IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

RICHARD K. LEHAN, Plaintiff, v. FOX TELEVISION STATIONS, INC., et al, Defendants.	)	Case No. 2011 CA 004592 B Judge Joan Zeldon Next Event: Initial Scheduling Conference September 30, 2011 9:30 AM

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR SPECIAL MOTION TO DISMISS

In support of its Special Motion to Dismiss filed pursuant to the District of Columbia Ant-SLAPP Act of 2010, D.C. Code §16-5502(a), Defendants Fox Television Stations, Inc. ("FOX 5") and Roby Chavez (collectively "Defendants"), respectfully submit this Memorandum of Points and Authorities:

INTRODUCTION

In this lawsuit, Plaintiff Richard Lehan, a supervisory fire department lieutenant who has earned hundreds of thousands in overtime pay, challenges truthful journalism on the public controversy over excessive overtime paid by the District of Columbia Fire and Emergency Medical Services Department ("FEMS"). FOX 5, owner of a television news station in the District, and its journalist Roby Chavez, on January 3, 2011, reported on the hearings of the D.C. Council Committee on Public Safety & Judiciary and records that revealed Lt. Lehan was one of FEMS' top overtime-pay earners for three straight years. The government's scrutiny of this matter is of obvious concern to all District residents—then, and now. Indeed, to this day, the Council continues to hold ongoing public hearings on the controversy.

Lt. Lehan bases this libel and libel *per se* lawsuit on the erroneous assertion that the information FOX 5 reported was "private," false, and accused him of a crime of moral turpitude. To the contrary, the subject of FOX 5's truthful reporting is a matter of the utmost concern to District residents, and accused him of no crimes. Lt. Lehan does not and cannot deny that he earned over $261,000 in overtime over a three year period. Moreover, Lt. Lehan has no likelihood of establishing that the journalism was false in any material respect, that FOX 5 and Chavez lacked legal privilege, or that the Defendants broadcast the information with First Amendment actual malice. This lawsuit therefore falls squarely within the ambit of the District's new Anti-SLAPP Act, D.C. Code §16-5502(a),[1] designed to prevent defamation plaintiffs from chilling public discussion of significant government policy issues and the conduct of public officers. The Court should grant this Special Motion to Strike, dismiss the lawsuit prejudice, and award Defendants the costs of this litigation, including reasonable attorney fees.

FACTUAL BACKGROUND

FEMS Overtime Controversy and Lt. Lehan's Involvement

In the last decade, FEMS consistently has overspent its annual overtime budget because of the aggregation of tens of thousands of dollars of overtime claimed by FEMS members and officers like the Plaintiff. For example, the FEMS exceeded its overtime budget by over $9 million in fiscal year ("FY") 2007, nearly $9 million in FY2008, over $7 million in FY2009, and nearly $5 million in FY2010.[2] During each of the last three years, Lt. Lehan was one of the top-seven FEMS overtime earners:

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[1] SLAPP stands for "Strategic Lawsuits Against Public Participation." *See* D.C. Code §16-5501 *et seq.*

[2] *See* Committee on the Judiciary Fiscal Year 2012 Committee Budget Report, at p.22-26 (May 11, 2011). Available at http://www.dccouncil.us/mendelson/archive_pr/COJ%20FY%202012%20Budget%20Report%20-%20FINAL.pdf.

- In FY2008, Lt. Lehan was the number-one overall overtime earner in FEMS, bringing home over $119,000 in overtime pay (133% over his $90,000 salary).[3]
- In FY2009, Lt. Lehan was the number-four overall overtime earner in FEMS, bringing home over $76,000 in overtime pay. (85% over his $90,000 salary).[4]
- In FY2010, Lt. Lehan was the number-seven overall overtime earner in FEMS, bringing home nearly $66,000 in overtime pay (69% over his $95,000 salary).[5]

Given the public importance of fiscal discipline, the D.C. Council Committee on Public Safety and the Judiciary, together with its Chair, Councilmember Phil Mendelson, initiated an investigation into the root cause of the FEMS overtime budget problems.[6] Since November 2009, the Committee has held periodic oversight hearings on problems related to excessive overtime expenditures.[7] Through these hearings—which included sworn testimony by FEMS leadership, FEMS union leadership, FEMS members, and the general public—the Committee identified a number of factors that contributed to the excessive overtime issue, and it identified a number of strategies to curtail the problem.[8]

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[3] FY2008 FEMS Top-25 Overtime Earners, Ex. A to Affidavit of Drew E. Shenkman, ¶3, attached as Exhibit 1.
[4] FY2009 FEMS Top-25 Overtime Earners, Ex. B to Shenkman Aff., ¶4.
[5] FY2010 FEMS Top-25 Overtime Earners, Ex. C to Shenkman Aff., ¶5.
[6] *See* Committee on the Judiciary Fiscal Year 2012 Committee Budget Report, at p.22-26 (May 11, 2011). Available at http://www.dccouncil.us/mendelson/archive_pr/COJ%20FY%202012%20Budget%20Report%20-%20FINAL.pdf.
[7] *Id.*
[8] *Id.*

One measure FEMS took to reduce overtime was the March 2010 deployment of a computerized program "TeleStaff."[9] TeleStaff replaced the "paper and pencil" method of staffing. Prior to TeleStaff, the on-duty Deputy Fire Chief Aide would contact each individual Battalion Fire Chief Aide to obtain the Battalion's staffing requests. With TeleStaff, this practice is no longer necessary, as overtime assignments are now automated. The computerized program was staffed by an administrator or officer with authority to act on his behalf.[10] According to credible information provided to Defendants by two reliable sources within FEMS with personal knowledge, both Lt. Richard Lehan and his brother, Sgt. Edwin Lehan, had administrative access to TeleStaff that would permit them to set or change overtime assignments. *See* Affidavit of Roby Chavez ("Chavez Aff."), at ¶¶ 7-8, attached as Exhibit 2.

