IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR SPECIAL MOTION TO DISMISS

Defendants Fox Television Stations, Inc. ("FOX 5") and Roby Chavez (collectively "Defendants"), respectfully submit this Reply in support of Defendants' Special Motion to Dismiss filed pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code §16-5502(a), and in response to Plaintiff Richard Lehan's Opposition, and state as follows:

INTRODUCTION

Lt. Lehan has abandoned his Count I for libel *per se* and fails to meet his burden of proving that he is "likely to succeed on the merits" of his Count II for libel. He admits that the "gist and sting" of the FOX 5 report was substantially true—that he earned over $100,000 in overtime over two years—and his quibbling over the size of his steady stream of large overtime checks does not render the FOX 5 report defamatory.

Lt. Lehan's libel claim also cannot survive this Special Motion for the independent reasons that he has not provided evidence of actual malice, damages, or the lack of privilege. Unable to meet any of these other elements of his defamation claim, Lt. Lehan resorts to a strained argument that the District's Anti-SLAPP Act, D.C. Code §16-5501 *et seq.*, does not apply to his lawsuit, even though he filed it more than two months after the law's effective date.

Under well-established authority, the Anti-SLAPP law, which simply advances the time for plaintiffs to meet their burdens and does not alter the elements of defamation, applies to all cases filed after its enactment. FOX 5's news report falls squarely within the protection of the law.

Because Lt. Lehan has not met his burden of showing he is likely to prevail on his claims for libel *per se* and libel, the Complaint should be dismissed in its entirety, with prejudice, and Defendants should be awarded their costs and fees.

ARGUMENT

I. THE DISTRICT'S ANTI-SLAPP ACT APPLIES TO THIS LAWSUIT.

A. The Anti-SLAPP Act Applies in Instances Like this One, Where the Lawsuit is Brought After Passage and the Elements of the Cause of Action Do Not Change.

Contrary to Lt. Lehan's argument (Opp. at 3-5), the D.C. Anti-SLAPP law applies to this litigation. Lt. Lehan filed his Complaint on June 10, 2011, more than two months after the D.C. Anti-SLAPP law became effective on March 31, 2011. Under established D.C. law, "unless contrary legislative intent appears, changes in statute law which pertain only to procedure are generally held to apply to pending cases." *Montgomery v. District of Columbia*, 598 A.2d 162, 166 (D.C. 1991). Other state courts[1] have applied similar SLAPP laws to lawsuits that involved statements published before the effective date of the statute, and even to the lawsuits already pending on the effective date of the statute. *See, e.g., Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal.App.4th 1050, 1065 (Cal. Ct. App. 2005) ("'The new [anti-SLAPP] statute

[1] Lehan incorrectly relies on the substantive/procedural analysis conducted by federal courts under *Erie v. Tompkins*, 304 U.S. 64 (1938) (Opp. at 6.) However, the D.C. courts' analysis of whether a statute is retroactive to pending cases is entirely different from the federal court *Erie* analysis, which turns on whether a state law conflicts with the Federal Rules of Civil Procedure. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 85-87 (1st. Cir. 2010) (holding that Federal Rules do not conflict with Maine's anti-SLAPP law); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009) (applying Louisiana's anti-SLAPP law as a "procedural mechanism"); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (applying California's anti-SLAPP as it had no "direct collision" with the Federal Rules).

applies to lawsuits brought before its effective date[.]"); *Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 352 (Cal. Ct. App. 1995) (applying California's anti-SLAPP statute even though allegedly libelous statement was published before statute's effective date);[2] *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E. 2d 1198, 1208 (Ill. App. 2010) (Illinois anti-SLAPP statute applied retroactively to pending case); *Anderson Development Co. v. Tobias*, 116 P.3d 323, 336 (Utah 2005) (Utah anti-SLAPP law applied to continued prosecution of case after statute enacted). *See also Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1193-94 (W.D. Wash. 2010) (federal court applied Washington anti-SLAPP law retroactively to pending case).

