

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

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3M COMPANY,		)	
		)	
		)	Civil Action No. 1:11-CV-01527-RLW
	Plaintiff,	)	
		)	
	-v-	)	
		)	
HARVEY BOULTER, <i>et al.</i>		)	
		)	
		)	
	Defendants.	)	
		)	
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**MEMORANDUM OF DEFENDANTS LANNY DAVIS,  
LANNY J. DAVIS & ASSOCIATES, PLLC AND DAVIS-BLOCK LLC  
IN OPPOSITION TO 3M'S MOTION TO STRIKE SPECIAL MOTION TO DISMISS**

Dated: November 29, 2011

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**MEMORANDUM OF DEFENDANTS LANNY DAVIS,  
LANNY J. DAVIS & ASSOCIATES, PLLC AND DAVIS-BLOCK LLC  
IN OPPOSITION TO 3M'S MOTION TO STRIKE SPECIAL MOTION TO DISMISS**

Defendants Lanny Davis, Lanny J. Davis & Associates, PLLC, and Davis-Block LLC (collectively "Davis") submit this Memorandum in opposition to 3M's Motion to Strike Davis's Special Motion to Dismiss filed pursuant to the District of Columbia's Anti-SLAPP Act, D.C. Code § 16-5501, *et seq.* (the "Act").

**INTRODUCTION**

3M's recent filings with this Court lay bare that 3M has SLAPPED Davis. 3M declined to file an opposition to Davis's Special Motion, an omission which allows the Court to deem the issues raised in the Special Motion as conceded. LCvR 7(b). Instead, 3M filed a "Motion to Strike" the Special Motion accompanied with a "Cross-Motion for Discovery" in which 3M eschewed making any showing that it has any valid claims. 3M instead asserted that:

- the Court should allow 3M to conduct full-blown discovery because the District of Columbia Council lacked authority to pass the Anti-SLAPP Act;
- the Court should allow 3M to conduct full-blown discovery because even if the District of Columbia Council had authority to pass the Act, it does not apply in a federal court; and
- the Court should allow 3M to conduct what amounts to full-blown discovery even if the Act is valid and applies in federal court, because without discovery, 3M cannot show that the claims it filed, first in New York and now here, have any merit.

By its November 15 Order, the Court appropriately denied 3M's Cross-Motion for Discovery and ordered it to file "a substantive response" to the Special Motion to Dismiss by December 15, 2001. That Order also provides (at 1-2) that "[i]f in opposing the Special Motion, Plaintiff contends that the Court should not grant the Special Motion without allowing Plaintiff the opportunity to take discovery, Plaintiff must set forth with particularity and specify precisely



what targeted topics and/or categories of discovery it needs to defeat the Special Motion, as well as what that discovery will likely show.”

The District enacted its Anti-SLAPP Act to protect defendants such as Davis from costly and protracted litigation filed by powerful interests, such as 3M, intent on punishing critics for exercising their First Amendment rights. The Act allows a judge to put the expensive and invasive discovery process on hold and to decide at the earliest stages whether to allow the suit to proceed. To move forward, a plaintiff must show that it is likely to prevail on the merits, and the court may allow limited or targeted discovery if the plaintiff shows that such discovery is necessary for it to establish a likelihood of success.

As shown below, 3M’s arguments against the validity of the Act do not withstand even minimal scrutiny. Indeed, the Court’s November 15 Order itself goes a long way in showing that nothing in the Act is inconsistent with the Federal Rules of Civil Procedure (particularly Rule 56). Nor does the Act in any way interfere with the organization and jurisdiction of any local or federal court in the District of Columbia. Moreover, the Act is hardly the merely procedural device 3M claims, and instead provides defendants just like Davis with a substantive immunity-from-suit defense. Finally, longstanding case law establishes that the Act, in its entirety, applies in federal court consistent with the Supreme Court’s decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Accordingly, the Court should forthwith deny 3M’s Motion to Strike.

### **STATEMENT OF FACTS**

As the Court will recall, the factual background of this dispute has its roots in litigation in the London High Court between 3M and companies affiliated with the Porton Group and Ploughshare Innovations Ltd. (the company that is wholly owned by the U.K. Ministry of Defence and that owns a substantial interest in the BacLite technology) over a medical diagnostic

device called BacLite, which was capable of detecting the deadly MRSA bacterium. 3M attempts to allege claims against Davis for intimidation and blackmail under United Kingdom law, defamation, tortious interference with prospective business, conspiracy and aiding and abetting. The relevant facts pertaining to this action and Davis's Special Motion to Dismiss are set forth in Davis's Memorandum in Support of Special Motion to Dismiss (Dkt. Item 9 at 2-20), as well as Davis's Motion to Dismiss under Rule 12(b)(6) (Dkt. Item 30-2 at 4-9) and are incorporated here.

In most contexts, review of Davis' prior filings would suffice to provide background with respect to Davis's Special Motion to Dismiss. In its Motion to Strike, however, 3M accuses Davis of taking "factual liberties" and "misleading" the Court "as to the allegations and facts actually before the Court." Mem. 1. And more recently, 3M has filed a "Notice of Supplemental Authority" (Dkt. Item 28) by which it submits the London High Court's November 7, 2011 decision and tries to sell that decision—which found 3M in material breach of several important provisions of the contract between it, and Porton and Ploughshare—as a 3M victory.

Contrary to 3M's apparent belief, the London High Court's decision supports Davis, particularly with respect to 3M's defamation claim. Given 3M's serious charge that Davis is "misleading" the Court, and its proffers of the London High Court decision in an effort to defeat the Special Motion, it is appropriate to point out here what the London Court actually held, and to correct where necessary 3M's own Statement of Facts. The London High Court's decision and 3M's Statement of Facts serve to provide further evidence as to what 3M is really up to—trying to punish Davis for speaking out against it.

### **A. The London High Court's Decision**

As noted, 3M recently submitted to the Court the decision of the London High Court in the London Litigation between 3M, Porton and Ploughshare involving BacLite. The Supplemental Notice's discussion, however, is best described by the headline of one news report concerning the London Court's decision: "*3M loses British BacLite case, claims victory anyway.*"<sup>1</sup> In virtually every particular relevant to Davis, the London Decision (attached as Exhibit A) shows that any factual statements (as opposed to opinions) Davis made concerning 3M with respect to BacLite are substantially true.

#### **1. 3M Breached the Stock Purchase Agreement by Discontinuing Efforts to Obtain Regulatory Approval and Shutting Down the Marketing of BacLite.**

The FDA petition filed by Davis on behalf of Porton requested the FDA to investigate how 3M had botched the clinical trials for BacLite and why 3M had pulled the plug on its efforts to obtain FDA approval. In this respect, Davis pointed to several errors 3M made in conducting the clinical trials, and mentioned that 3M had, even before the earn-out period had ended, announced that it was going forward with a new product that would be capable of detecting the MRSA bacterium. The London Court's decision supports Davis's statements. The London Court specifically found that from the end of March 2008, 3M was in breach of its obligation diligently to seek regulatory approval for BacLite in the U.S. and also found that had 3M complied with its obligation, such approval would have been obtained by the beginning of February 2009. (Ex. A, ¶ 158). Other relevant findings are as follows.

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<sup>1</sup> See <http://www.massdevice.com/news/3m-loses-british-baclite-case-claims-victory-anyway>.