Despite the oversight and the added measure of TeleStaff, FEMS failed to resolve the overtime issue heading into FY2011. The Committee therefore recommended even more stringent control to the D.C. Council. It proposed an additional subtitle in the Fiscal Year 2011 Budget Support Act that would limit, just for FY2011, the ranks within FEMS that could earn overtime and the amount of overtime that could be earned.[11] In turn, the Council, as part of its annual omnibus budget enactment, modified two existing provisions of the D.C. Code. *See* D.C. Law 18-223. The changes, effective for fiscal year 2011 (which began on October 1, 2010), were aimed at limiting overtime spending within FEMS in the following ways:

- "For fiscal year 2011, no officer or member of the Fire and Emergency Medical Services Department who is authorized to receive overtime compensation under this subsection may earn overtime in excess of $20,000 in the fiscal year." D.C. Code §1-611.03 (f)(4).

[9] FEMS, Response to Questions Asked by the Committee for "Fiscal Year 2009 and 2010 Performance Oversight," at 3 (Mar. 14, 2010). http://www.dccouncil.us/mendelson/archive_pr/COJ%20performance%20and%20budget%20materials/FEMS%20Performance%20Responses%203.15.11.pdf.

[10] *Id.*

[11] *See supra* n.6 at 25.

- "For fiscal year 2011, no member of the Fire and Emergency Medical Services Department, except for officers, shall work more than 204 hours in 2 consecutive pay periods." D.C. Code §5-405(f).

- "For fiscal year 2011, no officer or member shall be permitted to earn overtime compensation for overtime work performed in a pay period after that officer or member has received sick leave in the same pay period." D.C. Code §5-405(g).

As of May 11, 2011, operating under these new restrictions, FEMS has dramatically reduced overtime expenditures for the current fiscal year.[12] Indeed, as of March 29, 2011, FEMS had reduced overtime expenditures by an impressive 51 percent in comparison to the same period for FY2010.[13]

FOX 5's Coverage of the FEMS Overtime Controversy

In late 2010 and early 2011, FOX 5 journalist Roby Chavez prepared a news report on the Committee's scrutiny and the FEMS overtime controversy. Chavez, a seasoned journalist with 25 years of experience covering public affairs,[14] including nine years as a working journalist in the District, pursued this story given its impact on both the financial well-being of D.C. government and the public's safety. *See* Chavez Aff., ¶¶1-2. The news report first aired on FOX 5's January 3, 2011 10:00 p.m. newscast and was posted on the station's internet website, myfoxdc.com. A DVD copy of the news report is attached as Exhibit A to the Chavez Aff., and a copy of the news report as it appears on the website is attached as Exhibit B to the Chavez Aff.

FOX 5 truthfully reported that since 2008, Lt. Lehan repeatedly was one of the top overtime earners in FEMS. *See id.* The newscast and the internet report directed viewers and

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[12] *See supra* n.6 at 25.

[13] *See id.*

[14] Mr. Chavez previously served as an anchor for CNN Headline News and covered public affairs for television stations in some of the nation's largest markets, including New York, Atlanta, Dallas, and New Orleans. He has also been committed to public service work, particularly here in the District, volunteering for Food & Friends, the Capital Area Food Bank, Metro TeenAIDS, and the American Red Cross. *See* Chavez Aff., ¶ 2.

readers to the list of FEMS overtime recipients that was submitted to D.C. Council Committee on Public Safety and the Judiciary and was posted on FOX 5's website. *See* Chavez Aff, ¶ 16. The next day, FEMS Chief Kenneth Ellerbe, in only his second day on the job, appeared in a follow-up interview with Mr. Chavez live on FOX 5 to address how the issue of excessive overtime within the department would be handled under the new administration. *See* Chavez Aff., ¶ 17.[15]

ARGUMENT

In recognition that baseless defamation actions like this one choke off public discussion of important public issues, the D.C. Council last year enacted legislation designed to swiftly end the chill of expression and discourage others from bringing similar claims. D.C. Code §16-5501 *et seq.*, the Anti-SLAPP Act, applies to Lt. Lehan's claims here as the news report plainly reflects "acts in furtherance of the right of advocacy on issues of public interest" under the statute. *See id.* Once FOX 5 makes the showing that the statute applies, the statute mandates dismissal with prejudice, unless Lt. Lehan surmounts the heavy burden of showing that he is "likely to succeed on the merits" of his claims. *Id.* As demonstrated below, Lt. Lehan is unable to meet that burden with respect to any portion of this truthful and privileged news report that was broadcast without First Amendment actual malice. It is true, and Lt. Lehan cannot deny, that over the last three years, he earned $261,000 in overtime—an extreme amount by any measure—and that he is using this lawsuit as an opportunity to quash reporting and public debate about this important public controversy. Accordingly, the Act requires that the Court dismiss his claims promptly and with prejudice.

[15] A copy of this interview is attached as Exhibit C to the Chavez Aff, and is also available online at http://www.myfoxdc.com/dpp/news/dc/exclusive-interview-with-incoming-dc-fire-chief-kenneth-ellerbe-010411.

I. THE ANTI-SLAPP ACT MANDATES DISMISSAL OF THIS LAWSUIT.

A. D.C.'s New Statute Bolsters Free Speech on Public Issues.

The D.C. Council strongly bolstered the rights of citizens to criticize public officials and comment on public issues when it passed the Anti-SLAPP Act last year. The D.C. Council's Committee on Public Safety and the Judiciary, in proposing the legislation, explained the importance of providing a bulwark against those seeking to stifle freedoms through speech-chilling lawsuits.

> Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Report on Bill 18-893 (Nov. 18, 2010) at 1 (attached as Exhibit 3). In order to combat this chilling effect, the Anti-SLAPP Act "provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." *Id.* at 4.

