President Clinton. He is a principal of defendants Lanny J. Davis & Associates, PLLC and Davis-Block LLC. Lanny J. Davis & Associates is a law firm, formed as a professional limited liability company whose office is in the District of Columbia. Davis-Block LLC is a public relations firm, formed as a limited liability company, also based in the District of Columbia. There are no allegations in the Complaint that even remotely involve Davis-Block.

In a section entitled "Lanny Davis: Champion of Anyone Willing To Pay Top Dollar," the Complaint trashes Mr. Davis with allegations about his representation of prior clients who were depicted as unsavory. Complaint, ¶¶ 26-35. The allegations generally ignore widely published accounts of those representations that place them in an entirely different light.[1] They have no apparent purpose other than to hold Davis up to ridicule and scorn. They are irrelevant except that they, too, provide the Court with a glimpse into the personality and motivations behind this lawsuit.

[1] For example, the Complaint alleges that Davis represented Laurent Gbagbo, the former president of the Ivory Coast who lost an election in late 2010 but refused to relinquish power" and "had begun violently suppressing opposition protests … ." Complaint, ¶ 30. 3M goes on to allege that Davis resigned the representation "amid a firestorm of public criticism." Complaint, ¶ 31. But as Davis explained in a story published by Politico.com, he took the engagement because he "thought there was a chance I could ease him into a solution [including talking to President Obama] that would avoid the loss of a single life." Ex. 1. Politico.com also quoted State Department spokesperson P.J. Crowley as stating "Certainly, Lanny was very helpful. He did open up another alternative channel of communications for us, and was providing the right advice to his client. President Gbagbo has declined to engage our ambassador, Phillip Carter. Absent that avenue, Lanny became another route to encourage President Gbagbo to leave. Unfortunately, every indication is that [Davis's] client wasn't heeding [Davis's] advice." *See* http:www.politico.com/playbook/0111/playbook1284.html.

3. The Porton Defendants and the Ministry of Defence of the United Kingdom

Defendant Porton Capital Technology Funds and Porton Capital, Ltd. are both business entities organized under the laws of the Cayman Islands who do business principally in the United Kingdom and Dubai. Porton Capital, Ltd. is the investment manager for the Porton Capital Technology Funds. These entities were founded by defendant Harvey Boulter. Its origins are linked to United Kingdom military technology. Boulter was the lead advisor to the U.K. Ministry of Defence ("MoD") in the 1990s when it split up what was then the Defence Evaluation Research Agency into two distinct entities, one of which was the Defence Science and Technology Laboratories ("DSTL").

Porton specializes in teaming with the MoD in commercializing technology developed by the MoD, including DSTL, which in turn owns Ploughshare. In this regard, Porton and Ploughshare were the principal owners of Acolyte Biomedica Ltd., a U.K. corporation formed to commercially develop and market a medical detection device named BacLite. As discussed *infra*, 3M acquired Acolyte in 2007, and its conduct with respect to BacLite is currently the subject of litigation in London.

Upon information and belief, 3M has not yet served Porton and Boulter with the Complaint. 3M has not named the MoD as a defendant. This has not, however, prevented 3M from using the London press to threaten to subpoena the Minister of Defence, the Rt. Hon. Dr. Liam Fox MP, for testimony in the U.S. with respect to the meritless New York lawsuits discussed below—a fanciful notion given the obvious issues of immunity that would apply under international treaties and conventions.

4. The MRSA Superbug

Although not a party to this or any other lawsuit, the central character in 3M's disputes with the MoD, Porton and, now, Davis is a microscopic bacterium with the unwieldy name "Methicillin-Resistant *Staphylococcus aureus*," more commonly known as MRSA. Unlike other strains of the *S. aureaus* bacterium, MRSA is resistant to antibiotics. As such, it is often called a "superbug."

According to a 2007 report published in the Journal of the American Medical Association, the Centers for Disease Control estimates that in 2005 alone, there were more than 94,000 new cases of MRSA infections in the U.S., with these infections associated with 18,650 deaths in 2005. *See* Ex. 2 (*Invasive Methicillin-Resistant Staphylococcus aureus Infections in the United States*, JAMA vol. 298, No. 15 1763, 1769 (Oct. 17, 2007)). That is almost 19,000 deaths per year in the U.S. alone that were associated with a MRSA infection contracted in that same year. Based on these numbers, more people die from MRSA annually than from the AIDS virus.

Despite these alarming numbers, a recent presentation made by Dr. Eli Perencevich at the World HAI Forum, reported that the U.S. federal research establishment awards research grants of approximately $570 per each MRSA-related death, while awarding $69,000 per each AIDS-related death. *See* http://www/wired.com/wiredscience/2011/07/resistance-death-worth/. Ex. 3.

In short, MRSA is a serious health concern. It has a high mortality rate. Funds for researching a cure are relatively scarce. With MRSA, the old saying "an ounce of prevention is worth a pound of cure" has never been more true.

B. The Development of BacLite by the U.K Ministry of Defence[2]

BacLite is a product that was developed to test for the presence of MRSA, and was intended for use by hospitals and other clinics to allow them to identify infected patients upon admission so precautionary measures to prevent the spread of the deadly bacterium can be taken. Prior to MRSA's development, there were two principal methods for detecting the presence of MRSA. One, a DNA/molecular technology, was quick, but also expensive and not always reliable. The other, a so-called CHROMagar method that relies on Petri dishes developed in the 1890s by Louis Pasteur, was inexpensive and relatively reliable, but required two to three days to produce results.

BacLite uses a new technology—photoluminescence biotechnology—developed by the MoD's DSTL. The BacLite method detects MRSA within five hours with 95% reliability—a rate that 3M employees used to tout BacLite as late as September 2008—at a cost that, while more than the CHROMagar method, is much less expensive than DNA/molecular technology methods.

DSTL invented the new technology in the early 2000s and eventually transferred it to Acolyte BioMedica Ltd. for commercialization. Acolyte was a public-private venture whose principal owners were the MoD (through its unit Ploughshare) and Porton. By 2006, following rigorous clinical trials confirming BacLite's effectiveness, the European Union gave regulatory approval for BacLite and it was ready for marketing and sale.

[2] The facts from this section and sections B, C, and D are drawn from Claimants' Opening Submissions filed in the London litigation, which sets forth what the Claimants submit the evidence at trial will establish. A copy of the Opening Submissions is attached as Ex. 4.

C. 3M's Purchase of Acolyte and the BacLite Technology

3M purchased Acolyte on February 14, 2007. Pursuant to the stock purchase agreement ("SPA"), Acolyte shareholders received an initial payment of £10.4 million, with a right to receive earn-out payments of up to an additional £41 million through 2009 based on BacLite sales. The SPA further required 3M to diligently seek regulatory approval for BacLite in Canada, Australia and the United States and actively market the product in the U.K., E.U. and the other jurisdictions where regulatory approval was obtained.

D. 3M's Botched Clinical Trials and Decision to Deep-Six BacLite

As noted, 3M's purchase of Acolyte closed on February 14, 2007. Despite its obligation to diligently seek FDA approval, however, U.S. clinical trials of BacLite did not begin for another eight months, in mid-October, at five U.S. sites. Within weeks, however, the clinical trials were returning results that were only 55% reliable, far lower than the 95% reliability rate produced by testing in the U.K. and E.U. By the end of November, 3M had shut down all clinical testing and ceased all efforts to obtain FDA approval.

