UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

3M COMPANY, Plaintiff/Appellee, -v- **LANNY DAVIS**, *et al.*, Defendants/Appellants.	C.A. Nos. 12-7012 (consolidated with 12-7017)

APPELLANTS' OPPOSITION TO MOTION TO DISMISS

Dated: April 23, 2012

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Appellants Lanny Davis, Lanny J. Davis & Assocs., PLLC, Davis-Block LLC ("Davis") hereby oppose Appellee 3M Company's Motion to Dismiss.

INTRODUCTION

This appeal raises an important, and purely legal, issue: whether the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*, (the "Act") applies in federal actions based on diversity of citizenship.

The term "SLAPP" is an acronym for "Strategic Lawsuit Against Public Participation." In the typical SLAPP, a large, wealthy plaintiff (such as 3M) files a lawsuit against a small but vocal critic (such as Davis), thus initiating a war of attrition whose cost will eventually shut the critic up. Such lawsuits abuse the court system and are the antithesis of the fundamental principles of freedom of speech, freedom of conscience, freedom of association, and freedom to petition the government, upon which this nation was founded. At least 25 states have enacted "anti-SLAPP" laws, and virtually every federal court has applied them under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

The district court here went against this overwhelming body of case law, denying Davis' special motion to dismiss under the Act and holding that the key provision of the Act cannot apply to local law claims in federal court because it conflicts with the Federal Rules of Civil Procedure. This decision has had an immediate and predictable effect that goes to the heart of the *Erie* doctrine: at least

one plaintiff has gone forum-shopping by voluntarily dismissing his D.C. Superior Court lawsuit and re-filing it in federal court, candidly acknowledging that the district court's decision here allows him to avoid the Act.

3M contends that the Court should dismiss this appeal and allow this anomalous result to continue for the indefinite future because the Act confers merely procedural, and not substantive, rights, and the Court can adequately review the denial of a special motion to dismiss under the Act after this case has been fully litigated and a final judgment entered. But the great weight of authority runs against 3M's argument. The courts have overwhelmingly held that such laws provide a substantive defense in the nature of immunity from suit. Accordingly, in all but two cases, the courts of appeals have held that the denial of a motion to dismiss under anti-SLAPP laws is immediately appealable. The two cases holding otherwise, relied upon by 3M, involve statutes that do not have the background of the Act, and involve state court systems that, unlike the District of Columbia's, do not recognize the collateral order doctrine or permit an appeal of any order that adjudicates less than all the claims of all the parties.

Accordingly, the Court has jurisdiction over this appeal, and 3M's motion should be denied.

BACKGROUND

A. The District of Columbia Anti-SLAPP Act

While new to the District of Columbia, the Act is patterned on the anti-SLAPP laws of various states. It provides that a party subjected to "a claim arising from an act in furtherance of the right of advocacy on issues of public interest" may file a special motion to dismiss within 45 days of being served with the claim. D.C. Code § 16-5502(a). To succeed, the movant must make a *prima facie* showing that the claim arises from an act in furtherance of the right of advocacy on an issue of public interest. D.C. Code § 16-5502(b). To avoid dismissal, the responding party then must "demonstrate[ ] that the claim is likely to succeed on the merits." *Id.* If the responding party fails to make such a showing, the motion is granted and the claim dismissed with prejudice. D.C. Code § 16-5502(d).

The Act further provides that upon the filing of a special motion, "discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). However, "[w]hen it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted." D.C. Code § 16-5502(c)(2).

The Act defines the term "act in furtherance of the right of advocacy on issues of public interest" as:

(A) Any written or oral statement made:

(i) 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

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

D.C. Code § 16-5501(1).

The Act defines the term "issue of public interest" as

an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

D.C. Code § 16-5501(3).

B. Factual Background

3M filed the action underlying this appeal on August 24, 2011, alleging that a petition that Davis filed with the FDA and statements made in a press conference and press release announcing that petition were part of a grand conspiracy to (1) "blackmail" 3M into settling a London High Court lawsuit about a new medical device between 3M and Davis's clients, (2) defame 3M, and (3) interfere with

3M's ability to do business with the U.K. government. Davis filed a special motion to dismiss under the Act on October 6, 2011.

Rather than file an opposition, 3M instead filed a "motion to strike" Davis's special motion. 3M argued, among other things, that (1) the Act exceeded the District of Columbia's authority under the Home Rule Act and was invalid, and (2) even if valid, the Act's provisions conflicted with the Federal Rules of Civil Procedure, and thus that Federal Rules applied to the exclusion of the Act.