- Various clinical trials for BacLite prior to 3M's acquisition had produced results showing reliability of between 89 and 95 percent, with the then most recent results showing 95% reliability. (Ex. A, ¶¶ 25-28).
- Based on the above results, BacLite had received regulatory approval in the E.U. prior to 3M's acquisition. (Ex. A, ¶ 29).
- Although 3M acquired BacLite in February 2007, it did not begin clinical testing to obtain FDA approval until October 2007. (Ex. A, ¶ 74).
- In mid-November 2007, 3M shut down U.S. clinical trials because the results were showing only 50 percent reliability. (Ex. A, ¶ 75).
- As early as January 2008, just two months after 3M had halted U.S. clinical trials, 3M's initial investigation had found several errors made by 3M, including storage of MRSA samples at the wrong temperature and use of MSA rather than MSA-Ox as the comparator. (Ex. A, ¶ 142).
- These mistakes were confirmed in a February 2008 update. (Ex. A, ¶ 143).
- Days later, 3M's scientists had decided to change the comparator from MSA to MSA-Ox. (Ex. A, ¶¶ 144-145).
- By the end for March, 2008, 3M scientists had prepared a BacLite Technical Report [*i.e.*, the report that 3M has never made public and thus can be considered secret]; “[i]ts conclusions included that running the assay at 35°C instead of 37°C negatively impacted on performance, that performance was improved by lengthening the assay to 6 hours, and that MSA-Ox was inferior to MSA at detecting MRSA, so that BacLite might achieve apparently better results if it was compared to MSA-Ox.” (Ex. A, ¶ 150).

- With respect to Canada, the SPA required 3M “diligently to seek regulatory approval as from the date of the SPA” and 3M breached the SPA by failing to do so. (Ex. A, ¶¶ 161-162, 166).
- 3M was in material breach of its obligation actively to market BacLite in the EU from June 2008, in Canada and Australia from October 2008, and in the U.S. from February 2009. (Ex. A, ¶ 218).

## **2. 3M’s “Victorious” Breach**

As noted, despite these findings by the London Court, 3M has claimed victory in the London Litigation, pointing to the London Court’s damages award of \$1.3 million, and asserting that this vindicates 3M’s claim that BacLite was not commercially viable and thus that 3M was justified in pulling the plug on BacLite.<sup>2</sup> It is hard to see how 3M’s decision to discontinue development of life-saving technology for monetary reasons, and then to have been found to have breached a contract with the U.K. Ministry of Defence, reflects positively on 3M, especially given the London Court’s finding that (1) E.U. clinical trials had proven BacLite to have a reliability rate of 95 percent, (2) BacLite had received regulatory approval in the E.U. and (3) 3M could have obtained regulatory approval in the U.S. and Canada. A closer look at the London Court’s actual findings, however, shows that 3M did not “win” (and, indeed, cannot win) so far as the statements made by Davis are concerned.

The plain truth, as found by the London Court, is that less than a year after acquiring BacLite, this new device was not producing sales revenue fast enough to suit 3M’s business executives, including 3M’s chief executive, George Buckley. Accordingly, 3M abandoned

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<sup>2</sup> See 3M Press Release, *3M Prevails in London BacLite Trial*, BUSINESS WIRE (Nov. 7, 2011), [http://www.businesswire.com/portal/site/3m/index.jsp?ndmViewId=news\\_view&ndmConfigId=1000940&newsId=20111107005958&newsLang=en&vnsId=3M-Prevails-London-BacLite-Trial](http://www.businesswire.com/portal/site/3m/index.jsp?ndmViewId=news_view&ndmConfigId=1000940&newsId=20111107005958&newsLang=en&vnsId=3M-Prevails-London-BacLite-Trial).

BacLite, regardless of its life-saving potential, to cut costs and boost net income in a tough economy. Among the London Court's findings are the following:

- By January 2008—less than a year after its acquisition and only three months after 3M had commenced and then stopped U.S. clinical trials—“the BacLite business was coming under increasing pressure at 3M’s more senior management levels. 3M maintained an internal monthly forecast for all of its businesses known as the ‘Blue Book.’ Where businesses failed to fulfill their projected revenues (or exceeded projected costs), this could readily be identified by the senior management. The first ‘Blue Book’ forecasts for Acolyte had been prepared . . . during 2007, [showed that] Acolyte [*i.e.*, BacLite] had started to fall behind its forecasted sales.” (Ex. A, ¶ 78).
- By January 2008, the BacLite marketing team was already receiving pressure from 3M business managers about BacLite sales, even though, as noted, 3M had not put together an E.U. sales team for BacLite until September 2007, U.S. clinical trials had not started until October and were shut down in November, and 3M had not even started to obtain regulatory approval in Canada. (Ex. A, ¶ 195).
- “On 23 January 2008, [Brad] Sauer [the head of 3M’s Health Care business] circulated an email to the Health Care Business executives, noting that 2008 would be ‘a very tough year’ for the company. He instructed them to squeeze costs, stop hiring additional staff, and to err on the side of under-investing. Mr. Sauer pointed out that Acolyte was falling behind its forecast performance (the Blue Book) and that ‘We cannot tolerate this.’” (Ex. A, ¶ 79) (quoting e-mail).

- By March 7, 2008, 3M scientists had identified the mistakes made in the initial clinical testing and had decided to move forward with preliminary “beta-testing” of BacLite prior to restarting clinical trials. (Ex. A, ¶ 81).
- On that same day, 3M’s business executives were expressing concern that the revenues generated by sales of BacLite were not as high as originally projected. (Ex. A, ¶ 81). In particular, in an e-mail that CEO George Buckley sent to Brad Sauer, the head of 3M’s Health Care business, Buckley expressly “wonder[ed] if we should not just pull the plug on BacLite.” (*Id.*, ¶ 82) (quoting e-mail).
- The next day, March 8, Sauer responded to Buckley, that he was planning to shake things up in Health Care, including “shooting diagnostics.” (Ex. A, ¶ 82) (quoting e-mail).<sup>3</sup>
- Buckley responded to Sauer’s e-mail by stating that “its time to fish or cut bait” with respect to BacLite, and instructing Sauer to give the infection prevention team “some tough timing and costs targets and tell them to deliver or tell them we are likely pulling the plug.” (Ex. A, ¶ 82) (quoting e-mail).
- Four days later, on March 12, Cassie Jacobson, 3M’s clinical research manager in St. Paul, sent an e-mail to one Mike McLaughlin that “Given our US budget and resource constraints, as well as commercialisation challenges in Europe, it seems to me to make good sense to not move forward with a pivotal clinical in the US at this time.” (Ex. A, ¶ 84) (quoting e-mail). Jacobson also suggested that it might make sense for 3M to begin working on a second generation product. (*Id.*).

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<sup>3</sup> It is not clear whether this was a reference to the team in the medical diagnostics division that was working on BacLite, or the entire diagnostics business, which 3M commenced one month after acquiring BacLite in February 2007. (See Ex. A, ¶ 11).

- Prior to this, 3M business managers had considered whether 3M should continue to invest in U.S. clinical trials, and on March 13, 2008 Jeff Hillins, 3M's global business manager for the Medical Diagnostics division, noted that 3M's "proposed position currently is no and we should focus resources to other development and clinical activities on this and other diagnostic platforms." (Ex. A, ¶ 84) (quoting notes of meeting).
- Two weeks later, on March 27, 2008, "3M 'definitively' decided to formally stop the continued testing of BacLite in the United States. From that date forward, there was no further attempt by 3M to seek regulatory approval for BacLite in either the United States or Canada." (Ex. A, ¶ 85).
- As early as January 2008, 3M had reassigned members of the E.U. BacLite sales team to other products. (Ex. A, ¶ 174(ii)).
- In June 2008, 3M ceased all marketing activity in the E.U. (Ex. A, ¶ 209).
- 3M breached its obligations under the sale agreement to market the BacLite system in the European Union, the United States, Canada and Australia. (Ex. A, ¶ 218).

3M, of course, asserts that the London Court found that BacLite was not commercially viable. But 3M ignores a significant qualifier on the London Court's finding, and ignores other critical findings that may let 3M off the hook financially, but do not support 3M with respect to its claims against Davis.