During the months following cessation of clinical trials, 3M investigated the causes of BacLite's poor performance in the U.S. trials, resulting in a document entitled "BacLite Technical Report" prepared by an 11-member panel of scientists. Among the various errors identified in this report, two are particularly noteworthy.

First, MSA was used in the comparator in U.S. trials, rather than MSA-Ox, which was used in U.K. and E.U. trials. (Generically speaking, a comparator is a testing method known to produce accurate results against which the results of the trials can be compared.) MSA-Ox was used in the U.K. trials because it contains an antibiotic that kills non-resistant strains of *S. aureus*, thus allowing the test to specifically target MRSA. MSA does not contain an antibiotic.

Thus, many U.S. comparator results using MSA showed positive results for all types of *S. aurues* strains, not just MRSA, and the comparison of those positive results versus BacLite's fewer positive results misleadingly made BacLite appear to be less reliable. On November 30, 2007, Dr. Stephen O'Hara, who was instrumental in developing BacLite for the DSTL and was then employed by 3M's U.K. affiliate, identified this as a problem contributing to the poor U.S. results.

A second problem with the U.S. clinical trials was that the five testing sites were running incubators for comparator cultures at 35°C (95°F), when the proper incubation temperature was 37°C (98.6°F). (98°F is the normal temperature of the human body; at 95°, hypothermia can begin setting in.) This error was identified by 3M by December 7, 2007. As to this problem, a December 10 e-mail noted that "in a 5-hour microbiological assay, temperature is an especially critical factor."

By March 2008, the clinical team in 3M's health products division was making plans to restart testing and the FDA approval process with these and other errors corrected. People in the business end, including Sir George, were taking a different, less scientific view, however. By this time the U.S. economy was in recession. The costs of conducting clinical trials and obtaining FDA approval—a current expense—were not going to generate revenue in the short-term, thus negatively impacting 3M's bottom line for 2008. Business managers were raising questions as to whether 3M's cost-cutting should include BacLite. Sir George himself, apparently abandoning his "visionary" stance, told one 3M executive that he wondered "if we should not just pull the plug" on BacLite. On March 13, the global business manager for 3M's Medical Diagnostics unit stated that 3M's "proposed current position" was that further testing

and development of BacLite should not go forward. On March 28, 3M "definitively" decided to formally discontinue testing of BacLite in the U.S.

As to other markets, 3M did not begin marketing BacLite in the E.U. until seven months after its acquisition of Acolyte. In March, 2008, as it was deciding to "pull the plug" in the U.S., 3M began assigning its E.U. sales to other projects, and thereafter commenced only seven new customer evaluations for sales in Europe. 3M never sought regulatory approval in Canada, and never marketed BacLite there, despite indications of strong demand. And while 3M obtained the required license for BacLite in Australia, it never marketed the device there.

E. The London Litigation

In 2008, Porton filed a lawsuit against 3M in the High Court of Justice, Queen's Bench Division, Commercial Court in London, as 2008 Folio 877, for breach of contract. Ploughshare, (the company that is a unit of the MoD and a substantial owner of Acolyte), later joined the lawsuit as a complainant. The trial of that case commenced on June 15, 2011. Final arguments in the case began on Friday, September 30, and concluded on October 4.

F. Porton's FDA Petition

On May 9, 2011, Davis and Minneapolis attorney Robert R. Hopper filed with the U.S. Secretary of Health and Human Services and the FDA a Citizens' Petition pursuant to 21 C.F.R. § 10.30 on behalf of their client Porton. Ex. 5. The Petition requested that the FDA investigate 3M's mishandling of the U.S. BacLite clinical trials based on the facts developed in the London litigation. That same day, Messrs. Davis and Hopper held a press conference announcing the filing of the FDA petition.

Although the Complaint does not identify when and where the statements that 3M claims were defamatory were made, it is likely they were contained in the FDA petition, made at this

press conference, or made in press releases or new reports about the FDA petition and the broader BacLite controversy.

At the press conference, and in the documents, however, Davis set forth facts that are indisputable, stating that (1) BacLite had achieved a 95% reliability rate in the U.K. and E.U. and had received regulatory approval in those jurisdictions, (2) an 11-member panel of 3M scientists had prepared the BacLite Technical Report that determined that the U.S. clinical trials were flawed because of the use of MSA rather than MSA-Ox and storage of cultures at the wrong temperature, (3) 3M had never made the BacLite Technical Report public, (4) 3M pulled the plug on seeking FDA approval for BacLite and on all marketing efforts in 2008, and (5) 3M announced in May or June of 2009—with six months of the earn-out period remaining on the SPA—a new device that was being developed to detect MRSA. Davis explained that the FDA petition requested that the FDA investigate what happened to BacLite given these circumstances.

But even in doing this, Davis was respectful to 3M, providing for the possibility that 3M might actually use the FDA petition to show Porton wrong, or at least provide a cogent explanation for its conduct. *See, e.g.*, Ex. 6 at 18 ("So we ask the Food and Drug Administration … *if* information was withheld from them, which might constitute "*potentially* misleading" the agency) (emphasis added); *id.* at 27 ("It looks like they wanted to buy BacLite as a transition until they could finish their development of FastMan. I don't know that; it just looks that way."); *id.* at 28 (asking 3M to explain the announcement of FastMan when six months remained on the SPA earn-out period). Consistent with this approach, Davis asked 3M Chairman/CEO Sir George Buckley to make public the BacLite Technical Report—something that 3M has not yet voluntarily done. *Id.* at 13-14, 16-17, 27. And he asked that 3M provide a full explanation of why it killed BacLite and the timing of the announcement of 3M's new FastMan product.

Furthermore, far from accusing 3M of "bad faith," as the Complaint alleges, Davis said exactly the opposite. *Id.* at 18 ("So, finally, my message to anybody listening is that… we're not talking about people being evil or people acting in bad faith.")

Finally, one of 3M's chief gripes in this Court merits further discussion here. 3M specifically asserts that "Defendants knew that there was no 'secret report' at the time they made these statements … ." Complaint, ¶63.

3M's assertion is false. First, on May 11, when the statement was made, 3M had never made the BacLite Technical Report available to the public. In the London litigation, 3M had designated the Report as confidential, thus making it the subject of a protective order entered in the case. Ex. 7. It since has been admitted as an exhibit at the trial in London and is now public. But on May 11 the Report was still confidential—in other words "secret." This is why Davis repeatedly asked 3M, at the press conference, to release the Report to the public. To this day, 3M has not voluntarily made the Report public; rather Porton and Ploughshare introduced it into evidence in their case-in-chief in the London trial, and it is submitted here as Exhibit 8.

Second, the Complaint asserts that the Defendants *falsely* stated that (1) 3M botched the U.S. clinical trials, and (2) there is a report that establishes that 3M botched the U.S. clinical trials. The BacLite Technical Report establishes that it is 3M's allegations that are false. 3M could have, of course, attached a copy of the Report to its Complaint, just as it attached the e-mails in which Porton allegedly "blackmailed" it. 3M did not do so. This failure, which had to have been a calculated tactical decision, speaks volumes not only as to the merit of 3M's claims, but about the motivation behind filing this lawsuit.

G. The Pre-Trial Settlement Discussions and Porton's Alleged "Intimidation" and "Blackmail"

About a week before the commencement of the London trial, Davis and 3M's U.S. attorney William Brewer discussed settlement, but as reflected in Exhibit A to the Complaint, the parties remained far apart. The parties nonetheless made one more attempt to settle the case as opening statements in the London trial began.