Defendants' only burden under the Anti-SLAPP Act is to satisfy a modest two-part judicial inquiry: first, whether the "act" sued upon is of the type encompassed by the Anti-SLAPP, *i.e.*, an act in furtherance of the right of advocacy; and, second, whether that "act" addresses "an issue of public interest." While no D.C. Court has yet applied the new anti-SLAPP law, its terms are simple and their application to this case is straightforward. Section 16-5502 provides:

> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.
>
> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right

> of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code §16-5502 (emphasis added).

The Act further provides that, after an expedited hearing and a prompt ruling, "If the special motion to dismiss is granted, dismissal shall be with prejudice." D.C. Code §16-5502(d). Defendants thus bear the burden on this motion only of showing that Lt. Lehan's claims fall within the ambit of the statute. The burden then shifts to Lt. Lehan, as the act provides "the motion shall be granted unless" he demonstrates "the claim is like to succeed on the merits[.]"

B. FOX 5's Truthful Reporting on Lt. Lehan's Excessive Overtime Earnings, in the Context of the D.C. Council Investigation of the FEMS Overtime Crisis, Falls Squarely Under the Anti-SLAPP Statute.

The Anti-SLAPP Act plainly applies to Lt. Lehan's claims. The law itself defines an "[a]ct in furtherance of the right of advocacy on issues of public interest" in two ways directly relevant to this lawsuit:

- "Any written or oral statement made . . . in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," or
- "Any other 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(1)(A)(i) and (1)(B). The Act further defines an "issue of public interest" as:

> 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. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

D.C. Code §16-5501(3).

The journalism at issue here falls within the anti-SLAPP statute under D.C. Code §5501(1)(A)(i) and §5501(1)(B). First, the subject of this litigation is an "act in furtherance of the right of advocacy," as FOX 5 broadcast and webcast the report "in connection with an issue under consideration or review by a legislative . . . body"—a committee of the D.C. Council. D.C. Code §16-5501(1)(A)(i). The overtime abuse within FEMS has been, and remains, the focus of an investigation by the Council's Committee on Public Safety and the Judiciary since November 2009. The Committee has held nearly monthly hearings where FEMS leadership, union leadership, FEMS members, and members of the public have been called to testify. The news report included Councilmember Mendelson's outspoken commentary on FEMS's overtime spending problem and substantially accurate information about Lt. Lehan's position as one of the department's top overtime earners for several years. Moreover, the Committee's investigation into the overtime issue resulted in changes to the D.C. Code that limited how much overtime individual members of FEMS could earn.

Additionally, the news report was an "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(1). The Act specifically defines "an issue of public interest" as one "related to health or safety . . . or community well-being." D.C. Code §16-5501(3).[16] The news report concerned millions of dollars of questionable overspending by FEMS, an agency devoted to the public health and safety. The subject of the news report is particularly relevant to the public in these difficult economic times, when the District has been forced to make painful budgetary and service cuts. Thus, in addition to "health or safety," the FOX 5 report on the financial status of the agency related to the "community well-being" under the statute.

[16] FEMS has as its mission "to promote safety and health through excellent pre-hospital medical care, fire suppression, hazardous materials response, technical rescue, homeland security preparedness and fire prevention and education in the District of Columbia." http://fems.dc.gov/DC/FEMS/About+FEMS/Who+We+Are.

Accordingly, Defendants easily meet their burden under the Anti-SLAPP Act to show that the "claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest[,]" D.C. Code §16-5502, and the statute presumes that the lawsuit should be dismissed. Lt. Lehan may only rebut this strong presumption if he demonstrates that he is "likely to prevail" on his claims. *Id.* Lt. Lehan will be unable to meet this high burden.

II. LT. LEHAN CANNOT MEET HIS HIGH BURDEN UNDER THE ANTI-SLAPP ACT TO SHOW THAT HE IS "LIKELY TO PREVAIL."

To prevail in any defamation action, 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; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Armenian Assembly of America, Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 136-37 (D.D.C. 2009) (*citing Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n. 2 (D.C. 1997). The burden rests entirely on the plaintiff to prove the defamatory nature of the challenged material, including that it was false. *See e.g., Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001) ("[t]he plaintiff has the burden of proving the defamatory nature of [a challenged] publication . . . and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed."); *Moss v. Stockard*, 580 A.2d 1011, 1022 (D.C. 1990) ("falsity must be pleaded and proven by the plaintiff.").

The plaintiff's burden is significantly higher under the First Amendment where, as here, the lawsuit concerns the discussion of public issues and also concerns a public official in his official conduct. The U.S. Supreme Court has emphasized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *See*

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Since libel claims are an attack on speech, and the mere pendency of a libel action can seriously inhibit free speech, even before the Anti-SLAPP Act courts in the District emphasized the importance of early dismissal of baseless libel claims.

> Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits—particularly those bordering on the frivolous—should be controlled so as to minimize their adverse impact upon press freedom.

McBride v. Merrell Dow & Pharms. Inc., 717 F.2d 1460, 1466 (D.C. Cir. 1983); *see also Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("In the First Amendment area, summary procedures are even more essential. For at stake here, if harassment succeeds, is free debate. . . . Unless persons, including newspapers, . . . are assured freedom from the harassment of lawsuits, they will tend to become self-censors."). For these reasons, "defamation actions should be disposed of at the earliest possible stage of the proceedings if the facts as alleged are insufficient as a matter of law to support a judgment for the plaintiff." *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992).