The London Court found that BacLite "as it was" would not have been commercially successful (Ex. A, ¶ 296) and to be sure, 3M had no contractual obligation to develop or make salutary changes to BacLite for the Acolyte shareholders. But the larger point is that further



development may well have been helpful and life saving to future patients. Indeed, development of a second generation product was something that the London High Court noted was on the mind of 3M's St. Paul-based director of clinical studies if problems with the clinical trials of BacLite continued. Ex. A, ¶¶ 83, 84. That Court also specifically found that as a result of the April BacLite Technical Committee Report, 3M had decided "to look at improving the product or developing a new generation of it" and that it "continued on planning the next developments with a view to creating a viable product." Ex. A, ¶ 151, 152. 3M, however, ceased all efforts to obtain U.S. and Canadian regulatory approval, and in June 2008 ceased all efforts to market BacLite in Europe, instead seeking the Acolyte shareholders' approval to cease the Acolyte business altogether. Ex. A, ¶174(iv).

Although a 2010 study by the Centers for Disease Control showed a decrease in the incidence of onset of MRSA via hospitals and health-care facilities, the numbers are still alarmingly high, with the CDC estimating that 99,000 deaths per year are associated with health-care associated infections, principally anti-biotic resistant strains of bacterium such as MRSA. *See Health Care-Associated Invasive MRSA Infections, 2005-2008*, 2010 Journal of the American Medical Association, vol. 304, no. 6 at 641-647 (Oct. 26, 2010). 3M's explanation that in June 2008 it terminated Acolyte's entire business and ceased all development of BacLite in order to cut costs and boost 2008's bottom line may well satisfy 3M's business executives. But the explanation is hardly a ground for claiming "victory," and rings especially hollow when considered as a basis to assert that Davis "defamed" 3M by suggesting that this economic decision—a decision found by the London Court to have been a material breach of contract—may have cost lives.

Finally, one other point is worth mentioning with respect to the London Court's findings of fact, and that is the relation of those findings to 3M's far-fetched "intimidation/blackmail" claim. 3M attempts to bolster this claim by referring to Davis and the Porton defendants demanding a settlement in an amount that they "knew" was "far in excess of what the actual merits of the case warranted." Mem. 13, 14, 17-18; *see also* Mem. 6, 8. Far from being an amount anyone "knew" to be extortionately excessive, however, the London High Court opinion establishes the opposite. Among the London Court's findings were the following:

- Acolyte and the MoD's Ploughshare Innovation were seeking damages of \$66 million in the London Litigation. (Complaint, ¶ 48).
- In September/October 2006, 3M had prepared an internal presentation for purposes of obtaining formal approval to submit a bid to purchase Acolyte valuing Acolyte at £87.8 million [\$162 million]. This presentation noted that BacLite was in a "High Growth Market Space" and that the global market for infectious disease diagnostics had been worth \$6.2 billion in 2004 (Ex. A, ¶ 39).
- In November 2006 3M and Acolyte exchanged notes on sales forecasts, with both projecting 2009 sales of around £22 million [\$41.8 million]. (Ex. A, ¶ 40).
- On January 10, 2007, 3M forecast worldwide revenues for BacLite at \$13.1 million for 2008 and \$28 million for 2009. (Ex. A, ¶ 63).
- On January 23, 2007, 3M "confirmed" Acolyte's value at £81.5 million [\$160 million], based on forecasted sales of £6.157 million [\$12 million] in 2008 and £17.554 million [\$34.5 million] in 2009. (Ex. A, ¶ 42).
- A September review of the new medical diagnostic business indicated that the business was "very strong!" (Ex. A, ¶ 63).

- In a presentation made on September 26, 2007, one 3M manager described 3M's progress in marketing BacLite as "Very Strong and Confirmed Value Proposition." (Ex. A, ¶ 65).
- On October 29, 2007, 3M personnel described BacLite as being subject to "a strong interest in trials across a broad sector of hospitals." (Ex. A, ¶ 64).
- The Claimants in the London Litigation proffered a damages expert, whose testimony (which the London court ultimately did not accept) was that the Claimants incurred damages of \$56.45 million as a result of 3M's breaches of the SPA. (Ex. A, ¶ 246-248).

In short, far from being the stick-up that had 3M fearful for its corporate survival, the Porton defendants had a firm factual basis for making a \$30 million settlement offer, and there was absolutely nothing extortionate in their attempt to negotiate a settlement in this amount.

### **B. 3M's Statement of Facts**

3M's Memorandum in Support of its Motion to Strike and Cross-Motion for Discovery includes an 18-page section entitled "Relevant Factual and Procedural History." Mem. 2-20. 3M goes well beyond the Complaint's allegations, however, and throws against the wall a number of new allegations hoping that something will stick. Although they have absolutely nothing to do with Davis, several things are striking about 3M's tale, and again provide insight into 3M's real purpose in bringing this action.

First, there is no mention of Davis until half way through 3M's statements of facts. Mem. 9. The Memorandum then discusses Davis's so-called "defamatory media campaign" in a bare two pages, but cites no evidence to support its statements. Mem. 10-12. Indeed, 3M does not quote in full even one statement made in any of the "numerous press releases," "websites"

“twitter feeds” “blogs” and “manufactured ‘news’ articles” that the Complaint references in vague and conclusory fashion. Mem. 10. 3M instead cites to allegations from its own Complaint.

Second, more than half of 3M’s statement of facts concerns the June 18 meeting that Porton CEO Boulter had with former U.K. Defence Minister Liam Fox, Boulter’s June 18 telephone conversation with and e-mail to 3M counsel William Brewer, and a discussion of a scandal involving Dr. Fox and one Adam Werrity, Dr. Fox’s close personal friend. Mem. 12-20. None of this has anything to do with Davis, even though 3M refers to “Davis and Boulter” and “Defendants” throughout this irrelevant and at times bizarre discussion.

Third, 3M gripes that “Ploughshare, and its CEO Pete Hotten, were also enlisted by Davis and Boulter to participate in Defendants’ defamatory media blitz.” Mem. 11. It then goes on to describe Ploughshare as “a corporation *owned entirely by the Ministry of Defence* that works with private investors, like Porton Capital, to commercialize technologies originally developed by the [M]inistry—in this case, BacLite” that “*wields considerable ‘industry influence.’*” Ploughshare, of course, was also a plaintiff in the London Litigation.<sup>4</sup> This is an important concession by 3M in that it substantially, if not completely, undercuts any notion that any loss of business with the MoD or U.K government that 3M has experienced was caused by Davis (or Porton).

Fourth, 3M criticizes in the harshest possible terms Porton’s use of Tetra Strategy, a U.K. firm specializing in public and government relations that is nowhere mentioned in the Complaint, in connection with the London Litigation, and Boulter’s June 18 meeting with former Defence

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<sup>4</sup> 3M only mentions this indirectly when it asserts that, during his conversation with 3M counsel William Brewer, “Boulter stated that he was authorized to speak on behalf of all the U.K. Claimants, including Ploughshare.” Mem. 15. 3M’s decision to sue Davis but not Ploughshare, while also naming as defendants two companies organized under Cayman Islands law that operate in the U.K. and Dubai, speaks loudly as to what 3M is really doing here.