Against his better judgment, Davis gave Brewer permission to speak directly with Porton CEO Boulter. As reflected in a June 17 e-mail from Davis to Brewer (Complaint, Ex. B), Davis realized that a settlement in the near future was unlikely, but explained:

> I believe you should meet and talk because, first, you are both good people, no BS, and know how to do business, not just make arguments, and I am certain you will like each other; second, you can talk about me and not worry about hurting my feelings; and third, without offending the other, each of you can state your strongly held positions on the strength of the legal case of Porton and 3M, respectively, and perhaps, narrow the gap somewhat.

Davis concluded that, even if they did not reach an amicable resolution, "I think your discussion can be productive – at least better understanding the respective parties; perceptions." Complaint, Ex. B. It is apparently this e-mail which forms the basis for 3M's claim that Davis and Porton "conspired" to intimidate and blackmail 3M.

Later that day, after a 45-minute meeting with the U.K. Minister of Defence**,** Dr. Liam Fox, Boulter (in Italy) spoke with Brewer (in the U.S.) by telephone. No agreement was reached, but at the end of the call, Brewer asked Boulter to send him an e-mail summarizing the discussion so he would have something to take back to 3M. Boulter did so in an e-mail he sent at 3:16 a.m. on June 18. It is this e-mail, attached to the Complaint as Exhibit C, which provides the factual basis for 3M's "intimidation and blackmail" claim.

In this e-mail, Boulter recounted that he had been given "the sole authority by the MoD to settle on behalf of them." Boulter conveyed the MoD's displeasure with 3M's conduct as to BacLite, summarizing its position as

> Government sold Acolyte to 3M after a great pitch that they were going to commercialise it. 3M, in their view, broke the trust relationship. It is unfortunate, on discovery, that George [*i.e.*, 3M Chairman, CEO and President Sir George Buckley] had his DNA on that decision and it now puts Gov in an awkward situation publicly. As such they feel that you should do the right thing.

Boulter went on to explain his view that the London case could conceivably generate a variety of outcomes, then explained his view that even if 3M were found liable, but for damages substantially less than what the London claimants were seeking, 3M's London counsel "will rightly tell you he got you a great result—a battle win—but 3M may lose the war (sorry figure of speech). It might leave Gov quietly seething, with ramifications for a while—they have memories like elephants." He further advised that "IF it were to settle 3M would need to do an immediate charm offensive—my recommendation." Boulter further observed that "as a result of my meeting today you ought to understand that David Cameron's Cabinet might very shortly be discussing the rather embarrassing situation of George's knighthood. It was discussed today."

In concluding, Boulter acknowledged that he did not expect that day's discussion to result in a settlement, stating "I said to [the Minister of Defence] I would try, I have done so. I expect I know the answer."

3M's "intimidation and blackmail" and "intentional interference" claim is thus based, first, on Boulter's observation that the British government might not want to do business with a company that, in its view, flagrantly violated a contract to commercially develop and market a life-saving medical device. This, of course, is a matter of common sense that 3M itself must have realized, and, if not, should have already been brought to its attention by 3M's counsel.

The claim is apparently also based on Boulter's conveying that the British government found embarrassing, and might discuss internally, Sir George's knighthood on the eve of a trial exposing 3M's conduct with respect to BacLite. One would expect a Knight of the Kingdom to appreciate the embarrassing situation in which he had placed his Government, but in any event, it is clear that Harvey Boulter, CEO of an investment fund, had absolutely no influence, much less actual power, to do anything about Sir George's knighthood. Finally, the e-mail has one other noteworthy feature: it was not sent to Davis.

Having heard nothing from Brewer, the next morning, Sunday June 19, Boulter sent him an e-mail asking if 3M had a response that he could give to the MoD, as the Minister would not expect, and Boulter did not want to convey, a "radio silence message." Complaint, Ex. D.

H. 3M's New York Litigation

1. The First New York Complaint

3M responded to Boulter's request that same day, but not by e-mail, letter, telephone, telex or any other conventional method of communication.

On *Sunday evening*, June 19, 3M filed a hastily drafted complaint in the Supreme Court of the State of New York ("N.Y. Complaint") against Boulter and Porton, but not Davis. Ex. 9. The N.Y. Complaint's true purpose was obvious on its face. Boulter was not only named a defendant, but was the very first defendant listed in this caption, so the short form caption contained on future filings and likely referenced in press accounts would read "3M v. Boulter." The N.Y. Complaint's first page contained a "Preliminary Statement" consisting of one numbered paragraph that highlighted 3M's scurrilous—and preposterous—charge of "blackmail." Indeed, the "Preliminary Statement" began with the fatuous statement that "3M is compelled to commence this action on Defendants' wrongful efforts to *extort* million of dollars

from it" and then charged that "Defendants and their investors have engaged in an *unlawful campaign to blackmail* 3M …." (Emphasis added).

The text of the N.Y. Complaint revealed that the "campaign to blackmail" 3M consisted solely of (1) the June 17 telephone conversation between Brewer and Boulter, (2) the early-morning June 18 follow-up e-mail requested by Brewer and sent by Boulter, and (3) the e-mail that Boulter sent to Brewer scant hours before the N.Y. Complaint was filed asking if Brewer had any information that Boulter could relay to the MoD. 3M lead off the N.Y. Complaint's "Causes of Action" section in bold letters with:

"Count One: Blackmail (United Kingdom Theft Act of 1968)"

In this claim, 3M purported to impose civil liability in a New York State Court on the basis of a United Kingdom criminal statute for conduct that occurred in Italy. Although this complaint, like the one filed in this Court, contained causes of action for intentional interference with prospective business, defamation, conspiracy and aiding and abetting, "blackmail" and "extortion" was its focus. Indeed, the "Introductory Statement" asserted, somewhat incoherently, that the defendants engaged in their "campaign to blackmail 3M" "in order [to] *avoid* the continuation of the campaign by which Defendants seek to publicly defame 3M and its Chairman/CEO and to tortiously interfere with 3M's legitimate business pursuits in the UK." (Emphasis added).

2. The Press Reports of the First Complaint

On June 20, 2011—a matter of hours after 3M's Sunday night filing of the N.Y. Complaint—the London *Guardian* newspaper published an article entitled "3M countersues as MRSA row becomes toxic" with subheadlines of "Knighthood question gives fresh twist to dispute" and "Investment fund head accused of 'blackmail.'" Ex. 10. The article began

> A company with links to the government has been accused of threatening a knighthood awarded to the head of one of the U.S.'s biggest companies.
>
> Harvey Boulter, chief executive of Porton Capital, an investment fund that worked with the government to develop a test for MRSA, has been accused of "blackmail" by claiming that the prime minister may reconsider a knighthood awarded to George Buckley, the British-born chief executive of the US conglomerate 3M.

Ex. 10.

The same day, *The Wall Street Journal* published a story entitled "3M's Dispute with UK Government Deepens As It Sues Over Emails" that repeated 3M's sensational charges of "blackmail" against Boulter and Porton. Ex. 11. The article included a quote from Brewer that he was "shocked" to receive the e-mails—even though he had requested the June 18 e-mail—and reported that a spokesperson for Brewer's law firm had said that settlement "discussions had effectively broken by the time the firm received Boulter's e-mails." Ex. 11.

Headlines from other news outlets from the U.S. included "3M Sues Porton Capital, CEO Harvey Boulter over 'Blackmail,'" "3M accuses Proton [sic] of blackmail," "3M claims its being blackmailed by British investor," and "3M Accuses British Firm and its CEO of Blackmail." Ex. 12. All that was missing was the hackneyed Hollywood movie reel showing front-page newspaper headlines landing in a pile, one after the next, as the negative publicity mounted.