Lt. Lehan is not likely to prevail on his claims fail for a number of reasons. First, his libel *per se* claim in Count I falls completely on its own weight, since, contrary to his allegation (Complaint ¶20), the report does not impute that Lt. Lehan committed any crime, let alone a heinous crime of moral turpitude for which he could be criminally punished. Second, his libel claims in both Counts I and II fail because they are true, as he cannot prove that the "gist" or "sting" of the news report communicates any provably false statement of fact about him. Third, many of the statements fail to carry a provably false defamatory meaning, and are thus protected as rhetorical hyperbole. Fourth, the news report is protected under the "fair report" privilege,

because the journalism at issue here relied upon public records establishing Lt. Lehan's pattern of excessive overtime. Finally, as a ranking public safety official protecting District residents, Lt. Lehan cannot prove that Defendants acted with "actual malice" when publishing the story about him, or made false statements about him, by the heightened clear and convincing evidence standard. Thus, under the heightened burden of proof required by the Anti-SLAPP Act, and the Constitution, Lt. Lehan cannot show that he is "likely to prevail" in this action.

A. Lt. Lehan's Libel *Per Se* Claim (Count I) Fails as a Matter of Law.

FOX 5 and Chavez reported on the D.C. Council's probe into FEMS and its officers for an alleged violation of overtime policy, not for the alleged commission of crimes. Contrary to Lt. Lehan's contention that the statements in the news report were "libelous *per se*, because they constitute the imputation of a criminal offense involving moral turpitude for which the plaintiff could be indicted and punished" (Complaint, ¶ 20), the news report did not state that Lt. Lehan committed, or had been accused of committing, any crime. Nor does the Complaint identify any purported crime that the news report indicated he had committed. The libel *per se* cause of action simply is not available to Lt. Lehan on the basis of this news report, which did not accuse him of any crimes.

Under well-established D.C. law, libel *per se* claims are limited to the narrowest circumstances, confined to alleged defamations that impute the plaintiff committed an indictable, punishable, heinous crime of moral turpitude. Specifically, a statement underlying a claim of libel *per se* must:

> impute ... the commission of some criminal offense for which [the Plaintiff] may be indicted and punished, if the charge involves moral turpitude and is such as will injuriously affect [the Plaintiff's] social standing', or, ... the question is whether, from the language attributed to defendant, there is something from which commission of a crime can be inferred.

Raboya, 777 F. Supp. at 59 (citing *Farnum*, 293 A.2d at 281 (D.C. 1972) (quoting *Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955))). As to Lt. Lehan's strained interpretation of the news report, the District's law of libel *per se* defines "turpitude" as an "inherent baseness or vileness of principle, words, or actions; shameful wickedness; depravity." *Washburn v. Lavoie*, 357 F.Supp.2d 210, 215 n.6 (D.D.C. 2004) (quoting *Webster's Third New International Dictionary* 2469 (3d ed. 1981)). *See also Hughey v. Bradrick*, 177 N.E. 911, 912 (Ohio App. 1931) (finding that crimes purporting to fall within this exception should involve a "major social disgrace"). Moreover, while Lt. Lehan claims he was accused of an indictable offense, Superior Court Rule of Criminal Procedure 7(a) provides for indictments only for offenses punishable by death and those which may be punished for a term exceeding one year.

In keeping with these narrow definitions of "turpitude" and "indictable offenses," two courts in the District have dismissed libel *per se* claims because the statements sued upon did not impute that the plaintiffs committed sufficiently heinous criminal acts. In *Raboya*, 777 F.Supp. at 59, the plaintiff sued for libel *per se* over a letter accusing plaintiff of "child neglect" and of "failing to provide for her sixteen-year-old pregnant daughter." *Id.* at 58. The court granted defendants' motion to dismiss because the statement failed to impute any crime. *Id.* The *Raboya* court noted that judges "should not liberally permit a plaintiff to assert a libel *per* se claim," finding specifically that "child neglect" was not a criminal offense, but instead a civil statutory infraction. *Id.* at 60. It also noted that while the civil statute could result in a temporary loss of custody of the child, that outcome was "profoundly different in purpose and character" from a criminal sanction. *Id.* The court added that even if the letter had used the words "child abuse," which is a criminal offense, "the neglect statute does not provide for indictment or criminal punishment such as fines or imprisonment" and a libel *per s*e claim would not survive. *Id.*

Similarly, in *Washburn v. Lavoie*, 357 F.Supp.2d 210, 214 (D.D.C. 2004), plaintiff charged libel *per se* where a letter to a neighbor stated that plaintiff had "illegally" taped their conversations. *Id.* In finding as a matter of law that the statement was not libelous *per se*, the court noted that while the letter imputed a violation of federal eavesdropping law, it was "unconvinced that the accusations made by the defendants, in any way, imply that [plaintiff] committed a crime of [moral turpitude]." *Id.* It held that "such an accusation can hardly be considered one imputing the commission of a crime of shameful wickedness or depravity (i.e. a crime of moral turpitude)." *Id.* (adding that the *per se* rule "has traditionally been restricted to crimes with severe consequences, such as crimes leading to social ostracism, or even, as in past English courts, crimes punishable by corporal punishment.")

Here, as in *Raboya*, Lt. Lehan's Complaint fails to allege that the news report imputes any crime at all. Rather, it reports, in substantially accurate detail, Lt. Lehan's extensive overtime earnings. Importantly, the report does not state, nor does Lt. Lehan allege as much, that he recorded overtime and earned overtime pay for work that he did not actually perform. There is simply no law in the District making it a *crime* to exceed overtime limits, let alone a crime of moral turpitude or an indictable offense. *See generally* Title 22 of the D.C. Code.

Indeed, the only law alluded to in the Complaint—where Lt. Lehan alleges that the news report said he "met or exceeded overtime limits" and that his overtime "continues to exceed that amount even under the new law"—fails to reference any criminal offense, and therefore cannot form the basis for a libel *per se* claim. The "new law" that the D.C. Code enacted for FY2011, *see* D.C. Law 18-223, limited FEMS members to a total of $20,000 in overtime for the fiscal year, D.C. Code §1-611.03(f)(4), limited members (but not officers) to no more than 204 total work hours in two consecutive pay periods, *id.* at §5-405(f), and prevented all FEMS members

from receiving overtime in the same pay period for which they also received sick leave. *Id.* at §5-405(g). This new District law carries no criminal penalty.