The District of Columbia was granted leave to intervene to defend the Act's validity and application in federal court. Also, pursuant to the district court's order, Davis filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

C. The District Court's Order

On February 2, 2012, the district court issued a Memorandum Opinion and Order ("Order") in which it denied Davis' special motion to dismiss on the ground that the District's Anti-SLAPP Act did not apply in federal court. In reaching this decision, the district court relied on what it perceived to be the majority opinion in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), a case that did not involve an anti-SLAPP law.

The district court, citing section II.a of Justice Scalia's opinion in *Shady Grove*, held that Rules 12 and 56 of the Federal Rules of Civil Procedure were sufficiently broad to cover the same issues addressed by the Act's special motion

to dismiss provisions, and that, accordingly, the federal rules applied to the Act's exclusion. The district court also held that the Act did not confer upon defendants a substantive defense in the nature of immunity from suit, or indeed, any substantive right. While the district court dismissed all but one of 3M's claims against Davis for failure to state a claim, it did not dismiss 3M's commercial defamation claim—a claim squarely within the Act's purview.

Davis filed a notice of appeal on February 17, 2012, and the District of Columbia filed its notice of appeal on February 23, 2012. Davis has filed a motion to consolidate this appeal with *Sherrod v. Brietbart*, No. 11-7088 (D.C. Cir.). A panel of this Court is currently considering a motion to dismiss that appeal.

ARGUMENT

I. The District Court's Denial of Davis's Special Motion to Dismiss Is a Final Order under 28 U.S.C. § 1291 pursuant to the Collateral Order Doctrine.

3M asserts (Motion 2, 7, 8-9) that the Order is not a final order under 28 U.S.C. § 1291. This is incorrect. The Court has jurisdiction pursuant to the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Jurisdiction pursuant to that doctrine is conferred by 28 U.S.C. § 1291.

Under the collateral order doctrine, a court of appeals has jurisdiction to review an ostensibly interlocutory order as final for purposes of 28 U.S.C. § 1291 if the order: "(1) conclusively determine[s] the disputed question, (2) resolve[s] an

important issue completely separate from the merits of the action and (3) [is] effectively unreviewable on appeal from a final judgment." *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837, 843 (D.C. Cir. 2008) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

Every court of appeals that has considered the issue has held that orders denying anti-SLAPP motions satisfy the first two requirements. *See Godin v. Schencks*, 629 F.3d 79, 83-84 (1st Cir. 2010); *Henry v. Lake Charles Am. Press LLC*, 566 F.3d 164, 173-77 (5th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003). As the First Circuit most recently explained, orders denying anti-SLAPP motions conclusively determine a disputed question because the relevant inquiry is whether the order conclusively determines "the disputed question" (*i.e.*, whether relief under the anti-SLAPP law is available to defendants) rather than the entire action. *Godin*, 629 F.3d at 84.

The courts of appeals that have considered the issue have also held that the denial of an anti-SLAPP motion satisfies the second requirement—that the issue be separate from the merits of the action. As the First Circuit most recently explained, the legal issues raised by an appeal of the denial of an anti-SLAPP motion are "not so intertwined with factual issues as to make it 'highly unlikely to affect, or even be consequential to, anyone aside from the parties.'" *Id.* (quoting *Lee-Barnes v. Puerto Ven Quarry Corp.*, 513 F.3d 20, 26 (1st Cir. 2005)). This is

demonstrably true here. Within weeks of the Order, Bradlee Dean, the plaintiff in a SLAPP against NBC Universal and one of its reporters, voluntarily dismissed his D.C. Superior Court case while a special motion to dismiss was pending, and then re-filed his case in the federal district court, specifically citing the Order here as the reason for his switch in courts. *See* Es. A (Notice of Voluntary Dismissal filed in *Dean v. NBC Universal*, No. 2011 CA 006055 B (D.C. Sup. Ct.)); *see also* Ex. B (complaint filed in *Dean v. NBC Universal*, No.1:12-cv-00283 (D.D.C.)).

Further, except for two inapposite cases (discussed below), the courts of appeals have held denials of anti-SLAPP motions are effectively unreviewable on a later appeal. *See Godin*, 629 F.3d at 84-85; *Henry*, 566 F.3d at 177-78; *Batzel*, 333 F.3d at 1025. Anti-SLAPP statutes essentially provide defendants with immunity from suit. As the Ninth Circuit has explained:

> If the Defendant were required to wait until final judgment to appeal the denial of a meritorious anti-SLAPP motion, a decision by this court reversing the district court's denial of the motion would not remedy the fact that the defendant had been compelled to defend against a meritless claim brought to chill first amendment rights of free expression. Thus, a defendant's rights under the anti-SLAPP statue are in the nature of immunity: They protect the defendant from the burdens of trial, not merely from ultimate judgments of liability.