3. 3M's Second New York Complaint Adds Davis as a Defendant

On July 14, 2011, Porton and Boulter filed a motion to dismiss 3M's New York lawsuit on grounds of lack of personal jurisdiction, forum *non conveniens*, lack of subject-matter jurisdiction and failure to state a claim. Ex. 13. Of particular relevance, Porton and Boulter submitted in support of their motion the Affidavit of Pushpinder Saini Q.C. Regarding Points of English Law Relevant to Defendants' Motion to Dismiss. After reviewing the pertinent British legal authorities, Mr. Saini concluded that, under the facts relevant to 3M's N.Y. Complaint,

"[]there is no conceivable basis on which a demand made by one person overseas on another also overseas could constitute the offence of blackmail under English law." Ex. 13 (¶¶ 5-17). He also concluded, after further legal analysis, that the criminal offence of blackmail, even if it could be proven, does not give rise to a civil liability, under English law. *Id.* (¶¶ 18-20).

3M did not respond to this motion to dismiss. Thus, it did not provide any factual or legal basis for the New York court to exercise personal jurisdiction over Porton and Boulter, both foreign citizens. Nor did 3M try to explain how Porton and Boulter could be civilly liable under a U.K. criminal statute. Nor did 3M attempt to explain why the N.Y. Complaint stated any claim for relief.

Instead, on July 21, 3M filed a First Amended Complaint ("N.Y. Amended Complaint"), the precursor to the Complaint filed in this Court. Ex. 14. This time, attempting to provide a U.S. jurisdictional "hook," 3M added Davis, and, having had a full month since the hasty filing of the first complaint, charged up its theatrical allegations with more adjectives, hyperbole and invective. For example, the N.Y. Amended Complaint's first page again had a Preliminary Statement whose first sentence this time read:

> This lawsuit arises from a conspiracy – memorialized in written statements made by Defendants – whose purpose was to unlawfully coerce one of the world's largest and most successful companies, 3M, into paying tens of millions of dollars needed by the Boulter Defendants to save them from the consequences of yet another unprofitable investment.

The N.Y. Amended Complaint again had an entire section extolling 3M Chairman/CEO/President Sir George Buckley as "3M's Visionary Chairman/CEO." Added was a section entitled "Lanny Davis: Champion of Anyone Willing to Pay Top Dollar" followed by paragraphs 10 paragraphs of patently irrelevant—and misleading—allegations trashing Davis. And out of the blue, it asserted that Boulter and Porton are "under tremendous financial pressure

from investors to dramatically improve performance. … [T]hat pressure caused Boulter to commit desperate, unlawful acts, in an effort to salvage what had become a bad investment in Acolyte for all parties involved." *Id.*, ¶ 23.

To hopefully pass the "straight-face" test and avoid sanctions (and having learned from the tutorial on English law by Mr. Saini, Q.C.) 3M's N.Y. Amended Complaint made a feeble effort to allege the English tort of intimidation. It is clear, however, that 3M was more concerned with its outrageous charges of blackmail. The section of the N.Y. Amended Complaint entitled "Causes of Action" was slightly altered to read:

Count One: Intimidation and Blackmail (United Kingdom Law)

This count began by asserting that "all Defendants"—including now Davis—"are subject to United Kingdom law." *Id.*, ¶ 79. It then alleged that "Defendants committed the tort of intimidation under United Kingdom law by the unlawful means of blackmailing 3M …." *Id.*, ¶ 81. The N.Y. Amended Complaint then quoted section 21 of the criminal United Kingdom Theft Act 1968, which begins "A person is guilty of blackmail if, … ." All in all, the N.Y. Amended Complaint used some form of the word "blackmail," "extort," "coerce and "threaten" no less than 25 times in its 29 pages. *Id.*, ¶¶ 1, 37, 47, 48, 49, 50, 51, 54, 55, 61, 66, 70, 73, 74, 75, 81, 82, 109, 111. 3M made these allegations even though it knew that Davis (1) had merely authorized 3M's U.S. attorney to talk directly with Boulter outside of Davis's presence about settlement, (2) was not involved in the telephone call between 3M's U.S. attorney and Boulter, and (3) was not even copied on the e-mails sent by Boulter that form the basis of its intimidation and tortious interference claims.

The N.Y. Amended Complaint also set forth statements purportedly made by "Davis and the Boulter Defendants" that were allegedly defamatory. Like the Complaint filed in this Court,

the N.Y. Amended Complaint did not identify when or where the statements were made. And most telling, the N.Y. Amended Complaint (like the Complaint here) asserted in *ipse dixit* fashion these statements were false, and were made "intentionally, falsely and maliciously." 3M did not then, and does not now, provide any facts to support its claims of knowing falsehood on the part of Davis as to any of the alleged defamatory statements.

As with the original N.Y. Complaint, the filing of the N.Y. Amended Complaint and its sensational allegations was accompanied by virtually instantaneous media hoopla highlighting 3M's ridiculous intimidation and blackmail claim, which 3M originally made only against Porton and Boulter and now used to try to smear Davis.

I. 3M Decides to Sue Davis in the District of Columbia Federal Court

As with the original N.Y. Complaint, the defendants expended significant resources and efforts to file, on August 19, a motion to dismiss 3M's Amended N.Y. Complaint, again on grounds of lack of personal and subject-matter jurisdiction, forum *non conveniens*, and failure to state a claim. And, predictably, 3M again chose not to file any response explaining why the New York court had personal or subject-matter jurisdiction over the defendants or the case, why English law applied at all, and why the N.Y. Amended Complaint stated any claim for relief.[3]

Instead, on August 24—five days after the defendants filed their motion to dismiss in New York—3M filed in this Court a virtually identical complaint, containing the same scurrilous, false and misleading allegations against Davis, Porton and Boulter. And as with the two prior complaints, the filing of this lawsuit was occasioned by another round of by-now predicable stories highlighting 3M's intimidation and blackmail claim. Ex. 15.

[3] 3M waited until September 19 to seek to dismiss the New York lawsuit. Porton has filed a motion in the New York court seeking attorneys' fees and costs for the time and expense of moving to dismiss the two New York complaints, only to have 3M seek a discontinuance without responding to the motions.

ARGUMENT

The District of Columbia protects defendants like Davis who faces meritless claims seeking to coerce them into forgoing their right to freedom of speech. Under D.C.'s recently enacted Anti-SLAPP Act (the "Act"), once the target of such bullying makes a *prima facie* showing that the claims at issue arise from acts in furtherance of the right of advocacy on issues of public interest, a plaintiff such as 3M can only avoid dismissal by establishing its claims are likely to succeed on the merits. D.C. Code § 16-5502(3)(b). As shown below, Davis's statements fit squarely within the statute's purview and the likelihood that 3M can prevail on the merits of its claim is nil.

I. Plaintiff's Claims Arise from Conduct Protected by the District of Columbia's Anti-SLAPP Act

To receive the Act's protection, Davis need only make "a *prima facie* showing that the claims at issue arise from acts in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(3)(b). This is essentially a two-part inquiry: The Court first determines whether the "act" sued upon is "in furtherance of the right of advocacy," and, if so, then determines whether the advocacy addresses "an issue of public interest."