Minister Liam Fox. *See* Mem 6 (“Buying Access to British Officials”); Mem. 7 (“paying Tetra Strategy for access to high-level British officials”); Mem. 10 (“‘buying’ access to high-level Ministry of Defense officials”); Mem 12 (“Davis’s and Boulter’s plan to ‘buy’ access and influence with the highest levels of the British government through Tetra Strategy”); Mem. 13 (describing how Tetra, being paid £10,000 a month, arranged for access to Defence Minister Fox); Mem. 14 (“There is no doubt that Tetra Strategy introduced Boulter to Werrity so that Boulter could gain private access to Fox”); Mem. 19 (“buying access to high-level Ministry of Defence officials), Mem 34 (“it was improper for Defendants to attempt to *procure* such acts for wrongful purposes by buying access, through Tetra Strategy, to then U.K. Minister of Defence Fox”) (emphasis in original), Mem. 39 (tortious interference claim based on “steps taken by Davis and Boulter to use Tetra Strategy to obtain a private meeting with Fox”); Mem. 40 (“paying Tetra Strategy to arrange a private meeting with Fox”). 3M’s indignation at Porton’s access to U.K. government officials is reminiscent of Claude Rains, who as police captain Louis Renault in the classic movie *Casablanca*, informs Rick Blaine that he is closing Rick’s American Café because “I am shocked, shocked to find that gambling is going on in here!” just as the Café’s croupier is handing over Renault’s own gambling winnings. According to OpenSecrets.org, so far in 2011, 3M has paid 27 lobbyists more than \$3.5 million to influence lawmakers in Washington D.C. *See* OpenSecrets.org, *Influence and Lobbying, Lobbying*, 3M Co: LOBBYISTS, <http://www.opensecrets.org/lobby/clientlbs.php?id=D000021800&year=2011>.

## ARGUMENT

### **I. The Anti-SLAPP Act Does Not Alter the Jurisdiction of Any Court, Does Not Alter the Organization of or Relation Between D.C. Local and Federal Courts and thus is a Valid Enactment of the D.C. Council.**

The brief of intervenor the District of Columbia establishes that in enacting the D.C. Anti-SLAPP Act, the D.C. Council acted well within its authority under the Home Rule Act, and did not act *ultra vires*. Davis adopts and incorporates the District's argument in this regard, and adds the following observations.

3M quotes the relevant codified provision of the D.C. Home Rule Act as providing that the Council is prohibited from “enact[ing] any act, resolution, or rule with respect to any provision of Title 11 of the District of Columbia Code.” Mem. 21 (quoting D.C. Code § 1-206.02(04)). From this, 3M asserts that the Act establishes “new procedures ‘with respect to’ the District of Columbia Courts” (Mem. 22) and then concludes that because it concerns court “procedures” and the way the D.C. courts “conduct their business” the Act is prohibited by the Home Rule Act. 3M’s quote of section 1.206.02(04) is truncated. The statute reads in full that “[t]he Council shall have no authority . . . to enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (*relating to organization and jurisdiction of the District of Columbia courts*). D.C. Code § 1.206.02(04) (emphasis added). Cases interpreting this provision make clear that the type of legislation that is prohibited is legislation contracting or expanding the jurisdiction of the local and federal courts in D.C. *See, e.g., Bergman v. District of Columbia*, 986 A.2d 1208, 1225-26 (D.C. 2010); *Hessey v. Burden*, 584 A.2d 1, 7-8 (D.C. 1990); *District of Columbia v. Sullivan*, 436 A.2d 364, (D.C. 1981); *see also Dimond v. District of Columbia*, 792 F.2d 179, 191-90 (D.C. Cir. 1986).

Nowhere does 3M so much as suggest that the Act alters the organization or jurisdiction of the D.C. Superior Court or this Court. The Act plainly does not do so. The D.C. Superior Court can still hear tort actions, including actions alleging tortious interference with prospective business and defamation, as can this Court sitting in diversity. The Act instead simply provides defendants who are sued for exercising their First Amendment rights a new defense. In this regard, courts have described the protection provided by anti-SLAPP statutes as providing immunity to a defendant.<sup>5</sup>

Further, title 11 of the D.C. Code is one of several chapters in Division II of the Code. The others are title 12, which concerns “Right to Remedy,” title 13 “Procedure Generally,” title 14 “Proof,” title 15 “Judgments and Executions; Fees and Costs,” title 16 “Particular Actions, Proceedings and Matters,” and title 17 “Review.” The Act’s provisions are contained in title 16 “Particular Actions, Proceedings and Matters.” Several provisions of title 13 “Procedure Generally” undoubtedly affect how the D.C. courts “conduct their business” or how or when they apply the Superior Court Rules of Civil Procedure (“Superior Court Rules”). Legislation enacted by the Council contained in this title certainly does not run afoul of section 1.206.02(04), however, because it does not affect the jurisdiction or organization of the D.C. local and federal courts. Similarly, many of title 16’s provisions in some manner affect, modify or alter how the D.C. courts “conduct their business” or the Superior Court Rules, but again do not run afoul of

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<sup>5</sup> *Eklund v. City of Seattle Mun. Court*, 410 Fed. Appx. 14 (9th Cir. 2010) (Washington); *Hicks v. Cadle Co.*, 355 Fed. Appx. 186, 197-198 (10th Cir. 2009), *cert denied*, 131 S. Ct. 160 (2010) (Tennessee); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (California); *Phillips v. Okla. Publ’g Co.*, 2011 U.S. Dist LEXIS 119077, at \*27-28 (W.D. Wash. Oct. 14, 2011); *Trudeau v. ConsumerAffairs.com*, 2011 U.S. Dist. LEXIS 99852, at \*16 (N.D. Ill. Sept. 6, 2011); *Mills v. Brown*, 372 F. Supp. 2d 683, 694 (D.R.I. 2005) (Rhode Island); *Segaline v. Dept. of Labor & Indus.*, 238 P.3d 1107, 1110 (Wash. 2010); *Karousos v. Pardee*, 992 A.2d 263, 268 (R.I. 2010); *Wright Dev. Group, LLC v. Walsh*, 939 N.E.2d 389, 396 (Ill. 2010); *cf. Pennsbury Village Assocs., LLC v. McIntyre*, 11 A.3d 906, 915 (Pa. 2011) (describing Pennsylvania’s Environmental Immunity Act as “anti-SLAPP legislation”); *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 839 (Minn. 2010); *Benoit v. Frederickson*, 908 N.E.2d 714, 718 (Mass. 2009) (Massachusetts).

section 1.206.02(04) because they do not affect the organization or jurisdiction of local or federal courts in the District.

**II. The D.C. Anti-SLAPP Act Does Not Conflict with, Much Less Abolish, any Court Rule.**

3M's validity argument is based largely on its assertion that the Act "in effect, abolish[es] [the] Superior Court's existing procedures governing discovery and dispositive motions as to any lawsuit arguably falling with [sic] the Act's ambit" and "replace[s] them with a new system of rules that is solely of the Council's creation." Mem. 23-24. According to 3M, the D.C. Council cannot do this because under D.C. Code § 11-946, the Superior Court Rules can only be adopted by the D.C. Superior Court, and then must be approved by the D.C. Court of Appeals. Mem. 22. 3M goes on to cite Rules 12, 26 and 56 of the Superior Court and Federal Rules as rules that the Act "abolishes."

This is nonsense. Nothing in the Act prohibits a court from applying any civil procedural rule if a plaintiff defeats a Special Motion to Dismiss under the Act. And far from "abolishing" any rule, the Act is fully consistent with the Superior Court and Federal Rules.