The fact that the FOX 5 report aired before the effective date of the statute is irrelevant to the analysis because the statute does not alter the elements of Plaintiff's defamation claim. The statute has no impact on the legal consequences of FOX 5's broadcast, or diminishes Plaintiff's right to bring a libel claim.

The retroactivity doctrine ensures that people who conform their behavior to existing law are judged by those standards, and that no one is measured by, or deprived of redress under, rules enacted after the fact. *See Edwards v. Lateef,* 558 A.2d 1144, 1146-47 (D.C. 1989) ("statutes that create additional remedies, relate to the modes of procedure or confirm or clarify existing rights do not contravene the general proscription against the retrospective operation of legislation."). The D.C. Anti-SLAPP statute does not alter the standards under which FOX 5's broadcast will be measured or the redress for actionable defamations under D.C. law. Contrary to Lt. Lehan's suggestion (Opp. at 3-5), D.C. Code Section 16-5502 has had no impact

[2] Applying California law, a federal court in the District held that because the prima facie elements of defamation remained unaltered, that state's anti-SLAPP law—on which the District's new law is modeled—"is a procedural rule." *Blumenthal v. Drudge*, 2001 WL 587860 (D.D.C. 2001) (applying California's law but denying SLAPP motion as untimely).

whatsoever on the elements he would need to prove to establish a prima facie claim of defamation.

Rather, the Anti-SLAPP law provides for a new "special motion to dismiss" and merely furnishes a mechanism for the Superior Court, at the earliest opportunity, to weed out unsupported lawsuits that target First Amendment activity, as here. The doctrine of retroactivity therefore has no bearing here because the Anti-SLAPP law makes no "changes [to] the legal consequences of acts completed before its effective date." *Nixon v. District of Columbia Dep't of Employment Servs.*, 954 A.2d 1016, 1022 (D.C. 2008). *See also Montgomery*, 598 A.2d at 166 (D.C. 1991) (citing *Edwards*, 558 A.2d at 1146) (a law is "substantive" if it "impair[s] vested rights")). If Lt. Lehan had been able to demonstrate a prima facie case that FOX 5's report was false, unprivileged, made with First Amendment actual malice, and that he suffered actual injury—which his Opposition fails to do—this lawsuit would continue even under the new law.

Lt. Lehan also relies (Opp. at 4) on one word in the D.C. Council's Committee on Public Safety and the Judiciary's Report —"substantive"—to argue retroactivity, while ignoring: (1) the Committee Report's clear declaration that the law "adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with [SLAPPS.]" (emphasis added), *see* Report at 6 (attached Exhibit 3 to Defendants' Special Motion), and; (2) the fiscal impact statement accompanying the Committee Report, which also reflects that the statute was designed to have a "beneficial impact on current and potential SLAPP defendants." (emphasis added) (*Id.* at Attachment 3 to the Report).

Moreover, Plaintiff's reliance on *Bank of America v. Griffin*, 2 A.3d 1070, 1071 (D.C. 2010) (Opp. at 3-4), is entirely misplaced. There, in the middle of the underlying litigation, the District enacted a statute that made a *lis pendens* effective only upon the recording of notice of a

lawsuit, and not, as existing law had provided, merely upon its filing. *Id.* at 1073. Bank of America asserted that its sponsorship of a second mortgage, during the pendency of the litigation, gave it a priority interest over the first mortgage because that notice of *lis pendens* was never recorded. *Id.* The Court of Appeals disagreed, holding the statute could not be applied retroactively because "it would most certainly affect the substantive rights of litigants who had cases pending on [the effective date of the act]," changing the outcome of the case. *Id.* at 1076.

By contrast, Plaintiff filed his Complaint after the effective date of the District's Anti-SLAPP law, and the law in no way alters the elements of his defamation claims or predetermines the outcome of this Special Motion to Dismiss. Plaintiff still must prove all elements of falsity, fault, non-privilege and damages, under the same substantive burdens provided in existing Supreme Court and Court of Appeals First Amendment and common law precedent.[3] The District's new law merely shifts the order of presentation of proofs required to maintain a SLAPP in this type of defamation action. As the law became effective months before Plaintiff filed this lawsuit, and the law adds no additional requirements for defamation plaintiffs to establish their prima facie claims,[4] retroactivity is simply not an issue in this case, and the statute clearly applies.