Yet, even if it were a crime to violate these provisions of the Code—which it is not— any violation of law would not constitute a crime of "moral turpitude," just as the felony crime of telephone eavesdropping, according to the *Washburn* court, 357 F.Supp.2d at 214, "can hardly be considered one imputing the commission of a crime of shameful wickedness or depravity (*i.e.* a crime of moral turpitude)." *Id.* Further, as with the child abuse report in *Raboya*, 777 F.Supp. at 59, the District's overtime law provides no punishment whatsoever. As Lt. Lehan cannot maintain a libel per se cause of action, Count I should be dismissed with prejudice and FOX 5 should be awarded its attorney's fees pursuant to the Anti-SLAPP statute.

B. Lt. Lehan's Libel Claim (Count II) Also Fails as a Matter of Law.

Lt. Lehan cannot dispute the truth that he earned $261,000 in overtime during the three-year fiscal period, nor can he dispute that the news report as to his excessive overtime accurately reflected public records. He also cannot establish that Defendants' reliance on information from two reliable sources that Lt. Lehan and his brother had supervisory roles over TeleStaff constituted First Amendment "actual malice." The news report, therefore, is not actionable under District law and the U.S. Constitution.

1. Because the Defendants' news report was true that Lt. Lehan earned an extreme amount of overtime, he will be unable to meet his burden to establish falsity by clear and convincing evidence.

Lt. Lehan cannot dispute the truth true that he earned $261,000 in overtime during fiscal years 2008, 2009, and 2010—an extreme amount by any measure. Under the District's common law, the burden rests entirely on Lt. Lehan to prove the falsity of the alleged defamation. *See e.g., Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001); *Moss v. Stockard*, 580 A.2d 1011, 1022

(D.C. 1990) ("falsity must be pleaded and proven by the plaintiff."). Further, since FOX 5's reporting arose out of issues of public concern, under the First Amendment, Lt. Lehan bears the additional burden of establishing falsity by clear and convincing evidence. *Ayala v. Washington*, 679 A.2d 1057, 1069 (D.C. 1996) (citing *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986)). Moreover, truth is a complete defense to defamation. *See e.g., Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 108 (D.D.C. 2009) ("[T]ruth is a complete defense to defamation.") (quoting *Moldea v. New York Times Co.*, 15 F.3d 1137, 1142 (D.C. Cir. 1994)).

For a defendant to prevail on the defense of truth, a statement need not be literally true or "completely error-free." *Parsi*, 595 F. Supp. 2d at 108. Rather, courts have held that statements are deemed "true" if they are "substantially true," and thus are not actionable. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'"); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001) (emphasizing that "to be actionable, the story must be materially false," and that it is not enough to show that the author has "merely hyperbolized" or "provided colorful rhetorical description"); *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."). The overarching test for substantial accuracy asks whether the "gist" or the "sting" of the allegedly defamatory charge is "substantially true." *Moldea,* 22 F.3d at 318.

Lt. Lehan cannot meet his burden to show he is likely to establish, by clear and convincing evidence, that the "gist" or "sting" FOX 5 news report was substantially untrue. The "gist" or "sting" of FOX 5's January 3, 2011 news report was that Lt. Lehan earned "nearly $100,000 in overtime each year" over the "past two years." *See* Exs. A and B to Chavez Aff. at

Ex. 2. The public record corresponds to this report, as it reflects that Lt. Lehan has routinely been one of the "Top 25 Overtime Earners" at FEMS for fiscal years 2008, 2009, and 2010, earning:

- $119,000 in overtime in FY2008[17]
- $76,000 in overtime in FY2009[18]
- $66,000 in overtime in FY2010[19]
- For a total of $261,000 in overtime over the last three fiscal years.

Thus, it is undisputed that Lt. Lehan earned an average of $98,000 in overtime per year during a recent two-year period (FY2008-FY2009), and an average of $87,000 in overtime in the last three years (FY2008-FY2010). The "gist" and "sting" of the Fox 5 report therefore is true: substantially Lt. Lehan earned a large amount of overtime—a total of $261,000—in recent years.[20] And remarkably, in FY2008 alone, he earned $119,000 in overtime, an additional 134% above his annual salary of $90,000.

Even if Lt. Lehan were to contend that the differences in actual dollar amounts between the broadcast and the public record render the "gist" or "sting" of the news report false, that argument is completely unavailing. Under District law, "slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 318 (D.C. Cir. 1994). No reader or viewer of the news report would think any differently of Lehan if they knew that he earned an average of $87,000 in overtime over the last three years, instead of "nearly $100,000" over the last two years. Indeed, the "gist" of the Fox 5

[17] *See* Ex. A to Shenkman Aff. ¶ 3.

[18] *See* Ex. A to Shenkman Aff. ¶ 4.

[19] *See* FY2010 Top-25 Overtime Earners, Ex. C to Shenkman Aff., ¶ 5. These documents contain the full year-end 2010 overtime numbers.

[20] Although Lt. Lehan erroneously asserts in his Complaint that his salary as a public officer is "private information," privacy is not an element or issue in a libel action such as this one, and this Court should accordingly disregard all arguments regarding privacy.

report is that Lehan earned a significant amount of overtime, especially in light of his $90,000 annual salary, and that he was one of the firefighters whose earnings launched the D.C. Public Safety Commission's investigation. These records establish that the gist of the report was true.

2. The news report's statement that Lt. Lehan "racked up" overtime is both true and non-actionable imaginative expression.