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." The Act defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" as "any written or oral statement made: in connection with an issue under consideration or review by a legislative, executive, or judicial body . . ." or "expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(2)(1). Davis's statements—contained in press releases, public demonstrations, and the FDA Citizens' Petition—are all connected with an issue of high public

interest: the deadly MRSA bacterium, 3M's failure to obtain FDA approval for a fast, highly reliable, inexpensive device (already approved in the U.K. and E.U.) that can quickly detect the presence of MRSA and thus save countless individuals from serious illness or, all too often, death. The statements likewise involved an issue under executive and judicial review: the London trial and the FDA Citizens' Petition.

Any other lingering doubt as to whether Davis's statements on their face concerned issues of public interest are resolved by the Act too. It defines "[i]ssue of public interest" to mean "an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." D.C. Code § 16-5501(2)(3).

3M might try to avoid the Act by claiming that Boulter's comments in the June 18 e-mail are not protected, and the Court should thus deny the Act's protections to Davis as a "conspirator" or "aidor and abettor." But such an argument would ignore the Act's plain language and stretch the facts beyond recognition. Boulter's June 18 e-mail unarguably contained "written" statements, including the statements that 3M finds so offensive, that were literally made "in connection with an issue under consideration or review by … a judicial body," here, the London High Court's consideration of 3M's mishandling of FDA approval for, and then abandonment of, this lifesaving technology. Thus, even the June 18 e-mail—which was not published by Davis—cannot save 3M's claims against Davis from the Act's protection.

In short, if holding a press conference, issuing a press release, organizing public demonstrations, and petitioning the U.S. government about a serious public health issue do not qualify as statements made "in connection with an issue under consideration or review by a legislative, executive, or judicial body . . ." or "expression or expressive conduct that

involves . . . communicating views to members of the public in connection with an issue of public interest," it is hard to imagine what would.

Because Davis is entitled to the protection of D.C.'s Anti-SLAPP Act, 3M can only avoid dismissal by establishing that its claims are likely to succeed on the merits. D.C. Code § 16-5501(3)(b). For the reasons set forth below, 3M Plaintiff cannot possibly meet this burden.

II. 3M Is Unlikely to Succeed on its Defamation Claim.

3M's principal claim against Davis is for defamation. The statements about which 3M complains generally fall in three categories: (1) statements about 3M's abandonment of BacLite, (2) statements pointing out the effects of 3M's abandonment of BacLite, and (3) 3M's failure to forward to the FDA the BacLite Technical Report explaining the errors 3M made in the U.S. clinical trials.

As shown below, the likelihood that 3M can prevail on its defamation claim against Davis with respect to each category ranges from slim to none.

A. The Legal Standards Applicable to 3M's Defamation Claim Are Strict.

To prevail on a claim for defamation, a plaintiff must allege and prove: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; and (3) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm. *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005) (quoting *Crowley v. North Am. Telecomms. Ass'n*, 691 A2d 1169, 1173 n.2 (D.C. 1997)). Also, some form of state of mind is also required. *Id.* Two legal requirements are particularly applicable to 3M's claims here.

1. Substantially True Statements Are Not Actionable.

As noted, 3M is required to plead and prove that the alleged defamatory statements are false. *Klayman v. Segal*, 783 A.2d 607, 612-13 (D.C. 2001); *see also, Wells v. Liddy*, 186 F.3d 505, 532 n.21 (4th Cir. 1999) ("[A]ll plaintiffs (*i.e.*, both public and private figures) bear the burden of proving falsity when the allegedly defamatory statement touches upon a matter of public concern."). Mere technicalities do not count, however. As the D.C. Circuit has emphasized, if an allegedly defamatory statement is "substantially true," it cannot give rise to liability. *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 318 (D.C. Cir. 1994) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."); *see also Weyrich v. New Republic*, Inc., 235 F.3d 617, 627 (D.C. Cir. 2001) ("We emphasize again that, to be actionable, the story must be materially false."). Additionally, as the courts have observed repeatedly, "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.D.C. 1988).

2. The "Actual Malice" Standard Applies to 3M's Defamation Claims.

For rudimentary defamation claims, a plaintiff must usually plead and prove that the defendant was at least negligent in making the defamatory statement. *Oparaugo*, 884 A.2d at 76. Here, however, because 3M is a "public figure plaintiff," the heightened "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) applies. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (applying "actual malice" standard to public officials); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990) (applying "actual malice" standard to public figures as well as public officials) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967);

Gertz v. Robert Welch, Inc., 418 U.S. 323, 336-37 (U.S. 1974)) Like D.C.'s Anti-SLAPP Act, that standard is intended to protect the exercise of the First Amendment right of free speech. The "actual malice" standard requires a plaintiff to prove that the alleged defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 280. Here the standard applies for several reasons.

First, although incorporated in Delaware, 3M's headquarters are, and for over a hundred years have been, in Minnesota. Minnesota federal courts consider public corporations to be public figures as a matter of law. *See Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999); *Northwest Airlines, Inc. v. Astraea Aviation Servs.*, 111 F.3d 1386, 1391 (8th Cir. 1997). Because Minnesota recognizes 3M as a public figure, the Court should defer to Minnesota and likewise hold that 3M is a public figure.

Moreover, holding 3M to be a public figure is consistent with D.C. law. Federal courts in D.C., applying D.C. law, have ruled that corporate plaintiffs, such as 3M, are considered public figures. *See Oao Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 48 (D.D.C. 2005) ("Corporate plaintiffs are treated as public figures as a matter of law in defamation actions brought against mass media defendants involving matters of legitimate public interest."). As the court explained in *Martin Marietta Corp v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976):

> It is quite clear from the [Supreme] Court's opinion [in *Gertz*, *supra*], however, that the values considered important enough to merit accommodation with interests protected by the first amendment are associated solely with natural persons, and that corporations, while legal persons for some purposes, possess none of the attributes the Court sought to protect. . . . [A] libel action brought on behalf of a corporation does not involve 'the essential dignity and worth of every human being' and, thus, is not 'at the root of any decent system of ordered liberty.'

3M is a $27 billion international corporation that, as it touts in the Complaint, is the maker of such ubiquitous products as Scotch® Tape, Scotch-Brite® cleaning pads, and Post-it® Notes. 3M is thus a household name that is well-known to the public. In addition, 3M produces products for use in pharmaceuticals, radiology, adhesives, and energy control. It is thus beyond cavil that 3M is pervasively involved in the affairs of society to at least the same degree as any celebrity considered to be a public figure. Further, 3M is and has been the subject of widespread news coverage. It enjoys access to the channels of effective communication that enable it to respond to any defamatory statements and influence the course of public debate, as evidenced by the media's publication of each of 3M's lawsuits against Boulter, Porton and now Davis, before the ink on the pleadings was barely dry. In short, 3M is a "public figure" if ever there was one. *See Oao Alfa Bank*, 387 F. Supp. 2d at 48 & n.51.

Even if 3M is not public figure for all purposes as a matter of law, it has to be considered a "limited purpose" public figure with respect to the Complaint. Persons become limited purpose public figures in specific instances where they are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Milkovich*, 497 U.S. at 14 (citing *Curtis Publ'g*, 388 U.S. 130; *Gertz* 418 U.S. at 336-37). A limited purpose public figure "thrust[s] himself into the vortex of a public issue, [or engages] the public's attention in an attempt to influence its outcome." *Gertz*, 418 U.S. at 352.

In *Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287 (D.C. Cir. 1980), the D.C. Circuit created a three part test to determine if a plaintiff is a limited purpose public figure with regard to a particular controversy. *Waldbaum*, 627 F.2d at 1296. First, a court must determine whether there was a public controversy. *Id.* "A public controversy is not simply a matter of interest to

the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Id.* If the issue in dispute is "being debated publicly and if it ha[s] foreseeable and substantial ramifications for nonparticipants, it [i]s a public controversy." *Id.* at 1297.