**A. Neither the Superior Court nor Federal Rules Prohibit Special Motions to Dismiss under the Act.**

3M's argument assumes *sub silentio* that the Superior Court Rules and Federal Rules of Civil Procedure identify and exhaust the universe of motions that a litigant can file in a federal court, and that any motion not so identified by these Rules, such a motion to dismiss under Rule 12(b) or for summary judgment under Rule 56, is improper. 3M cannot seriously believe this, however, as no rule authorizes a "Motion to Strike" another party's motion—as 3M has filed here. The only rule that mentions motions to strike is Rule 12(f), which only permits a party to file a motion to strike with respect to "a pleading," and only permits the court to strike "an



insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” See Fed. R. Civ. P. 12(f); *see also* Fed. R. Civ. P. 7(a) (defining pleadings).<sup>6</sup>

In any event, Rule 7(b)(1) provides that “[a] request for a court order must be made by motion.” SCR-Civil 7(b)(1); Fed. R. Civ. P. 7(b)(1). It does not put any limitation on the type of motion that may be filed, or even on the type of relief that may be requested. “Rule 7 is broad enough to permit a party to seek virtually any relief . . . .” *Potter v. Potter*, 199 F.R.D. 550 (D. Md. 2001). “[A] party confronted by a situation in which the rules do not provide specifically for a motion, but who can show a need for an order from the court to prevent overreaching or injustice, may make what might be called an ‘undifferentiated motion,’ stating his problem, the grounds for relief, and the remedy desired.” C.A. Wright & A. R. Miller, *Federal Practice and Procedure*, § 1190 at 47 (2004); *see, e.g., Citizens & So. Nat’l Bank v. Auer*, 514 F. Supp. 638, 639 (E.D. Tenn. 1981) (describing memorandum of law asking for additional “finding” and conclusion that conveyance was not fraudulent as an “undifferentiated motion” under Rule 7(b)(1)). Certainly a Special Motion to Dismiss pursuant to the Act falls within the ambit of Rule 7(b)(1) and does not displace or abolish any of the other rules.

In this regard, this Court often considers motions that are not specifically authorized by any Rule. For example, while Rule 54(b) allows a court to “revise” an interlocutory decision or order before the entry of final judgment, it nowhere authorizes a party to file a motion for

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<sup>6</sup> If 3M wants to be a strict constructionist with respect to the Rules, the Court should deny 3M’s “Motion to Strike” and thus reject 3M’s challenge to the Act’s validity. *See Bond v. ATSI/Jacksonville Job Corps. Ctr.*, 2011 U.S. Dist. LEXIS 106210, at \*4-\*5 (D.D.C. Sept. 20, 2011) (denying motion to strike motion to dismiss as unauthorized by Rule 12(f)); *Yendes v. McCulloch*, 2011 U.S. Dist. LEXIS 65281, at \*3-\*4 (S.D. Cal. June 13, 2011) (denying motion to strike motion for summary judgment on same ground); *Hughes v. Lavender*, 2011 U.S. Dist. LEXIS 38085, at \*15-\*16 (S.D. Ohio March 29, 2011) (denying motion to strike amendment to declaration and amendment to memorandum as unauthorized by Rule 12(f)); *Great Socialist People’s Libyan Arab Jamahiriya v. Ahmad Miski*, 683 F. Supp. 2d 1, 15 (D.D.C. 2010) (denying motion to strike expert designations and interrogatories on same grounds); *Feingold v. Budner*, 2008 U.S. Dist. LEXIS 80468, at \*8-\*11 (S.D. Fla. Oct. 8, 2008) (denying motion to strike motion to compel as unauthorized by Rule 12(f)); *Azikiwe v. Nig. Airways Ltd.*, 2006 U.S. Dist. LEXIS 56722, at \*4-\*5 (E.D.N.Y. July 27, 2006) (denying motion to strike motions on same ground).

reconsideration of interlocutory orders. *Compare* Fed. R. Civ. P. 54(b) with Fed. R. Civ. P. 59(e) (authorizing motion to alter or amend judgment) and Fed. R. Civ. P. 60(b) (authorizing motion for relief from judgment). This Court nonetheless considers motions for “reconsideration” of interlocutory orders under Rule 54(b). *See, e.g., Zeigler v. Potter*, 555 F. Supp. 2d 126 (D.D.C. 2008), *aff’d*, 2010 U.S. App. LEXIS 6904 (D.C. Cir. Apr. 1, 2010); *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005); *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004).<sup>7</sup>

Moreover, this Court also permits the filing of and decision on what might be termed “miscellaneous motions” or motions for miscellaneous relief. *See Schwarz v. FBI*, 2002 U.S. Dist. LEXIS 28373, at \*26-27 (D.D.C. Sept. 24, 2002), *aff’d*, 2003 U.S. App. LEXIS 1417 (D.C. Cir. Jan. 28, 2003) (ruling on miscellaneous motions such as motion to compel U.S. Marshall to serve each of 70 named defendants, motion to correct docket sheet); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 474 F. Supp. 2d 75, (D.D.C. 2007) (ruling on such motions as motion to file surreply, motion for leave to file supplemental brief, motion to amend scheduling order, motion to strike expert designation, and motion to seal expert report).

In similar vein, a number of federal statutes permit a party to file a motion that is not mentioned or authorized by the Federal Rules. *See, e.g.,* 9 U.S.C. § 9 (authorizing motion to confirm arbitration award); *Reed & Martin, Inc. v. Westinghouse Elec. Corp.*, 439 F.2d 1268, 1275-76 (2d Cir. 1971) (request for order confirming arbitration award within ambit of Rule 7(b)(1)). No one has ever suggested that these rules alter or abolish the Federal Rules merely because they authorize the filing of a motion. These statutes further show that there is no basis

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<sup>7</sup> Similarly, no rule specifically addresses motions “for reconsideration” of a final judgment, but D.C. federal courts construe such motions as having been made under rules such as Rule 59(e). *See, e.g., Lance v. UMW 1974 Pension Trust*, 400 F. Supp. 2d 29, 30 (D.D.C. 2005); *Piper v. DOJ*, 312 F. Supp. 2d 17, 20 (D.D.C. 2004); *Rann v. Chao*, 209 F. Supp. 2d 75, 76 n.1 (D.D.C. 2002), *aff’d*, 346 F.3d 192 (2003).

for holding that D.C. Anti-SLAPP Act impermissibly intrudes on court procedure or violates the Home Rule Act.

Federal courts have regularly applied state anti-SLAPP statutes to cases based on diversity jurisdiction, or otherwise based on state law, because such statutes not only do not “abolish” the Federal Rules, but are not even inconsistent with the Federal Rules. *See Godin v. Schencks*, 629 F.3d 79, 90-91 (1st Cir. 2010) (Maine); *Englert v. MacDonell*, 551 F.3d 1099, 1105-06 (9th Cir. 2009), *aff’d in part and rev’d in part, remanded by*, 2011 U.S. App. LEXIS 10796 (9th Cir. Or. May 26, 2011) (Oregon); *Phoenix Trading, Inc. v. Kayser*, 2011 U.S. Dist. LEXIS 81432 at \*20-\*24 (W.D. Wash. July 25, 2011) (Washington); *Trudeau v. ConsumerAffairs.com*, 2011 U.S. Dist. LEXIS 99852 at \*15-\*18 (N.D. Ill. Sept. 6, 2011) (Illinois); *Collins v. Laborers Int’l Union of N. Am. Local No. 872*, 2011 U.S. Dist. LEXIS 79853 (D. Nev. July 21, 2011); *Armington v. Fink*, 2010 U.S. Dist. Lexis 24294 at \*8 n.2 (E.D. La. Feb. 24, 2010) (Louisiana); *Containment Techs. Group, Inc. v. Am. Soc. of Health Sys. Pharmacists*, 2009 U.S. Dist. LEXIS 25421 at \*21-\*24 (S.D. Ind. Mar. 26, 2009) (Indiana); *Buckley v. DirectTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (Georgia); *see also Sharif v. Sharif*, 2010 U.S. Dist. LEXIS 86853 at \*9-\*12 (E.D. Mich. Aug. 24, 2010) (Michigan federal court applying Indiana’s anti-SLAPP statute); *USANA Health Scis., Inc. v. Minkow*, 2008 U.S. Dist. LEXIS 16613 at \*6-\*8 (D. Utah Mar. 3, 2008) (Utah federal court applying California’s anti-SLAPP statute to California state law claims); *Chi v. Loyola Univ. Med. Ctr.*, 2011 U.S. Dist. LEXIS 55743, at \*8-\*10 (N.D. Ill. May 24, 2011) (although Arizona law applies to plaintiff’s defamation claim, Illinois anti-SLAPP Act applies as a defense in diversity action filed in Illinois federal court, as Illinois has a strong interest in protecting its citizens’ constitutional rights as evidenced in the anti-SLAPP statute).