Lt. Lehan's Complaint also takes issue with the isolated phrases from the news report that he "racked up" overtime "month after month." Complaint ¶ 6. First, Lt. Lehan cannot dispute the truth of these descriptions. It is true that from 2008 to 2010, Lt. Lehan "racked up" $261,000 in overtime, "month after month," for the entire three-year period. The dictionary defines the verb "rack up" to mean to "achieve" or "gain."[21] There is no question that Lt. Lehan gained or achieved a significant amount of overtime, as detailed in the report. Therefore, the use of the words "racked up" and "month after month" are not actionable for the simple reason that they are true.

Further, the First Amendment, as District of Columbia courts recognize, provides legal protection for "imaginative expression" and "rhetorical hyperbole" in nation's public debate, a tradition "that has added much to the discourse of our Nation." *Coles v. Wash. Free Weekly*, 881 F. Supp. 26, 32 (D.D.C. 1995). The First Amendment was "intended to protect the use of loose, figurative or hyperbolic language" in journalism about matters of public concern. *White*, 909 F.2d at 522. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-22 (1990) (holding that the First Amendment provides "breathing space" for "rhetorical hyperbole" that cannot reasonably be interpreted as stating actual facts).

For example, the Supreme Court held that while an allegation of "blackmail," in certain contexts, is an accusation of criminal conduct that may be proven true or false, in other contexts

[21] Merriam-Webster's Online Dictionary, "Rack Up" http://www.m-w.com/dictionary/rack%20up.

it is just as clearly a non-actionable expression. Thus, in *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14 (1970), the Court held that "blackmail," when used in an article about a developer's aggressive negotiating tactics with Greenbelt, MD, zoning authorities, was a non-actionable expression under the First Amendment: "[E]ven the most careless reader must have perceived that the word ["blackmail"] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the real estate developer's] negotiating position extremely unreasonable." *See also Old Dominion Branch No. 496 Nat'l Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974) (the word "traitor," in context of a union newsletter, was protected rhetorical hyperbole, not an accusation of criminal conduct).

The District's law of defamation also recognizes the stalwart protections for rhetorical hyperbole. In *Kreuzer v. George Washington Univ.*, 896 A.2d 238, 248 (D.C. 2006), a news report quoted GWU's president about a real estate dispute involving the plaintiff, saying that the amount of damages sought was too high, and adding "I think he's inhaling." *Id.* The Court of Appeals held that no reasonable reader would understand the word "inhaling" as an accusation of illegal drug use, as the context made "manifest that [the president] meant that [the plaintiff] was seeking an outlandish sum of money, not that he was 'smoking marijuana.'" *Id.* Likewise, in *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 598-99 (D.C. 2000), the author of unflattering commentary had described a transportation company as "bolting" from labor negotiations. In holding that description non-actionable, the Court of Appeals noted that while "use of the verb 'bolted' reflects lack of precision, and treats the plaintiffs with undeserved asperity," courts cannot adopt a rule that forces "authors of every sort . . . to provide only dry, colorless descriptions of facts, bereft of analysis or insight." *Id.*

Here, while Lt. Lehan's Complaint makes much of FOX 5's use of the words "racked up" in reporting on his excessive overtime, the decisions in *Greenbelt*, *Kruezer*, and *Guilford* make clear that this loose, descriptive language is simply not actionable. In context, FOX 5's use of those words are a clear figure of speech, chosen in lieu of reporting that Lt. Lehan "accumulated" overtime in historically greater proportions than the majority of employees within FEMS. Plaintiff's allegation that he was defamed by the truthful phrase "racked up" therefore also fails to state a claim for libel.

3. The Alleged Defamatory Statements Are Protected Under the Fair Report Privilege.

Even if Lt. Lehan claims that his actual overtime pay was materially different than the public records reflect—which it is not—FOX 5's broadcast based on those records are privileged. Lt. Lehan therefore is not likely to prevail in this litigation in the face of the Defendants' privilege.

The District, as does every other jurisdiction, recognizes a privilege for fair and accurate reports of official public records. This privilege applies to "reports of proceedings before any court," as well as to "reports of any official . . . action taken by any officer or agency of government." *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980). To fall within the privilege, the report must be "(a) accurate and complete, or a fair abridgement of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern." *Id.* (quotations omitted). The privilege applies to news reports of an official action or proceeding so long as the "news reports are presented in such a manner that the average reader would be likely to understand the communication to be a report on—or summary of—an official document or proceeding." *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir.

1990). The publisher of information from official records is not liable even if the plaintiff contends that the records themselves are false.

For example, in *White v. Fraternal Order of Police*, the D.C. Circuit applied the privilege to news reports by the *Washington Post* about a series of letters, written by a police union ("FOP") to the Mayor, which alleged irregularities in drug tests performed on the plaintiff police captain. *See* 909 F.2d at 515. The Mayor referred the letters to the Police Chief, "who in turn created the 'Cox Committee,'" a department group "headed by Assistant Police Chief Ronal Cox, to investigate the matter." *Id.* During the course of the investigation, but before the Cox Committee made any findings, the *Post* published articles "concerning the FOP's allegations and the Cox Committee's investigation of those allegations." *Id.* at 516.