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[3] Even if, as Plaintiff asserts, the new law reflects "a reallocation of the burden of proof " (Opp. at 5)—which it does not—D.C. law squarely holds that "a statute relating solely to procedural law, such as burden of proof . . . applies to all proceedings after its effective date even though the transaction occurred prior to its enactment." *United Securities Corp. v. Bruton*, 213 A.2d 892, 893-94 (D.C. 1965).

[4] Courts facing the issue also have uniformly rejected Lt. Lehan's argument that the prevailing party attorney's fees provision in the new law renders it non-retroactive and thus inapplicable here. (Opp. at 5). *See e.g., Robertson v. Rodriguez,* 36 Cal. App. 4th 347, 352 (Cal. Ct. App. 1995) (applying anti-SLAPP law retroactively and awarding fees and costs to prevailing defendant); *See, e.g., Ingels v. Westwood One Broadcasting Services, Inc.*, 129 Cal.App.4th 1050, 1065 (Cal. Ct. App. 2005) (same); *Shoreline Towers Condominium Ass'n v. Gassman*, 936 N.E. 2d 1198, 1208 (Ill. App. 2010) (same). Moreover, this argument is premature as no fees motion is pending, and the new law's procedure on fees is segregable from the remainder of the statute.

B. This is a Classic SLAPP Lawsuit.

Lt. Lehan erroneously asserts that news reports on D.C. government investigations, including FOX 5's report on local firefighter overtime pay, are not covered by the broad protections of the Anti-SLAPP law. (Opp. at 7-9). Lt. Lehan cites no provision in the law to support his argument, because there is none. The law applies without limitation to (1) "[a]ny written or oral statements 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 (2) "[a]ny 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) (emphasis added). The law defines a matter of "public interest" to include issues "related to ... the District government." D.C. Code § 16-5501(3). The plain language of the law is extremely broad. There is nothing in the statute that would authorize the Court to exclude a news report from the law's protection for "any written or oral statement" relating to official government proceedings or "any ... expressive conduct" to the public regarding matters of "public interest."

Indeed, other jurisdictions with similar statutes have held that news reporting on government or public issues is protected by anti-SLAPP law as an exercise of free speech or expression. *See e.g. Sipple v. Foundation for Nat. Progress*, 71 Cal.App.4th 226, 240 (Cal. Ct. App. 1999) (anti-SLAPP law applied to news report on nationally recognized political consultant); *Braun v. Chronicle Publishing Co.* 52 Cal.App.4th 1036, 1044 (Cal. Ct. App. 1997) (anti-SLAPP law applied to news report regarding allegations of illegal and improper management of state university research center); *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, 37 Cal.App.4th 855, 863 (Cal. Ct. App. 1995) (anti-SLAPP law applied to news report chronicling alternative lifestyle university); *Shepard v. Schurz Communications, Inc.*, 847

N.E.2d 219, 221-22 (Ind. Ct. App. 2006) (anti-SLAPP law applied to news report regarding one attorney's unfounded accusation that town attorney unlawfully invaded citizen's privacy); *Poulard v. Lauth*, 793 N.E.2d 1120 (Ind. Ct. App. 2003) (anti-SLAPP law applied to news report regarding town council president).

Lt. Lehan's argument that "he has not filed this lawsuit to chill the defendants' exercise of free speech" or for "economic bullying" (Opp. at 8-9) is entirely beside the point. Lt. Lehan cannot cite any "intent-to-chill" language from the law because a plaintiff's intent is not an element of the District's Anti-SLAPP law. Other jurisdictions with similar statutes have held that those statutes do not include an intent requirement. *See, e.g., Equilon Enterprises LLP v. Consumer Cause Inc.*, 52 P.3d 685, 690 (Cal. 2002) (rejecting intent-to-chill requirement and applying California statute). The same rule applies here. Under the D.C. law, Defendants need only demonstrate that Plaintiff's litigation arises from the defendant's expressive conduct regarding either "an issue under consideration" by the D.C. government or "an issue of public interest." Defendants have met their burden. The burden has shifted to Lt. Lehan to establish that he is "likely to succeed on the merits," which he cannot do.