Finally, the Ninth Circuit has held that the California anti-SLAPP statute's provisions permitting a defendant to file a motion to strike, and requiring a plaintiff to show a likelihood of success to defeat such a motion, do not conflict, and are consistent with the Federal Rules. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 970-73 (9th Cir. 1999); *see also Makaeff v. Trump Univ., LLC*, 2011 U.S. Dist. LEXIS 13603, at \*4-\*6 (S.D. Cal. Feb. 11, 2011) (applying California anti-SLAPP statute's automatic stay of proceedings pending appeal of the denial of special motion to dismiss). In *Buckley*, 276 F. Supp. 2d at 1275 n.5, the court held that Georgia's requirement that a complaint that involves an exercise of the right to freedom of speech filed in federal court must be accompanied by the special verification required by Georgia's anti-SLAPP statute. *See also Davis v. Wyeth, Inc.*, 2004 U.S. Dist. LEXIS 26499 at \*21 (M.D. Ga. June 10, 2004) (same).

Because the Superior Court Rules and Federal Rules of Civil Procedure do not prohibit the filing of a Special Motion to Dismiss, and instead allow parties to file motions seeking virtually any relief from the Court, the Act is not inconsistent with, and certainly does not abolish, any particular rule.

**B. The Act Does Not Abolish the Superior Court or Federal Rules Concerning Discovery.**

The closest that 3M comes to identifying a conflict between the Act and the Superior Court or Federal Rules is its contention that the Act's Special Motion to Dismiss and automatic stay provisions conflict with Rule 26, which it claims grants an unlimited right to discovery, and Rule 56, particularly Rule 56(d), which permits a party to engage in discovery in order to oppose a motion for summary judgment. But even this argument misses the mark, as it runs against the weight of prevailing authority on the issue.

The Ninth Circuit is the only federal court of appeals to hold that the automatic stay provision of an anti-SLAPP statute conflicts with Rule 56(d) of the Federal Rules. *Metabolife Int'l v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001). The Ninth Circuit's decision appears to be based upon its view that, in the context of a summary judgment motion, discovery is required ““where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.”” *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)) (emphasis added).

*Metabolife* is hardly the final word on this issue, however. One judge in *Metabolife* dissented specifically, pointing out that the automatic stay provision of California's anti-SLAPP statute and then-Rule 56(f) both allow for discovery that is needed to rule on their respective motions upon a proper showing, and that thus there is no conflict. *Id.* at 859-60 (Rymer, J., dissenting). In the wake of *Metabolife*, district courts in the Ninth Circuit have gone on to hold—based on the California anti-SLAPP statute's purpose of protecting free speech and the goals of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) discouraging forum-shopping and avoiding the inequitable administration of justice—that any discovery permitted must be specifically targeted only to what is “essential” to defeat the anti-SLAPP motion, and that the plaintiff has the burden of making a particularized showing that such discovery is essential. *See Davis v. Elec. Arts, Inc.*, 2011 U.S. Dist. LEXIS 71642, at \*12-\*15 (N.D. Cal. July 5, 2011); *Carr v. Asset Acceptance, LLC*, 2011 U.S. Dist. LEXIS 89862, at \*15 (E.D. Cal. Aug. 12, 2011); *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 2010 U.S. Dist. LEXIS 105497, at \*2-\*3 (S.D. Cal. 2010) *Price v. Stossel*, 590 F. Supp. 2d 1262, 1270-71 (C.D. Cal. 2008); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1101-03 (C.D. Cal. 2004); *see also USANA Health*, 2008 U.S. Dist. LEXIS 16613 at \*6-\*8 (applying California's anti-SLAPP

statute to California state law claims). Likewise, the District Court for the Eastern District of Michigan has interpreted the Ninth Circuit case law as providing that “California anti-SLAPP challenges may be brought in federal court under a ‘motion to strike’ as long as the discovery limiting provisions of the statute are not applied in direct conflict with the Federal Rules of Civil Procedure.” *Mero v. United States Figure Skating Ass’n*, 2006 U.S. Dist. LEXIS 4854, \*7-\*8 (E.D. Mich. Jan. 20, 2006) (citing *Verizon Delaware, Inc. v. Covad Communs. Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004)).

For precisely this reason, the First Circuit Court of Appeals, last December, upheld the automatic stay provision of Maine’s anti-SLAPP statute, Me. Rev. Stat. tit. 14, § 556. *Godin*, 629 F.3d at 90-91. The First Circuit further noted that the Maine statute (like D.C.’s Anti-SLAPP Act here), “in imposing on the opponent of the motion the burden of justifying discovery, is consistent with the allocation of burdens under Rule 56(d), formerly Rule 56(f).” *Id.* at 90.

The First Circuit in *Godin* also held that Maine’s anti-SLAPP statute applied in federal court lawsuits because applying it “would best serve the twin aims of the *Erie* rule: discouragement of forum shopping and inequitable administration of the laws.” *Id.* at 91. The court of appeals explained:

Plainly, Section 556 substantively alters Maine-law claims that are based on a defendant’s protected petitioning activity by shifting the burden to the plaintiff and altering the showing the plaintiff must make. Section 556 also allows courts to award attorney’s fees to prevailing defendants, and alters the traditional common-law rule that, in libel cases, a plaintiff need not demonstrate specific damages to recover on a claim, as alleging damages per se does not satisfy Section 556’s actual injury standard.

Declining to apply Section 556 in federal court would thus result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court. Likewise, were Section 556 not to apply in federal court, the incentives for forum shopping would be strong: electing to

bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid Section 556's burden-shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for attorney's fees and costs.

*Id.* at 91 (citations omitted).

In *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 168-69 (5th Cir. 2009), the Fifth Circuit likewise held that Louisiana's anti-SLAPP statute, La. Code Civ. Proc. Ann. art. 971, which it described as "nominally procedural," "govern[ed] this diversity case" under the *Erie* doctrine. The Fifth Circuit further held that the denial of a defendant's special motion to dismiss under that statute was immediately appealable as a collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). *Id.* at 181. In doing so, it noted, but did not criticize, the Louisiana statute's automatic stay of discovery, and later noted that the district court could have allowed limited discovery under the Louisiana statute if the plaintiff had requested it. *Henry*, 566 F.3d at 170, 182. More recently, the District Court for the Eastern District of Louisiana has held that there is no conflict between Louisiana's anti-SLAPP statute and Fed. R. Civ. P. 56(d). *Armington*, 2010 U.S. Dist. Lexis 24294 at \*8 n.2; *but see Containment Techs. Group, Inc.*, 2009 U.S. Dist. LEXIS 25421 at \*21-\*24 (court applies special motion to dismiss and attorneys' fees provision of Indiana anti-SLAPP statute, and Rule 56).

**III. The *Erie* Doctrine Does Not Require the Application of D.C. or Federal Procedural Rules to the Exclusion of the Act's Motion to Dismiss, Automatic Stay, and Limited Discovery Provisions, or Otherwise Prohibit Application of the Act in Federal Court.**

3M makes an additional, back-door argument against the validity of the Act in its Memorandum supporting its since-denied Cross-Motion for Discovery. It asserts that under the *Erie* doctrine the Court must apply the full panoply of discovery rules set forth in the Federal Rules, and is precluded from applying the Act, with its motion to dismiss, automatic stay and

limited discovery provisions in federal court. Indeed, it appears that 3M wants the Court to disregard the Act altogether. 3M's argument is meritless.