Id.; *see also Godin*, 629 F.3d at 85; *Henry,* 566 F.3d at 178.

Significantly, this Court (in a case that 3M relegates to a footnote) has likewise recognized that immunity-from-suit defenses are not reviewable on appeal

from a final judgment because "appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate." *La Reunion*, 533 F.3d at 843 (quoting *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998)).

Finally, in recent years, the Supreme Court has emphasized that, in assessing the above criteria, appeals under the *Cohen* collateral order doctrine must involve an important right or a value of a high order. *Will v. Hallock*, 546 U.S. 345 (2006). That is true here. Immunity from suit has been recognized as a sufficiently important right to justify immediate appeal of an order denying immunity in other contexts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982) (claim of qualified immunity by state actor in civil rights suit); *Abney v. United States*, 431 U.S. 651 (1977) (claim of right not to stand trial under double jeopardy clause); *Wuterich v. Murtha*, 562 F.3d 375, 381-82 (D.C. Cir. 2009) (government employee's claim of immunity under Westfall Act); *Vann v. Kempthorne*, 534 F.3d 741 (D.C. Cir. 2008) (claim of tribal immunity by Native Americans); *Roth v. King*, 449 F.3d 1272, 1280 (D.C. Cir. 2006) (claim of D.C. local court judges to immunity from suits seeking injunctive relief provided by 42 U.S.C. § 1983); *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 196 (D.C. Cir. 2004) (order denying claim of immunity under the Foreign Sovereign Immunities Act). It is thus not surprising that federal courts have held that immunity provided by

anti-SLAPP laws is an important right for purposes of the collateral order doctrine. *See Batzel*, 333 F.3d at 1025-26; *Godin*, 623 F.2d at 84; *Henry*, 566 F.3d at 181.

Moreover, immunity under anti-SLAPP statutes protects First Amendment rights. First Amendment rights reflect values of the highest order in our democracy. As the Fifth Circuit explained in *Henry*, in anti-SLAPP appeals

> importance weighs profoundly in favor of appealability. Anti-SLAPP statutes ... aim to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights, and as the Supreme Court [has] stated, ... "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Indeed, the Supreme Court has time and again emphasized the importance of First Amendment rights.

Henry, 566 F.3d at 180-81 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) and citing *Curtis Publ'g Co. v Butts*, 388 U.S. 130, 165 (1967) (Warren, C.J. concurring in result)). And generally, "'in free-speech cases[,] interlocutory appeals sometimes are more freely allowed.'" *Id.* at 181 (quoting *Union Carbide Corp. v. U.S. Cutting Serv., Inc.*, 782 F.2d 710, 712 (7th Cir. 1986)). Indeed, this Court has held that an order denying newspaper reporters' First Amendment rights to immediate access to court records is immediately appealable under the *Cohen* collateral order doctrine. *In re Reporters Committee for Freedom of Press*, 773 F.2d 1325 1330 (D.C. Cir. 1985) (Scalia, J.).

II. 3M's Assertion that the Denial of an Anti-SLAPP Special Motion is Reviewable on Appeal from a Final Judgment Is Wrong.

3M does not contest the Order's satisfaction of the collateral order doctrine's first two requirements. Motion 12. Instead, 3M asserts that the Order "does not meet the third requirement," claiming that denials of anti-SLAPP special motions can be effectively reviewed after the parties have fully litigated the case and the lower court has entered a final judgment. *Id.*

3M does not attempt to explain how a SLAPP defendant could receive meaningful appellate review of a denial of an anti-SLAPP special motion on appeal from a final judgment. Common sense counsels the opposite. A defendant whose special motion is denied, but who obtains a final judgment in his or her favor after the case is fully litigated, will not file an appeal. Indeed, such a defendant lacks standing to do so. "'A party may not appeal from a judgment or decree in his favor.'" *Reporters Committee*, 773 F.2d at 1328 (quoting *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939)).

Absent an appeal, however, that same SLAPP defendant will have had to shoulder the burden and expense of defending a meritless lawsuit based on his or her exercise of First Amendment rights, something that cannot be repaired on appeal from a final judgment. *La Reunion*, 533 F.3d at 843. This is precisely the damage from which the District's Council sought to protect defendants. More

importantly, the District's Council determined, as have the legislatures of numerous other jurisdictions, that the burden and expense of litigating such cases will have a chilling effect on others who might consider exercising their First Amendment rights.