The district court granted summary judgment for the *Post* on the ground that "[c]omparing the allegations in the FOP letters to the allegations set forth in the Post articles," the articles "contained 'fair and substantially correct repetition[s] of these allegations.'" *Id.* at 597 (quoting *Johnson v. Johnson Publishing Co.*, 271 A.2d 696, 698 (D.C. 1970)). The D.C. Circuit unanimously affirmed, holding that the articles "summarized the gist of the allegations set out in the FOP letters which the 'special panel' was investigating, and consistently attributed the reported facts to those documents," *id.* at 528, and, therefore, "the *Post* has met all of the requirements for invoking the fair report privilege." *Id.*

Here, FOX 5's news report is not actionable because it was a privileged, fair and accurate report of public records detailing FEMS's top overtime earners from 2008-2010. Since 2008, Lt. Lehan has been a prominent member of this group. In FY2008, Lt. Lehan earned $119,000 in overtime (on top of his salary that year of $90,000), in FY2009 he earned $76,000 in overtime (on top of his salary that year of $90,000), and in FY2010 he earned $66,000 in overtime (on top

of his salary that year of $95,000). The news report correctly stated that during the first three months of FY2011 (i.e. "the last three months of 2010"), Lt. Lehan had already racked up a great deal of overtime, "working 153 overtime hours in the last three months of 2010, earning him nearly $10,000." *See* Ex. B to Chavez Aff. Public records substantiate that, as of February 28, 2011, Lt. Lehan had earned nearly $8,000 in overtime.[22]

The news report fairly and accurately summarized these public records. The report therefore is privileged, Lt. Lehan is not likely to prevail in the litigation, and the Court should dismiss his claims.

4. Lt. Lehan is a Public Official Who Must Prove that FOX 5 Acted with First Amendment "Actual Malice."

Finally, as a public official, Lt. Lehan faces the high First Amendment burden to establish, by clear and convincing, evidence of "actual malice." This stringent standard, under First Amendment and District of Columbia law, requires clear and convincing proof that Defendants knew the statements were false or deliberately uttered them despite entertaining serious doubts. Lt. Lehan is unlikely to surmount this elevated hurdle, and dismissal is warranted for this reason as well.

A public official like Lt. Lehan cannot recover damages for defamation unless he proves that the publisher acted with "actual malice," i.e. knowledge or reckless disregard of the truth or falsity of a statement. *See, e .g., New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). "To have acted with actual malice, the publisher must have 'come close to willfully blinding itself to the falsity of its utterance.'" *OAO Alfa Bank v. Center for Public Integrity*, 387 F.Supp.2d 20, 48-49 (D.D.C. 2005) (quoting *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1508 (D.C. Cir. 1996)).

[22] *See* FY2011 Top-25 Overtime Earners, Ex. D to Shenkman Aff., ¶6.

Actual malice is measured by what the defendant actually believed and not "by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Indeed, actual malice is a far higher standard than ordinary or heightened negligence, or common law "ill will" malice.[23] Instead, it is a subjective standard that requires clear and convincing proof of the speaker's deliberate intent to lie.

In defamation cases in the District, courts routinely have rejected plaintiffs' arguments that fall short of the subjective test of actual malice. For example, in *Clyburn v. News World Communications, Inc.*, 705 F. Supp. 635 (D.D.C. 1989), the court found no actual malice where journalist relied on single source. *See also Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001) (no actual malice where author of article failed to read it before it was published); *Harper v. Walters,* 822 F. Supp. 817 (D.D.C. 1993)(no actual malice for omissions or defects in investigation concerning report of charges made); *Dowd v. Calabrese*, 589 F. Supp. 1206 (D.D.C. 1984) (no actual malice where object of story had denied the facts). Thus, because Lt. Lehan is a public official, and Defendants did not act with First Amendment actual malice in reporting the truthful story about Lt. Lehan's excessive overtime, he is unlikely to prevail on the merits of his claim.

[23] As the D.C. Court of Appeals and the Supreme Court have held, actual malice has nothing to do with ill will or bad motive. *Moss*, 580 A.2d at 1027 n.29 (citing *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n.7 (1989) ("The phrase "actual malice" is unfortunately confusing in that it has nothing to do with bad motive or ill will."). While common law malice looks to "ill will or enmity" as the primary motive of the defendant, actual malice is the heightened standard that looks to the defendant's attitude toward the truth, and not his attitude toward the plaintiff. Indeed, actual malice is the "intentional or reckless disregard for falsity." *Clampitt v. American University,* 957 A.2d at 43-44 (citing *Moss*, 580 A.2d at 1027 n.29).

a) As a supervisory lieutenant with FEMS, Lt. Lehan was "substantial responsibility for our control over "the Department's affairs.

The Supreme Court has held that "public officials" are those who have a "position in government [that] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees," and "at the very least" includes those in the government hierarchy "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U .S. 75, 85-86 (1966); *Moss v. Stockard*, 580 A.2d 1011, 1029-30 (D.C. 1990). Whether an individual is a public official is a question of law for the court to determine. *Id.* at 1029.

The public official category is not limited to the "upper echelons of government." *See, e.g.*, Robert D. Sack, Libel, Slander, and Related Problems at 249 (Practicing Law Institute 2d ed., 1994). For the purposes of the actual malice standard, public officials include individuals "among the hierarchy of government employees" and not merely supervisors, or those at the top of the hierarchy. *Moss*, 580 A.2d at 1029 (quoting *Rosenblatt*, 383 U.S. at 85-86). Therefore, even a subordinate who has significant authority, such as Lt. Lehan, is a public official.

In the District, many lower ranking officers and decision-makers have been found to be public officials. *See e.g. Beeton*, 779 A.2d at 920-22 (corrections officer who held the rank of corporal); *United States v. Neville*, 82 F.3d 1101, 1107 (D.C. Cir. 1996) (D.C. Department of Corrections officer); *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (captain in D.C. Metropolitan Police Department); *Paul v. News World Communications,* 32 Med. L. Rep. 2391, *5 (D.C. Super. 2003) (Chief Information Officer of the Prince George's County Public School System).

While no District court has ruled whether a lieutenant firefighter is a public official, the out-of-state decision in *Miller v. Minority Brotherhood of Fire Protection*, is instructive. 463 N.W.2d 690, 695-96 (Wis. App. 1990). In *Miller*, the Wisconsin intermediate appellate court held that the plaintiff, who was one of 45 to 50 captains in the Milwaukee Fire Department, was a "public official." *Id.* The court reached its conclusion because of the plaintiff's considerable authority over his firehouse and the considerable discretion he enjoyed to use that power. *Id.* at 695-96.