II. LT. LEHAN PUTS FORTH INSUFFICIENT EVIDENCE TO MEET HIS BURDEN TO SHOW THAT HE IS "LIKELY TO SUCCEED ON THE MERITS."

Lt. Lehan's Opposition makes no effort to support Count I of his Complaint (Libel Per Se). He therefore has failed to meet his burden of establishing that he is "likely to succeed on the merits" of that claim. The Court should dismiss that claim with prejudice for the reasons stated in Defendants Special Motion (at 12-15).

Lt. Lehan's proffer of evidence also fails to show he is likely to succeed on the merits of the defamation claim in Count II (Libel), as he has not demonstrated a prima facie case of actual

malice, substantial falsity, lack of privilege, or damages—all of which are required to survive this Special Motion.

A. Lt. Lehan is a Public Official, and He Proffers No Evidence, Let Alone Clear and Convincing Evidence, that Defendants Acted with First Amendment Actual Malice.

Lt. Lehan, as a ranking lieutenant in FEMS, is a public official and must therefore establish by clear and convincing evidence that Defendants acted with First Amendment actual malice. *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). Instead of presenting any such evidence, he erroneously attempts to argue for a lower burden of fault by confining the category of "public officials" to government employees appointed to high office. (Opp. at 9-10). Citing no law, Lt. Lehan contends that if this Court were to hold that he is a public official, it would "subject an extremely large portion of federal, state and local government employees" to that designation. (Opp. at 10). Whatever concerns Lt. Lehan may have about other plaintiffs' cases, his Opposition completely fails to address precedent in the District and elsewhere holding that public safety officers fit well within the group of officials "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" and, thus, are public officials. *Moss v. Stockard*, 580 A.2d 1011, 1029-30 (D.C. 1990) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966)).[5]

As a lieutenant in FEMS, the public has an abiding interest in the performance of Lt. Lehan's "conduct of governmental affairs." "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant.'"

[5] *See e.g. Beeton*, 779 A.2d at 920-22 (corrections officer who held the rank of corporal was public official); *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990) (captain in D.C. Metropolitan Police Department was public official); *Paul v. News World Communications*, 2003 WL 23899002, *5 (D.C. Super. Sept. 15, 2003) (Chief Information Officer of the Prince George's County Public School System was public official). *See also Miller v. Minority Brotherhood of Fire Protection*, 463 N.W.2d 690, 695-96 (Wis. App. 1990) (ranking officer in fire department wielding power over his firehouse was public official).

Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1298 (D.C. Cir. 1980) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)). Lt. Lehan, a ranking D.C. firefighter who consistently earned a disproportionate amount of overtime, and far more overtime than most other FEMS members, is a public official worthy of the heightened public scrutiny of his "conduct of governmental affairs," and this issue certainly touches on his "fitness for office."

As a public official, Lt. Lehan has the burden of providing clear and convincing evidence that Mr. Chavez and FOX 5 knew that the information they obtained from government records and from Mr. Chavez's sources was false, or that the Defendants entertained serious doubts about the information. (*See* Chavez Aff. ¶¶ 5-13, attached as Ex. 2 to the Special Motion). *See also Moss*, 580 A.2d at 1029-30. Unable to establish clear and convincing evidence of actual malice, Lt. Lehan presented an argument, entirely unsupported by any evidence, that Defendants were negligent, which is the entirely wrong standard.[6] (Opp. at 11). Lt. Lehan's failure to proffer a prima facie case of actual malice alone warrants the Court granting the Special Motion and dismissing the lawsuit with prejudice. *See Annette F. v. Sharon S.*, 119 Cal.App.4th 1146, 1170 (2004) (affirming dismissal of SLAPP lawsuit and holding: "[Plaintiff] introduced no evidence . . . to contradict [Defendant's] declaration as to her belief in the truthfulness of this allegedly defamatory statement."); *Cholowsky v. Civiletti*, 887 N.Y.S.2d 592, 596-97 (N.Y. App. Div. 2009) (affirming trial court finding that plaintiff put forth no evidence of actual malice); *Containment Technologies Group, Inc. v. American Soc. of Health*, 2009 WL 838549, *14 (S.D. Ind. 2009) (granting anti-SLAPP motion, finding no evidence of actual malice as to scientific journal's peer review process).