After a public controversy has been found, the court must analyze the plaintiff's role in the controversy. *Id.* If the plaintiff has achieved a "special prominence" in the controversy because of a purposeful attempt to influence the outcome or could be "realistically have been expected, because of his position in the controversy, to have an impact on its resolution," the plaintiff is a limited purpose public figure. *Id.* at 1297. In making this determination, courts can consider the plaintiff's past conduct, the extent of press coverage, and the public reaction to the plaintiff's conduct and statements. *Id.* If the plaintiff is a limited purpose public figure and the alleged defamation relates to the controversy at issue, the *New York Times* malice standard applies. *Id.* at 1298.

While noting that it is not bound to follow *Waldbaum*, the D.C. Court of Appeals has stated that its analysis is a "road map through the terrain of Supreme Court precedent." *Moss v. Stockard*, 580 A.2d 1011, 1020 (D.C. 1990). The *Moss* court further noted that the touchstone for determining a plaintiff's status as a public figure is "whether the individual has assumed a role of special prominence in the affairs of society . . . that invites attention and comment." *Id.* (citing *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987)).

At the very least, 3M is a public figure in the controversy involving BacLite. First, a public controversy is a "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Waldbaum*, 627 F.2d at 1296. The controversy—3M's decision to abandon a product that impacts the health and safety of the public—certainly

qualifies. Second, because it purchased BacLite and then failed to obtain FDA approval and market the product, 3M has undoubtedly assumed a "special prominence" in the controversy. *Id*. at 1297. Finally, the challenged statements Davis allegedly made are not only "germane" to the public controversy, they are at the center of the debate. *Id*. at 1298. The statements critically comment upon 3M's decisions concerning BacLite. It can safely be said that these statements are related to the broader debate regarding 3M's termination of BacLite development and the repercussions that followed. 3M is, at the very least, a limited purpose public figure, if not a general public figure.

Thus, the *New York Times* "actual malice" standard applies in this case. "[T]he standard of actual malice is a daunting one." *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1515 (D.C. Cir. 1996) (quotation and citation omitted). A defendant acts with actual malice if it "either knows that what it is about to publish is false or it publishes the information with 'reckless disregard' for its truth or falsity." *Id.* at 1508. The test is subjective: the plaintiff must come forward with sufficient evidence to prove "that the defendant in fact entertained serious doubts" as to the truth of the publication or acted "with a high degree of awareness of . . . probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). To act with actual malice, the defendant must "come close to wilfully blinding itself to the falsity of its utterance." *McFarlane*, 91 F.3d at 1508.

Finally, 3M is required to prove actual malice by clear and convincing evidence. *Lohronz v. Donnelly*, 350 F.3d 1772, 1283 (D.C. Cir. 2003); *Moss*, 580 A.2d at 1029; *Liberty Lobby v. Rees*, 852 F.2d 595, 597-98 (D.C. Cir. 1988)

B. 3M Is Unlikely to Succeed on its Defamation Claim Concerning its Abandonment of BacLite.

As noted, 3M claims that Davis made statements about the company and its abandonment of BacLite. *See, e.g.*, Complaint, ¶ 58 (Davis allegedly said that "the decision to shelve BacLite" was the result of "'3M's bad faith' and was an attempt to 'evade[]' investors" and told the press that "3M sabotaged the trial because it was developing a more expensive molecular test to detect MRSA internally . . . and wanted it to be the first to reach the market."); *id.* 3M's defamation claim cannot succeed.

First, it is telling with respect to these and the other allegedly statements discussed below, that 3M did not include a copy of the transcript of the May 11 press conference, the press release or Porton's FDA petition. Many of the statements attributed to Davis and characterized as "defamatory" were either not made or have been taken out of context to suit 3M's public relations purposes. As noted, Davis never said that 3M acted in "bad faith" and made clear he was not saying this. Nor does the word "sabotage" appear in the FDA petition, the press release, or the transcript of the press conference. Indeed, for the sabotage allegation, 3M appears to be relying on something said by a T.V. news reporter, not anything Davis said. *See* Complaint, ¶ 62.

Moreover, as to 3M's abandonment of BacLite, the facts are essentially undisputed and compelling. BacLite had been proven to be 95% reliable in detecting MRSA and had been given regulatory approval for use and marketing in the U.K. and E.U. 3M delayed almost nine months before starting U.S. clinical trials, and then shut down the trials after only one month based on the aberrant results. An 11-member panel of 3M scientists investigated and determined that the aberrant results had been caused by serious mistakes made by 3M and the testing sites. Just as

3M healthcare division clinical personnel were planning to restart clinical trials, 3M's business managers—including apparently Chairman/CEO Sir George Buckley—suddenly decided to abandon BacLite, later telling Porton and the MoD that BacLite did not work and was not commercially viable. Then in May or June of 2009, with at least six months remaining in the SPA's earn-out period, 3M announced that it had partnered with Quest Diagnostics to develop and market its FastMan Simplexa technology, a DNA diagnostic tool that 3M was developing to test for and detect MRSA.

If all this were not enough, in the London Litigation, 3M has refused to allow any of the senior executives responsible for BacLite to testify as witnesses. Ex.4, 130. Finally, it is noteworthy that in the five months since Davis's statements were made, 3M has done nothing to refute the statements other than to file spurious lawsuits asserting in conclusory fashion that they are false.

Finally, even if 3M could prove that Davis said what it claims, and that the statements were literally false, it cannot possibly establish "actual malice." Again, the test is "subjective." *St. Amant*, 390 U.S. at 731. 3M would have to prove that Davis in fact knew that the statements were false, or spoke with "'reckless disregard' for [their] truth or falsity." *McFarlane*, 91 F.3d at 1515. And even recklessness requires proof that Davis "c[a]me close to wilfully blinding [himself] to the falsity of its utterance." *McFarlane*, 91 F.3d at 1508. The facts establish just the opposite.

C. 3M Is Unlikely to Succeed on its Defamation Claim Concerning the Effects of 3M's Abandonment of BacLite.

As noted, 3M also bases its defamation claim on statements that Davis made concerning the effects of 3M's abandonment of BacLite, including that MRSA victims could have avoided contracting the disease, and thousands of people who died might still be alive had 3M not abandoned BacLite. *See* Complaint, ¶ 60.

Again, 3M cannot possibly prove these statements were false, or made with actual malice. As explained above, rigorous testing in the U.K. and E.U. had proven BacLite's effectiveness, which led to regulatory approval in those jurisdictions. Further, as explained above, the 2007 Centers for Disease Control study estimated that, in 2005 alone, there were more than 94,000 new cases of MRSA infections in the U.S., which resulted in 18,650 deaths from those newly contracted infections. With its extremely infectious nature and its high mortality rate, MRSA causes more deaths annually than the AIDS virus.

Given these facts and statistics, the statements were substantially true. In any event, given the facts and statistics, there is no likelihood that 3M can prove Davis's statements were made with "actual malice" by even a preponderance of the evidence, much less clear and convincing evidence.

D. 3M Is Unlikely to Succeed on its Defamation Claim Concerning 3M's Testing Errors and Communications with the FDA about BacLite.