In *Lee v. Flintkote*, 593 F.2d 1275, 1278-79 (1979), the D.C. Circuit held that the principles of *Erie* were to be followed analogously by D.C. federal courts exercising diversity jurisdiction. *Lee*, 593 F.2d at 1278-79; *see also Steorts v. American Airlines, Inc.*, 647 F.2d 194 196-97 (D.C. Cir. 1981). In so holding, the D.C. Circuit explained that *Erie* applies to D.C. federal courts by analogy because the basis for *Erie*, specifically, the Rules of Decision Act, 28 U.S.C. § 1652 and related constitutional concerns, do not apply directly to the District of Columbia. *Lee*, 593 F.2d at 1278-79 n. 14; *Steorts*, 647 F.2d at 196 n.24.) D.C. federal courts nonetheless must follow *Erie* to further the “dual aims” of (1) discouraging forum shopping and promoting uniformity within the District of Columbia on matters of District of Columbia law and (2) showing due deference and respect to the District of Columbia Court of Appeals as the District's highest court. *Lee*, 593 F.2d at 1278-79 n. 14; *Steorts*, 647 F.2d at 196 n.24. Accordingly, the substantive law of the forum, here District of Columbia law, controls with respect to issues which are “outcome determinative,” *Steorts*, 647 F.2d at 196-97, and the Court's “duty, then is to achieve the same outcome we believe would result if the District of Columbia [local courts] considered this case.” *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042-43 (D.C. Cir. 2010).

Citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), 3M claims that resolution in its favor is easy: “if the [Federal] Rule is ‘sufficiently broad to control the issue’ on which the state law purports to govern . . . then the Rule must be given effect despite the existence of the competing state law.” Mem. 27-28 (quoting *Shady Grove*, 130 S. Ct. at 1451 (Stevens, J. concurring in part)).



3M is mistaken, largely because it misconstrues *Shady Grove*. The issue in that case was whether a New York law that prohibited actions seeking penalties or minimum damages to proceed as class actions applied in a federal court lawsuit, rather than Fed. R. Civ. P. 23. The Court held, in a 5-4 decision, that Rule 23 applied. Justice Stevens, whom 3M quotes, provided the fifth vote to create a majority in favor of applying Rule 23. *Shady Grove*, 130 S. Ct. at 1448. In his view the New York statute was merely a procedural rule and not a substantive law. He did not, however, view the applicable analysis to be as simple as 3M makes out.

As Justice Stevens explained in the sentence from which 3M has extracted the catchphrase it quotes, the Rules Enabling Act expressly provides that a rule of civil procedure adopted by the Supreme Court may “not abridge enlarge or modify any substantive right.” *Shady Grove*, 130 S. Ct. at 1452 (quoting 28 U.S.C. § 2072(b)). He went on to explain that “[a] federal rule, therefore, cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right.” *Id.* at 1452. Justice Stevens elsewhere cited cases providing examples of situations where a state’s ostensibly procedural rule made it significantly more difficult to bring or prove a claim, and thus was considered substantive. *Id.* at 1450 (citing *Cohen v. Beneficial Fin. Co.*, 337 U.S. 541 (1949) (state’s ostensibly procedural rule requiring plaintiffs to post bond before suing); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (concerning state statute of limitations); and *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), *aff’d in part and vacated in part, remanded by*, 149 F.3d 137 (2d Cir. N.Y. 1998) (involving state procedure for examining jury verdicts as means of capping the available remedy)).

Perhaps the case most clearly illustrating this is *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). In that case, a state statute of limitations required that a case be “commenced” within two years, and that the case was not deemed “commenced” until served, while Rule 3 of the Federal Rules provided that a case is “commenced” when filed. The Supreme Court applied the state statute rather than Rule 3.

The D.C. federal court likewise has applied provisions of D.C. law that might be considered procedural where the failure to apply the D.C. law would create a different result than if the case were brought in the D.C. Superior Court. Earlier this year, in *Burke v. Air Serv. Int’l, Inc.*, this Court granted summary judgment in favor of a defense contractor who was sued for negligence by an employee who had been injured in Afghanistan because the plaintiff employee had failed to provide expert testimony establishing the duty of care, as required by District of Columbia case law. *Burke v. Air Serv. Int’l, Inc.*, 775 F. Supp. 2d 13, 18-21 (D.D.C. 2011). In doing so, the Court cited a number of cases where the D. C. Circuit likewise applied the law. *See id.* 20 and n.8. And just over a year ago, this Court held that the District of Columbia Medical Malpractice Act requirement that medical malpractice plaintiffs provide putative defendants with notice of the action at least 90 days before filing a complaint applied in federal court. *Coleman v. Washington Hosp. Ctr. Corp.*, 734 F. Supp. 2d 58, 62-63 (D.D.C. 2010); *see also Diffenderfer v. United States*, 656 F. Supp. 2d 137, 139 (D.D.C. 2009); *Davis v. Grant Park Nursing Home LP*, 639 F. Supp. 2d 60, 72-73 (D.D.C. 2009).

There is more. In *Bledsoe v. Crowley*, the D.C. Circuit held that a Maryland law requiring plaintiffs to submit to arbitration before bringing suit applied to a diversity action brought in a D.C. federal court. *Bledsoe v. Crowley*, 849 F.2d 639, 643-44 (D.C. Cir. 1988).<sup>8</sup>

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<sup>8</sup> Other courts have done likewise with respect to similar laws of other states, even though they could be characterized as procedural. *See Connolly v. Foudree*, 141 F.R.D. 124, 127-130 (S.D. Iowa 1992) (applying Iowa

In *Answering Service, Inc. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984), the D.C. Circuit affirmed the dismissal of a cross-claim for indemnity against a third party even though Fed. R. Civ. P. 13 would have permitted such a claim because the action was essentially one for wrongful involvement in litigation under D.C. law, a requirement of which is that the litigation with which the plaintiff became wrongfully involved had to have terminated. Applying *Erie* by analogy, the D.C. Circuit held that the “requirement . . . is best understood as an expression of substantive state policy concerns.” *Id.* at 1504.

Contrary to 3M’s belief that it is merely procedural, the D.C. Anti-SLAPP Act’s protection of the rights of free speech and petitioning the government provides defendants with an important substantive immunity defense. Courts have consistently described anti-SLAPP statutes as providing defendants immunity from suit. *Batzel*, 333 F.3d at 1025 (California); *Eklund*, 410 Fed. Appx. 14 (Washington); *Segaline*, 238 P.3d at 1110 (Washington); *Karousos*, 992 A.2d at 268 (Rhode Island); *Wright Dev. Group, LLC*, 939 N.E.2d at 396 (Illinois); *Middle-Snake-Tamarac Rivers Watershed Dist.*, 784 N.W.2d at 839 (Minnesota); *Benoit*, 908 N.E.2d at 717-18 (Massachusetts); *Hicks*, 355 Fed. Appx. at 197-198 (Tennessee); *Phillips*, 2011 U.S. Dist. LEXIS 119077 at \*27-28 (Washington); *Trudeau*, 2011 U.S. Dist. LEXIS 99852 at \*16 (Illinois); *Mills*, 372 F. Supp. 2d at 694 (Rhode Island); *cf. Pennsbury Village Assocs.*, 11 A.3d at 915 (Pennsylvania) (describing Pennsylvania’s Environmental Immunity Act as “anti-SLAPP legislation” that provides “immunity”).