[6] Even were this Court to adopt a negligence standard, Lt. Lehan has failed to demonstrate that he is "likely to succeed" on his libel claim because he has not provided any evidence that Defendants published with negligence. It is not negligent for a reporter to rely on government records and trusted, proven sources in reporting on government activity.

B. Lt. Lehan Fails to Proffer Admissible Evidence on Damages.

Lt. Lehan equally fails to proffer prima facie evidence that he suffered any damage, which he acknowledges is an essential element to his defamation claim. (Opp. at 10-11, citing D.C. Standardized Jury Instruction §17.02). A defamation plaintiff must establish an allegedly defamatory statement caused "actual injury," including proof that he has suffered damage to his reputation. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 86 (D.C. 1980). The Opposition is barren of any evidence of injury to Lt. Lehan's reputation, or any other compensable form of damages. He therefore also has failed to meet his burden to show a "likelihood of success" on this element. For this reason as well, his defamation claim cannot stand, and it should be dismissed in its entirety.

C. Lt. Lehan Concedes the Substantial Truth of Defendants' News Report.

In addition to not proving fault or that he was damaged, Lt. Lehan fails to meet his burden of proving by clear and convincing evidence that the statements about him were false. *Ayala v. Washington,* 679 A.2d 1057, 1069 (D.C. 1996). Lt. Lehan admits that he earned over $100,000 in overtime pay over two years, well above his base salary, placing him in the highest overtime bracket in the entire department in the years preceding FOX 5's news report. (*See* Opp. at 10-11). His argument over exactly how far his two-year overtime earnings reached into the six-figures does not render FOX 5's report "false." As noted in Defendants' Special Motion (at 16), FOX 5's report need not be "completely error-free" or literally true to defeat a libel claim. Rather, the overarching test for substantial accuracy asks whether the "gist" or the "sting" of the allegedly defamatory charge is "substantially true." *Moldea v. N.Y. Times Co.*, 22 F.3d 310, 318 (D.C. Cir. 1994).

Lt. Lehan fails to establish that the FOX 5 report about his overtime pay was materially false. Nowhere in his Opposition does he contest that his FY2008 overtime earnings were

$119,000. And he quibbles that he earned nearly $127,000 in overtime pay over two years, instead of FOX 5's report that he earned $153,000 in two years. (See Opp. at 10, R. Lehan Affidavit ¶3(d)). He, therefore, does not contest the "gist" or "sting" of the FOX 5 report that he earned "nearly $100,000 in overtime each year" over those two years. (See Opp. At 10, R. Lehan Affidavit ¶3(a)). Moreover, Lt. Lehan's own calculation of his overtime—that he "earned $68,894.22 in overtime in calendar year 2009" and "$57,927.07 in overtime in calendar year 2010" (R. Lehan Aff. ¶3(a))—is not materially different from the FOX 5's news report, based on the government records before this Court, that Lt. Lehan earned $76,000 in overtime in FY2009, and $66,000 in FY2010. Further, Lt. Lehan attempts to create a dispute over his overtime pay by artfully citing to his overtime figures for "calendar year" 2009 and 2010, rather than the figures for the fiscal years reflected in the government records. But even under his own "calendar year" formulation, according to government records reported by FOX 5, he would still have been the eleventh-highest overtime earner in FEMS in both FY2009 and FY 2010. (*See* Motion at Exs. B and C to Shenkman Aff.).