Finally, 3M attempts to base its defamation claims on various statements Davis made concerning 3M's communications with the FDA about BacLite. It first asserts as false statements that 3M botched the U.S. clinical trials, and that a secret internal 3M report identified

these errors. This statement, however, is unarguably true, as established in the BacLite Technical Report. Ex. 8.

3M also asserts that Davis falsely stated that 3M failed to inform the FDA of the mistakes it made in the short-lived U.S. clinical trials, or provide the FDA with the BacLite Technical Report. *See* Complaint, ¶ 63. 3M claims that Davis "knew that 3M never withheld any material information concerning BacLite from the FDA and had appropriately informed the FDA of all required information." 3M simply misstates what Davis said. He did not accuse 3M of withholding the BacLite Technical Report from the FDA. Rather, he explained that through the petition, Porton was asking the FDA whether it was given the report, and suggesting that if it did not, the FDA *may* have been misled.[4] The statements were not false, and the request for an FDA investigation could not have been false.

Moreover, while 3M alleges that it "appropriately informed the FDA of all required information," it is careful *not* to say that it gave the BacLite Technical Report to the FDA. Complaint, ¶ 63. 3M, of course, could have readily attached to the Complaint the Report and any transmittal letter it sent to the FDA, just as it attached the e-mails supporting its meritless "blackmail" claim. It did not. Indeed, 3M inexplicably continues to assert that the Report does not exist, even though this is demonstrably false. *Compare* Complaint, ¶ 63 ("Defendants knew that there was no 'secret report' at the time they made these statements") with Ex. 8 (BacLite Technical Report).[5]

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[4] *See, e.g.*, Ex. 6 at 18 ("And so we ask the Food and Drug Administration, because it supervised these tests, has jurisdiction, if information was withheld from them, misleading a federal agency; and we suggest that the withholding of this technical committee report from the FDA constitutes potentially misleading the FDA as to what really went wrong on these tests. We ask the FDA … to investigate this matter.")

[5] Assuming *arguendo* that 3M is actually complaining that Defendants' characterization of the Report as "secret" is false, then, as noted, even this is wrong. On May 11 the Report was

In short, there is virtually no chance that 3M can succeed on its defamation claims with respect to statements concerning the FDA.

E. Even if the Defamation Claims Had some Factual Validity, the Statements Are Privileged.

In addition to the above, the statements about which 3M believes are defamatory are in fact subject to well-recognized privileges.

First, the District of Columbia recognizes a privilege for fair comment on matters of public interest. *Lane v. Random House, Inc*., 985 F. Supp. 141, 150 (D.D.C. 1995). "The common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Id*. "Fair comments are not actionable in defamation 'because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts.'" *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994).

The fair comment privilege "afford[s] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 32 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (1996). The fair comment privilege is intended to protect public debate. *Milkovich*, 497 U.S. at 13. In the District of Columbia, a speaker's opinions can be found to be privileged even if the facts upon which the opinions are based are not included with the opinion. *Coles*, 881 F. Supp. at 32 (citing *Fisher v. Washington Post Co.*, 212 A.2d 335, 338 (D.C. 1965)).

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subject to a protective order in the London litigation (Ex.7), and 3M has never voluntarily made the Report public. Perhaps by asserting that there was no "secret report" 3M is hoping to keep the Report secret.

The fair comment privilege applies here because the allegedly defamatory statements are expressions of Davis's views, supported by the facts, about a matter of legitimate public concern. First, it is beyond dispute that 3M pulled the plug on BacLite and then, with six months remaining in the earn-out period, announced that it had a new product that was being developed to detect the MRSA bacterium that was more expensive. Second, Daviss' statements regarding the relationship between Plaintiff's failure to develop BacLite and individuals becoming unnecessarily infected with MRSA are based upon the fact that BacLite was proven in U.K. and E.U. clinical trials to be a reliable, fast and cost-effective way of detecting MRSA, the fact that Plaintiff failed to introduce BacLite into the United States, Canadian and Australian markets, and the statistics concerning MRSA. Finally, based on all of the facts, Davis's statements that 3M did not disclose the BacLite Technical Report are opinions based upon facts, particularly the existence of the Report and 3M's continued denial that it even exists.

Second, the District of Columbia recognizes the common interest privilege. *Cloonan v. Holder*, 602 F. Supp. 2d 25, 29 (D.D.C. 2009). This privilege exists when an otherwise defamatory statement is: "(1) made in good faith; (2) on a subject in which the party communicating has an interest, or in reference to which [she] has, or honestly believes [she] has, a duty to a person with a corresponding interest or duty; (3) to a person who has such a corresponding interest." *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995); *see also Cloonan v. Holder*, 602 F. Supp. 2d 25, 29 (D.D.C. 2009). Defendants' alleged statements were made pursuant to the common interest privilege. MRSA is a serious health problem in which Porton (and its attorney Davis) and the MoD have a legitimate interest. The public has an obvious legitimate interest in MRSA. In making the statements, Davis notified MRSA victims, the FDA and the medical community of facts concerning of 3M's actions in keeping BacLite out

of the market. 3M cannot possible prove that any statements Davis made were made in bad faith.

Third, statements made to someone who may act in the public interest are also privileged. As the Restatement (Second) of Torts § 598 explains:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

The District of Columbia recognizes this privilege. *See Carter v. Hahn*, 821 A.2d 890, 894 (D.C. 2003) ("[A] qualified privilege exists when a statement about suspected wrongdoing is made in good faith to law enforcement authorities."); *Mosrie v. Trussell,* 467 A.2d 475 (D.C. 1983) ("communications concerning alleged misconduct of a police officer to his superiors are entitled to a qualified privilege."). Defendants' filing of the citizen's petition with the FDA, and comments made to the public concerning the petition are privileged under this doctrine. And finally, the First Amendment to the Constitution specifically provides citizens the right to petition the Federal Government. The FDA petition and the comments made to the public concerning it are specifically permitted and protected under the First Amendment.

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The truth sometimes hurts. 3M may not like what Davis and his clients have said. But everything they have said is soundly supported by the facts. Porton has filed the FDA petition and if 3M really believes that anything Davis has said is false, it can—and should readily—join in Porton's request to the FDA for a hearing. A SLAPP containing bogus defamation claims, however, is not only inappropriate, but abusive of the Court.

III. 3M Cannot Succeed on its "Intimidation/Blackmail" Claim.

3M attempts to drag Davis into its intimidation and blackmail claim against Porton and Boulter by referring to "Defendants" through the claim without any differentiation. One thing is readily apparent about this claim on the face of the Complaint, however. 3M has not set forth any facts even remotely suggesting that Davis threatened 3M with anything. Stated in terms of statistical probability, the likelihood that 3M will succeed on its claim of "Intimidation and Blackmail" against Davis is zero.

The U.K. Court of Appeals has recently stated "the essential ingredients of the tort of intimidation are: 1) a threat by the defendant (D) to do something unlawful or 'illegitimate'; 2) the threat must be intended to coerce the claimant (C) to take or refrain from taking some course of action; 3) the threat must in fact coerce C to take such action; and 4) loss or damage must be incurred by C as a result." *Berezovsky v. Abramovich*, [2011] All ER (D) 253 (Feb); [2011] EWCA Civ 153. In addition, it has long been the law in Great Britain that "[s]o long as the defendant only threatens what he has the legal right to do he is on safe ground." H. Carty, *The Economic Torts and English Law: An Uncertain Future*, 95 Ky. L.J. 845, 858 (2006/2007) (quoting Lord Reid in *Rookes v. Barnard*, [1964] A.C. 1129, 1168).[6] And as the court in *Merrill Lynch, Inc. v. Raffa*, [2001] 1 I.L.Pr. 31, at para [41] has observed, in language that is particularly applicable here:

> I do not think that it automatically amounts to blackmail for one party to say to another in negotiations something to the effect of 'if this litigation proceeds, it is going to be bad publicity and embarrassing for you and that may affect your business.' That can be a fair negotiating point. What will make it objectionable is if the threat is made to continue the litigation by means of false evidence.