As the Supreme Court has explained with respect to the qualified immunity provided to government officials in cases alleging claims under 42 U.S.C. § 1983, such immunity from suit

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statute prescribing time limits for designating experts in attorney malpractice case and citing numerous cases where federal courts have applied screening, mandatory arbitration, or state law evidentiary or “procedural” requirements); *Hill v. Morrison*, 870 F. Supp. 978, (W.D. Mo. 1994) (applying Missouri law requiring medical malpractice plaintiff to file sworn affidavit that he or she has obtained opinion of healthcare provider that attending healthcare provider failed to exercise reasonable care, and citing similar cases.).

has been fashioned “in such a way as to ‘permit the resolution of many insubstantial claims on summary judgment’ and to avoid “[subjecting] government officials either to the costs of trial or to the burdens of broad-reaching discovery’ . . . .” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). The Supreme Court has repeatedly made clear that the defense provides immunity from suit, not just liability, and that resolution of the defense before discovery is important and desirable. *See Pearson v. Callahan*, 555 U.S. 223, 172 L. Ed. 2d 565, 573 (2009); *Mitchell*, 472 U.S. at 526; *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987), *aff’d*, 922 F.2d 443 (1990); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*).

The D.C. Anti-SLAPP Act likewise provides defendants an immunity from suit, the benefit of which is lost if the Court does not apply the Act, including its sections providing for the Special Motion to Dismiss, automatic stay of discovery, and court discretion to permit discovery only upon a showing that certain discovery is essential to a showing of success on the merits. And given the Supreme Court’s preference for having immunity defenses decided quickly and before discovery, there is nothing unusual about the Act’s motion to dismiss and automatic stay of discovery provisions. Particularly where, as shown, nothing in the Act actually conflicts with any D.C. or federal rule, the Court is required under the *Erie* doctrine to apply the Act in this case.

Finally, although 3M complains that the Act improperly shifts the burden of proof, thus making the Act inapplicable in federal court, it has long been held that a state law allocating the burden of proof is substantive for purposes of the *Erie* doctrine. *See Dick v. New York Life Ins.*

*Co.*, 359 U.S. 437, 446 (1959) (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943) and *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939)).<sup>9</sup>

**IV. The Anti-SLAPP Act Applies to 3M’s Tortious Interference with Prospective Business and Conspiracy Claims.**

Although contained in the portion of its Memorandum dedicated solely to its Cross-Motion for Discovery (at 39-40), 3M offers several reasons why the Act does not apply to the Complaint’s tortious interference with prospective business claim.

3M first asserts that the Act does not apply to its tortious interference claim because “[t]he conduct at the core of 3M’s tortious interference claims are Davis’s and Boulter’s intentional efforts to influence Fox, and other officials and employees of the British government, not to do business with 3M,” and thus “cannot, by definition,” be “acts in furtherance of the right of advocacy on issues of public importance.” Mem. 39. If the Court considers this assertion as part of 3M’s Motion to Strike, it should have little difficulty rejecting it.

First, courts have applied various state anti-SLAPP statutes to claims for tortious interference with contract or prospective business advantage. *Language Line Servs. v. Language Servs. Assocs., LLC*, 2011 U.S. Dist. LEXIS 1248836, at \*21-23 (N.D. Cal. Oct. 13, 2011); *New York Studio, Inc. v. Better Bus. Bureau of Alaska*, 2011 U.S. Dist. LEXIS 62567, at \*17-\*21 (W.D. Wash. June 13, 2011); *New.Net, Inc.*, 356 F. Supp. 2d at 1113-1115; *Metzler v. Rowell*, 547 S.E.2d 311, 314-15 (Ga. App. 2001); *Margolis v. Gosselin*, 1996 Mass. Super. LEXIS 335 at \*1 (Mass. Super. Ct. May 22, 1996); *Hometown Props. v. Fleming*, 680 A.2d 56, 58 (R.I. 1996).

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<sup>9</sup> For D.C. federal court cases applying D.C. or state law with respect to the burden of proof, see *Baltimore and Ohio R. Co. v. Postom*, 177 F.2d 53, 57 n.5 (D.C. Cir. 1949) (under *Erie*, applying D.C. choice of law rules to apply Maryland law shifting burden of proof to defendant); *Williams Enterprises, Inc. v. Strait Mfg. & Welding, Inc.*, 728 F. Supp. 12, 23 (D.D.C. 1990), *aff’d in part and rev’d in part*, 938 F.2d 230 (D.C. Cir. 1991) (applying D.C. law regarding burden of proof for certain contract law defenses).

Moreover, assuming as true 3M's own description of "the core" of its intentional interference claim as Boulter and Davis advocating with the U.K. Minister of Defence and other U.K. officials about not doing business with 3M, the Complaint also makes clear that the basis for their purported entreaties was at the very least the London Litigation and 3M's breach of its obligations to Porton and the MoD's Ploughshare to obtain FDA approval for and then to market BacLite. Complaint, ¶¶ 77-81. Contrary to 3M's assertion, such conduct fits precisely within the Act's definition of an "act in furtherance of the right of advocacy on issues of public importance" because it is indisputably a "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" (D.C. Code § 16-5501(1)(A)(i)), as well as "any other expression or expressive conduct that involves petitioning the government . . . in connection with an issue of public interest" (D.C. Code § 16-5501(1)(b)).

Additionally, 3M cannot possibly claim that any communications that Boulter had with the U.K. government did not concern "issues of public interest." MRSA and 3M's breach of its contractual obligations with respect to BacLite, and the possible ramifications of those breaches, fit precisely within the Act's definition of that term as both are unarguably "an issue related to health." D.C. Code § 16-5501(3).

Further, 3M's own exhibits show that MRSA and BacLite were matters of keen public interest. As the London trial began, a June 21, 2011 article in *The Guardian* attributed to U.K. Member of Parliament Tom Watson a statement that "the public had a right to know why such an important British product fell into disuse 'as a result of 3M's failure to re-do those vital FDA tests.'" Mem., Ex. J-15 (quoting MP Watson). Another document, also submitted by 3M, quoted MP Watson as stating:

This is clearly a matter of public interest, both in terms of public health and also in terms of the potential earnings lost to the UK taxpayer from sales of this product. For this reason, I urge the court to ensure full transparency throughout the legal proceedings in the coming weeks, allowing all documentation and evidence to be made public. The British public has a right to know why such an important, potentially life-saving U.K. product became obsolete as a result of 3M's failure to re-do those vital FDA trials."

Mem., Ex. J-18.

3M also claims that the Act does not apply to its tortious interference claim because "the Act does not apply to 'statements directed primarily toward protecting *the speaker's commercial interests* rather than toward commenting on or sharing information about a matter of public significance.'" Mem. 40 (quoting D.C. Code § 16-5501(3)). 3M then concludes that regardless of any public interest attaching to statements Davis made about 3M to the media, "no such interest was served by paying Tetra Strategy to arrange a private meeting with Fox, in order to advance Defendants' illegal scheme to intimidate 3M into an unreasonable settlement of the London Litigation." *Id.* As applied to Davis, this argument's lack of merit is obvious. Assuming *arguendo* that Davis said or did something that was "*primarily* directed toward protecting" Porton's "commercial interests," there is not even so much as an allegation that Davis, "the speaker" had any "commercial interests" in any Porton defendant, the MoD, Ploughshare, BacLite, the London Litigation or the FDA petition. And it is obvious that he did not have any such interest.

In short, the Act applies to 3M's tortious interference claim as to Davis.

**CONCLUSION**

For the foregoing reasons the Court should deny 3M's Motion to Strike Davis's Special Motion to Dismiss.

Dated: November 29, 2011

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**CERTIFICATE OF SERVICE**

I certify that on November 29, 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