Lt. Lehan, just as the fire captain in *Miller*, is a ranking officer in a municipal fire department. As a D.C. FEMS lieutenant, Lt. Lehan wields considerable power over his firehouse and over the group of firefighters he manages. He is responsible for directing those men and women under his supervision in their public safety duties serving the people of the District of Columbia. He is also responsible for training and employee evaluation. Like a police officer, members of the public look-up to fire fighters every day as public servants who serve and protect them. Lt. Lehan no doubt has, "or appears to the public to have," substantial responsibility for or control over the conduct of FEMS affairs, and should therefore be deemed a "public official," making it highly unlikely that he will succeed on the merits of his claim. *See Rosenblatt*, 383 U.S. at 85-86.

b) Lt. Lehan is unlikely to prevail on First Amendment "actual malice."

In addition to public records obtained from the D.C. Council regarding Lt. Lehan's high overtime earnings, FOX 5 journalist Roby Chavez consulted two reliable and credible sources in FEMS with personal knowledge of Lt. Richard Lehan's and his firefighter brother, Sgt. Edwin Lehan's, involvement in the assignment of overtime through TeleStaff. *See* Chavez Aff. ¶6.

Both sources, high-ranking officers within FEMS who spoke to Mr. Chavez on the condition of confidentiality, told him that there were two types of access to TeleStaff: one that permits FEMS members to look at the schedule, and the other which provides a member with administrative access to set or change the schedule. *Id.* at ¶7. According to these sources, Lt. Lehan and his brother had access under the second category, allowing them to set or change the schedule. *Id.* The sources noted that the former chief Dennis Rubin, or one of his assistant chiefs, determined which officers get that type of access, and that the Lehans had been given such access. *Id.* at ¶9.

Mr. Chavez had previously relied on these sources for documents and information regarding at least eight other news reports he prepared concerning FEMS, including fire hydrant safety, emergency response, and other internal investigations. *Id.* ¶10. In these previous stories, these same sources provided reliable information to Mr. Chavez, and many of his other news reports regarding FEMS prompted investigations within FEMS which eventually confirmed the accuracy of the information he received from these sources. *Id.* Mr. Chavez therefore considered these sources to be reliable at the time of the January 3, 2011 news report, and still considers these sources to be extremely reliable. *Id.*

The information provided by both sources has also been further corroborated by public records obtained from the D.C. Council's Committee on Public Safety and the Judiciary, indicating that Sgt. Edwin Lehan received training to administer TeleStaff,[24] as well as other public documents suggesting that Richard and Edwin Lehan were able to enter and change data

[24] FEMS, Response to Questions Asked by the Committee for "Fiscal Year 2009 and 2010 Performance Oversight," Exhibit to Question 12 (p.166 of pdf) (Feb. 10, 2011). http://www.dccouncil.us/mendelson/archive_pr/COJ%20performance%20and%20budget%20materials/FEMS%20Performance%20Responses%2002.10.11.pdf

on TeleStaff.[25] Moreover, not all overtime was even assigned through TeleStaff, as Raymond Sneed, former President of Local 36 of the International Association of Fire Fighters, testified at a Committee meeting on June 22, 2010, despite the benefits of automating overtime through TeleStaff, overtime for special events such as baseball games and concerts was not under TeleStaff.[26]

In short, because of the past reliability of Mr. Chavez's sources, he believed the veracity of the information he obtained from them, each of whom had reliably given him accurate information numerous times before. Chavez Aff., ¶¶10-11. Mr. Chavez also believed the veracity of information contained in public records regarding the overtime he reported on. He therefore had no serious doubts as to the veracity of the information from either of his sources. *Id.* at ¶11.

Furthermore, as to Lt. Lehan's libel *per se* count, Mr. Chavez did not intend to impute or otherwise imply in the news report that Lt. Lehan had committed any crime or engaged in any criminal behavior. *Id.* at ¶ 13. Rather, Mr. Chavez reported that Lt. Lehan worked all of the overtime hours he was paid for, and not that Lt. Lehan's overtime hours were above those that he actually worked. *Id.* Indeed, prior to airing the news report, Mr. Chavez asked Lt. Lehan about the allegations and showed him the public records referenced to in the report. *Id.* at ¶ 9. Lt. Lehan did not deny any of the allegations nor did he offer any clarification, and admitted that he worked the overtime hours. *Id.*

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[25] FEMS, Response to Questions Asked by the Committee for "Fiscal Year 2009 and 2010 Performance Oversight," Exhibit to Question 2, (*see* pp. 23 and 42 of pdf) (Mar. 14, 2011). http://www.dccouncil.us/mendelson/archive_pr/COJ%20performance%20and%20budget%20materials/FEMS%20Performance%20Responses%203.15.11.pdf

[26] Statement before Committee on Public Safety and the Judiciary of Raymond Sneed, President D.C. Fire Fighters Association Local 36, of the International Association of Fire Fighters, AFL-CIO-MWC (June 22, 2010), a copy of which is attached as to the Shenkman Aff., at Ex. E, ¶ 7.

Therefore, Lt. Lehan cannot prove by clear and convincing evidence that the Defendants acted with First Amendment "actual malice," and his libel and libel *per se* claim fails for this additional reason.

CONCLUSION

For the foregoing reasons, Lt. Lehan's Complaint must be dismissed with prejudice under the District's Anti-SLAPP Act, D.C. Code §16-5502, because Defendants have made a prima facie showing that Lt. Lehan's claim arises from an act in furtherance of the right of advocacy on an issue of public interest, and Lt. Lehan cannot demonstrate that his claim is likely to success on the merits. Accordingly, this Court should award to Defendants their reasonable attorney's fees and costs, pursuant to D.C. Code §16-5504(a).

Dated: July 22, 2011

Respectfully submitted,

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