Rather than explain how a defendant could obtain meaningful review of the denial of a special motion to dismiss in an appeal from a final judgment, 3M instead offers unsupported assertions that are incorrect or irrelevant. 3M first asserts (Motion 14) that anti-SLAPP orders are not immediately appealable because "the 'right' granted by the D.C. Anti-SLAPP Act is merely the creation of a procedural motion to effect early dismissal of certain types of claims." 3M cites no case supporting this assertion. In fact, courts considering other anti-SLAPP laws have held otherwise, consistently describing such laws as providing defendants immunity from suit.[1]

[1] *Batzel*, 333 F.3d at 1025 (California); *Eklund v. City of Seattle Mun. Court*, 410 Fed. Appx. 14 (9th Cir. 2010) (Washington); *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); *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 839 (Minn. 2010); *Benoit v. Frederickson*, 908 N.E.2d 714, 717-18 (Mass. 2009); *Hicks v. Cadle Co.*, 355 Fed. Appx. 186, 197-198 (10th Cir. 2009) (Tennessee); *Phillips v. Oklahoma 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); *cf. Pennsbury Village Assocs., LLC v. McIntyre*, 11 A.3d 906, 915 (Pa.

Further evidence that the Act's protections are substantive includes its provisions allocating the burdens of proof, and for the award of attorneys' fees to a prevailing party. D.C. Code §§ 16-5502, 16-5504. State laws allocating the burden of proof are substantive for purposes of the *Erie* doctrine. *See Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21 (2000); *American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994). State laws shifting attorneys' fees are also considered substantive for *Erie* purposes. *See Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011) (Oregon anti-SLAPP statute); *Godin, supra*, 629 F.3d at 85 n.10; *Henry, supra*, 566 F.3d at 182-83; *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972-73 (9th Cir. 1999) (California anti-SLAPP statute); *see generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31 (1975).

Any lingering doubt that the Act confers substantive rights is eliminated by its legislative history, which unequivocally shows that the District's Council viewed the Act as conferring substantive rights that further protect the exercise of First Amendment rights. *See* Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, the "Anti-SLAPP Act of 2010," November 18, 2010 ("Committee Report") (attached as Exhibit C) at 1

2011) (describing Pennsylvania's Environmental Immunity Act as "anti-SLAPP legislation" that provides "immunity").

("Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view"); *id.* at 4 ("Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest"); *id.* ("Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP ..."); *id.* at 7 (Subsection (a) of Section 3 "[c]reates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest"); *id.* (Section 4 "[c]reates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons [sic] identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest").

3M also notes that the Act itself does not provide for an immediate appeal of the denial of a special motion to dismiss and concludes (Motion 20) "[b]ecause the District of Columbia City Council [sic] has not itself deemed the matters at issue in an Anti-SLAPP motion sufficiently important to warrant immediate interlocutory appeal in the courts of the District ... the Court thus should prohibit an appeal in

the federal courts." 3M is wrong. The original version of the Act authorized the immediate appeal of an order denying a special motion to dismiss. Ex. C at 7. That provision ultimately was removed only because a then-new D.C. Court of Appeals case held that a similar provision in the District's arbitration law expanded the Court of Appeals' jurisdiction and violated the Home Rule Act. *See* Ex. C at 7.[2] The Committee Report explained:

> As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal. [footnote omitted] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

3M also relies on two Ninth Circuit cases—*Metabolic Research, Inc. v. Ferrell*, 668 F.3d 1100 (9th Cir. 2012), and *Englert v. MacDonell*, 551 F.3d 1099 (9th Cir. 2009)—claiming that these cases provide a "harmonizing principle" that

[2] That case is *Stuart v. Walker*, 6 A.3d 1215 (D.C. 2010). The Court of Appeals later voted to hear the case *en banc* and vacated the initial Court of Appeals opinion. *See Stuart v. Walker*, 2010 D.C. App. LEXIS 697 (D.C. July 8, 2011). After rehearing *en banc*, the Superior Court's order was affirmed by an equally divided court. *See* Order in *Stuart v. Walker*, No. 09-CV-900 (D.C. Ct. of App. Feb. 16, 2012), attached as Ex. D.

"*interlocutory appeal should be permitted if and only if, the text of a state's anti-SLAPP law or the general operation of state law provides a right of immediate appeal.*" Motion 19-20 (emphasis in original). Neither case is persuasive here.