Courts have routinely held that news reports involving even a larger disparities in reported dollar values were not false and were "substantially true." *See Ramada Inns, Inc. v. Dow Jones & Co., Inc*, 543 A.2d 313, 322 (Del. Super. 1987) ("Even to the average reader of [the report] of $200,000 lost in rigged card games (the alleged libel) would, in my view, be no more damaging to Ramada's reputation than a report of $100,000 lost in rigged card games (the precise truth)."); *McCracken v. Evening News Ass'n*, 141 N.W.2d 694, 698 (Mich. App. 1966) (report that plaintiff was charged with a $100,000 fraud was substantially true even though he was actually charged with a $50,000 fraud); *Turnbull v. Herald Co.*, 459 S.W.2d 516, 519 (Mo.Ct.App.1970) ("newspaper report that jewelry found in raid at plaintiff's home was valued at

'thousands of dollars,' when the value was actually, according to plaintiff, about $500, was not such variance as would cause damage to plaintiff and was sufficiently true to establish defense of truth to charge that statement was defamatory"); *Dudley v. Farmers Branch Daily Times,* 550 S.W.2d 99 (Tex. Civ. App. 1977) (newspaper article stating that plaintiff was charged with theft of $168,000 worth of material was substantially true even if the value of the property was much less); *Weisburgh v. Mahady,* 511 A.2d 304 (Vt. 1986) (news account of plaintiff's arrest for receiving stolen property valued at $50,000 was substantially accurate even though the value of the property was $500); *Mark v. Seattle Times,* 635 P.2d 1081, 1093 (Wash. 1981) ("No significantly greater opprobrium attaches to a statement that a person 'bilked the state out of at least $300,000' [] than to one that he was charged with larceny based on an audit sample revealing 'over $200,000 in fraud billing'".).

The other averments contained in Lt. Lehan's Affidavit also fail to demonstrate prima facie case, by clear and convincing evidence, of the falsity of FOX 5's report:[7]

- Lt. Lehan challenges the accuracy of FOX 5's report that "others" in the department "complain they are getting little" overtime compared to Lt. Lehan. He asserts that this statement is false because, supposedly, "no grievances have been filed regarding overtime from 2004 to the present." (R. Lehan Aff. ¶ 3(b)). Even if a reference to other firefighters' complaints were defamatory, which it is not, Lt. Lehan's affidavit cites to an email that is not even before this Court, therefore presents no competent evidence of falsity. And in any event, his affidavit only discusses grievances in the union context, which is insufficient to dispute FOX 5's reporting of "complaints" in the colloquial sense.

[7] Indeed, recognizing the lack of any good faith basis, Lt. Lehan's opposition cites no case law, and makes no legal argument, that his affidavit supports an argument of falsity.

- Lt. Lehan asserts that the overtime limits enacted at the start of FY2011, D.C. Code §1-611.03(f)(4) and §5-405, did not, in fact, become "effective" until January 11, 2011. He bases this assertion on the words "effective date" on the form of an internal FEMS memorandum. But as the text of the memorandum recites: "Effective and beginning October 1, 2010" all FEMS members were required to adhere to the new law. (R. Lehan Aff. ¶ 3(c) and Special Order attached to Opposition). The D.C. Fire Chief's decision to publicize the new law in January 2011 does not alter the effective date that the Council provided.
- Similarly, Lt. Lehan challenges the accuracy of FOX 5's report that "Department policy dictates that there should be no more than 36 hours of overtime per pay period," which he contends, as an officer, did not apply to him. (R. Lehan Aff. ¶ 3(c)) Yet, even if that were the case, he does not contest truth of the gist or sting of the report, that he was "averaging 45 hours of overtime per pay period".
- Lt. Lehan admits that he earned $7,300 in overtime for the first three months of FY2011, and therefore he concedes the gist or sting of the news report that he earned $10,000 during that same period. (R. Lehan Aff. ¶ 3(e)). By his own admission, Lt. Lehan already was well on the way to exceeding the new $20,000 limitation in just the first three months of the fiscal year. Thus, the gist or sting of the news report is true: both before and after D.C. tightened restrictions on overtime, Lt. Lehan continued to accumulate excessive amounts of overtime.