[6] Ms. Carty is a Reader in Law (the English equivalent of a professor) at the Manchester University Law School. She has been a Barrister since 1977, and writes extensively on English economic torts. *Rookes v. Barnard,* [1964] A.C. 1129, is the modern seminal House of Lords case on the tort of intimidation.

Assuming *arguendo* that U.K law even applies here, the Complaint does not even come close to alleging a claim for intimidation under U.K. law. First, Davis was not a party to the telephone conversation between 3M's counsel and Boulter, and was not even copied on the June 18 e-mail that purportedly contained the extortionate threat. Second, even Boutler did not "threaten" to do anything. He is the principal of an investment fund. He is not a government official. He certainly has no authority or ability to influence with whom the U.K Government does business (or more accurately here, with whom it does business in the future), or who is knighted by the Queen. Moreover, his e-mail did nothing more than point out possible ramifications of 3M's conduct.

Second, the U.K Government has every right to either reduce or cease doing future business with 3M. Indeed, who could blame the Government if it did, given 3M's conduct with respect to BacLite. Nor would there be anything "illegal" or "illegitimate" if the U.K. Government were to decide to exercise its sovereign prerogative to revoke Buckley's knighthood, something that is highly unlikely in any event.

Third, Boulter plainly did not believe or intend that anything he said would "coerce" 3M into doing anything. Boulter noted at the very end of his June 18 e-mail that "I expect I know the answer," clearly indicating that he expected 3M to reject the last offer of Porton and the MoD to settle the case for $30 million. Complaint, Ex. C.

Fourth, it is even more clear from the face of the Complaint that whatever Boulter said did not "in fact coerce" (*Berezovsky v. Abramovich, supra*) 3M to agree to *any* settlement. Instead, less than 48 hours after Boulter sent the e-mail, 3M's counsel had drafted and filed 3M's first slipshod complaint, followed that up with a second complaint, and now has filed this action in this Court.

Finally, 3M has not even attempted to plead the essential element of damages, and there is no way that it could plead or prove damages. Indeed, in the only order issued in 3M's aborted New York litigation, Justice Sherry Klein Heitler, the Administrative Judge of the New York County Supreme Court, found on July 27, 2011, that 3M's amended "complaint is devoid of any monetary demand." Ex. 16. Because the Complaint makes clear that 3M was not coerced, 3M could not possibly have suffered any economic damages resulting from any "intimidation."

IV. 3M Cannot Succeed on its Tortious Interference with Prospective Business Relationships and Economic Advantage Claim.

To establish a claim for tortious interference with prospective advantageous business relationships and economic advantage under District of Columbia law, 3M must plead and prove: (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional interference inducing or causing a breach of termination of the relationship or expectancy; and (4) resultant damage. *Genetic Sys. Corp. v. Abbott Labs.*, 691 F. Supp. 407, 422-23 (D.D.C. 1988). 3M cannot demonstrate that its cause of action for tortious interference is likely to succeed on the merits.

The Court can quickly dispose of this claim as a matter of obvious fact and common sense based on the face of the Complaint. 3M is required to allege enough factual matter in its Complaint to state "a claim to relief that is plausible on its face" *Ashcraft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). There are no factual allegation in the Complaint that even so much as suggest that Davis communicated with the U.K. Government, much less that he tried to convince it not to do business with 3M. Moreover, the notion that Davis (or even Davis, Boulter and Porton in combination) could persuade, much less compel, the entire British Government not to do business with 3M is ridiculous on its face. Further, Ploughshare (a unit of the MoD) is a plaintiff in the London

litigation against 3M. Any damage to 3M's prospects for doing business with the U.K. Government has been inflicted by 3M, and its conduct with respect to the SPA and BacLite, not Davis.

The Complaint fails to plead the technical elements of a tortious interference claim. First, the Complaint fails to identify a valid business relationship or expectancy. An "expectancy" of a business relationship cannot be a one-sided hope or an intention to do business with a third party, but rather there must be allegations and evidence of some type of mutual understanding of an expected contract between the parties. *See Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 850 (D.D.C. 1996). 3M fails to identify any such expectancy, but only alleges that it has "a number of prospective business relationships with the English government." Complaint, ¶ 91. The potential to do business is not a business relationship. 3M's generic allegation that Davis "interfered and continue to interfere[s], without lawful justification or excuse, with 3M's prospective business relationships," (Complaint, ¶ 95) simply does not cut the mustard.

Second, because 3M has not established a valid business relationship or expectancy, it necessarily follows that 3M has not pleaded that Davis possessed knowledge of the relationship or expectancy.

Third, even if 3M could demonstrate a valid business relationship or expectancy and Davis' requisite knowledge of that arrangement, 3M must also allege and demonstrate a termination of the business relationship or expectancy. *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 399 (D.C. Cir. 1995) (interference must induce or cause a breach or termination of the relationship or expectancy). The Complaint does not allege any such breach or termination.

Finally, as to damages the Complaint merely asserts in conclusory fashion 3M suffered harm in excess of the jurisdictional amount. 3M must allege damages resulting from any alleged tortious interference for its claim to succeed. *See Genetic Sys. Corp.*, 691 F. Supp. at 423. 3M's failure to do so, combined with its inability to plead any of the other elements of a tortious interference claim, renders it unlikely that its cause of action will succeed on the merits.

V. 3M Cannot Prevail on its Throw-Away Claims for Secondary Liability.

Finally, it is anti-climactic to note that 3M cannot prevail on its conspiracy and aiding and abetting claims.

First, District of Columbia law does not even recognize the tort of aiding and abetting. *Flax v. Shertler*, 935 A.2d 1091, 1108 n.15 (D.C. 2007). Even if did, however, as has been shown, 3M cannot establish any tort or even an underlying wrongful act for Davis to aid and abet.

Second, under D.C. law, there is no separate cause of action for civil conspiracy. *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989). Rather, conspiracy is only a means of spreading liability to secondary actors, and necessarily requires the establishment of a primary tort. *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983). Again, 3M lacks an underlying tort upon which to base any claim for civil conspiracy.

VI. The Court Should Award Davis his Costs and Attorneys' Fees.

The Anti-SLAPP Act provides that "[t]he Court may award a moving party who prevails, whole or in part, on a motion brought under [the Act] the costs of litigation, including reasonable attorney fees." This lawsuit's patent lack of merit and 3M's meanderings, first through the New York state court system and now this Court, along with its ready-at-the quick media efforts, make clear that 3M is simply waging a war of attrition to get Davis to shut up about BacLite and

3M's conduct. It is a textbook example of a SLAPP for which an award of attorneys' fees and costs are fully merited. The Court should make such an award here to vindicate Davis's right to free speech and send a message to bullies such as 3M that wasteful lawsuits like this one will not be tolerated.

CONCLUSION

For the foregoing reasons, the Court should grant Davis's special motion to dismiss, dismiss the case with prejudice and award Davis his costs of suit, including attorneys' fees.

Dated: October 6, 2011

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CERTIFICATE OF SERVICE

I certify that on October 6, 2011, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system.

/s/ SHEILA HENDERSON