The Oregon and Nevada laws at issue in *Englert* and *Metabolic* did not contain provisions expressly permitting immediate appeal of a denial of a special motion. From this, the Ninth Circuit reasoned that the Oregon and Nevada legislatures *intended* both that their anti-SLAPP laws not provide immunity from suit, and that orders denying anti-SLAPP motions be reviewable on a later appeal. *Englert* and *Metabolic* are inapposite for at least two reasons.

First, unlike the laws in *Englert* and *Metabolic*, the Act's legislative history makes clear that the District's Council viewed the Act as creating a substantive right the denial of which should be immediately appealable. As shown, the Act's original version provided for an immediate appeal, and the only reason the appeal provision was removed was the limitation imposed by the Home Rule Act.

Second, in *Englert* and *Metabolic* the Ninth Circuit was unable to identify any other method by which the denial of an anti-SLAPP motion could be immediately appealed. In fact, the Nevada Supreme Court has expressly rejected the collateral order doctrine. *See State Taxicab Authority v. Greenspun*, 862 P.2d 423, 425 (1993). Oregon state courts apparently do not recognize the doctrine either. *See State v. Salzmann*, 850 P.2d 1122, 1125-26 (1993) (dismissal of appeal

involving denial of motion to dismiss on double jeopardy ground and noting that such an order is appealable as a final order in the federal courts).

In contrast, the D.C. Court of Appeals has long interpreted the District's appellate jurisdictional statute, D.C. Code § 11-721, to be substantially similar to 28 U.S.C. §§ 1291 and 1292. *See B.F. Saul Co. v. Tiefenbacher*, 28 A.3d 1115, 1116 (D.C. 2011); *see also United States v. Harrod*, 428 A.2d 30, 31 n. 1 (D.C. 1981) (*en banc*)). What is more, for the past 50 years the D.C. Court of Appeals has interpreted the local "final judgment" law to permit appeal of collateral orders pursuant to *Cohen*. *See Raney v. D.C. Transit System, Inc.*, 166 A.2d 261, 262 (D.C. 1960); *see also Frost v. Peoples Drug Store, Inc.*, 327 A.2d 810, 812 (D.C. 1974), *overruled on other grounds*, *Rolinski v. Lewis*, 828 A.2d 739, 742 (D.C. 2003).

The D.C. Court of Appeals has not yet had the opportunity to determine whether the denial of a special motion to dismiss is immediately appealable as a collateral order. It has indicated, however, that such orders meet the collateral order doctrine's requirements. In *McNair Builders, Inc. v. Taylor*, 3 A.3d 1132 (D.C. 2010), the D.C. Court of Appeals considered whether an order denying a motion to dismiss on grounds of the judicial proceeding privilege was an appealable collateral order in light of the Supreme Court's opinion in *Will v. Hallock*, 546 U.S. 345 (2006), which emphasized that an appealable collateral

order must involve a right that is important or reflect a value of a high order. *McNair*, 3 A.3d at 1137-38. In doing so, the D.C. Court of Appeals commented on the Fifth Circuit's decision in *Henry*, *supra*, as follows:

> Following *Will*, the Fifth Circuit in *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009), identified another public interest worthy of protection on interlocutory appeal, that of enforcing a statutes that "aim[s] to curb the chilling effect of meritless tort suits on the exercise of First Amendment rights. ..." *Id.* at 180. In *Henry*, the court considered Louisiana's anti-SLAPP ("strategic lawsuits against public participation") statute, which was designed to bring an early end to meritless claims "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances," noting that in enacting the statute, the Louisiana legislature had "declare[d] that it is in the public interest to encourage continued participation in matters of public significance. ..." *Id.* at 169.

McNair, 3 A.3d at 1138.

Although the statements in *McNair* are not binding on the D.C. Court of Appeals in a future appeal involving the Act, they provide persuasive authority. The Court of Appeals also would be informed by its prior collateral order jurisprudence, the Act's provisions and legislative history, the cases holding that orders denying anti-SLAPP motions are immediately appealable, and the D.C. Attorney General's concordant view that an immediate appeal lies. Thus, it is probable that the D.C. Court of Appeals would hold that orders denying special motions to dismiss are immediately appealable.

CONCLUSION

For the foregoing reasons, the Court should deny 3M's motion to dismiss the appeal.

Dated: April 23, 2012

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CERTIFICATE OF SERVICE

I certify that on April 23, 2012, 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