Lt. Lehan also fails to submit clear, convincing and admissible evidence that Defendants falsely reported that he or his brother were "in charge of" the computerized TeleStaff overtime system. The gist and sting of the report is that the Lehan brothers had gained some type of

access or "control" of the TeleStaff system so they could give Lt. Lehan overtime assignments. Cutting through the evasive word play of the Lehan brothers, their affidavits do not deny that they had obtained some type of access or control to the TeleStaff system.

- Lt. Lehan's statement that "at no time" did the former chief or his assistant chiefs "provide me administrative or special access to the TeleStaff system" does not deny that he or his brother obtained access to TeleStaff through unofficial channels. (R. Lehan Aff. at ¶3(f)).
- Edwin Lehan's statement that "at no time was [I] in charge of the computerized TeleStaff System" does not deny that he or his brother obtained access to TeleStaff through other means. (R. Lehan Aff at ¶3(f)).

Neither of these affidavits establish the falsity of the information that Edwin Lehan obtained some type of administrative access required to "set or change" the overtime in the TeleStaff system, as Mr. Chavez has been told by his reliable sources. (Chavez Aff. ¶¶ 6-12). Nor, does the Plaintiff's proffer controvert the information that Lt Lehan himself was able to "set or change" the overtime schedule, as Mr. Chavez's sources have stated. (*Id.* at ¶ 7). Since Lt. Lehan cannot, by clear and convincing evidence, established a prima facie case for falsity as to his and his brother's access or involvement in the FEMS computer regimen for assigning overtime, Lt. Lehan cannot show that he is "likely to succeed" on his claim that the statement about TeleStaff is false and published with actual malice.

D. Lt. Lehan Concedes the Use of Non-Actionable Imaginative Expression.

Lt. Lehan abandons his allegation that the statement that he "racked up" overtime "month after month" is false and defamatory, and thereby concedes that they are non-actionable imaginative expressions of opinion protected by the First Amendment. (*See* Special Motion at

18-20). Lt. Lehan therefore has no argument that he is "likely to succeed on the merits," and this portion of his case should be dismissed with prejudice as well.

E. Lt. Lehan Concedes the Defendants' Fair Report Privilege Defense.

Lt. Lehan similarly concedes that Defendants lawfully relied on credible government records obtained from the D.C. Council Committee on Public Safety and the Judiciary in preparing FOX 5's news report. In the District, journalism about government proceedings is privileged 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). Lt. Lehan notably does not contest that FOX 5 and Chavez lawfully relied on government records detailing his overtime—he merely contests the accuracy of the numbers, which are at worst substantially true. Lt. Lehan's unsupported attack on the numbers underlying the credible government records, and his failure to meet the argument that FOX 5 and Chavez were entitled to rely on those records, further demonstrates that he is not "likely to prevail on the merits," and that this case should be dismissed with prejudice.

III. IF THIS COURT FINDS THAT ANTI-SLAPP DOES NOT APPLY, IT SHOULD ALTERNATIVELY DISMISS THE CASE UNDER RULE 12(b)(6).

If this Court finds that the Anti-SLAPP Act does not apply, Defendants request, under Superior Court Rule 12(b)(6), that this Court dismiss Count I of Plaintiff's Complaint for failing to allege imputation of a crime of moral turpitude, and Count II because the alleged statements carry no defamatory meaning, or even if they do, are substantially true and legally privileged.[8]

[8] The Court can take judicial notice of the District's records regarding Lt. Lehan's overtime earnings if the Court construes this as a motion to dismiss. *Hargrave v. Washington Post*, 2009 WL 1312513, *1 (D.D.C. May 12, 2009) (court reviews public records, grants motion to dismiss under Fed.R.Civ.P. 12(b)(6) based on fair report privilege.).

CONCLUSION

For the foregoing reasons, as well as those stated in Defendants' Special Motion to Dismiss, 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 succeed 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: August 18, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of August, 2011, a copy of the forgoing was filed with the Court and served via CasefilesXpress on:

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