UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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

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

Dated: January 3, 2012

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INTRODUCTION

The lack of merit of 3M's claims in this action can be discerned from a brief review of the exhibits 3M has submitted with its Opposition to Davis's Special Motion to Dismiss under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501, *et seq*. (the "Act"). No less than 23 of 3M's exhibits are newspaper articles that are inadmissible hearsay. Further, 17 of those report on a U.K. political scandal (apparently touched off by a meeting between Harvey Boulter and former Defence Minister Liam Fox) that has nothing to do with Davis or the claims against him. Declaration of Robert Gifford ("Gifford Decl."), Exs. D, J, L, N, Q, R, S, T, Y, Z, aa, bb, cc, dd, ee, ff, gg. Two others report on 3M's filing of *this* lawsuit (*id.*, Exs. K, W), and one (*id.*, Ex. B) has nothing to do with anything.

There is not even one declaration from a 3M employee showing that Davis's statements were false. 3M instead has submitted a two-page declaration of one employee of its U.K. subsidiary that vaguely discusses one of that subsidiary's contracts with, and a couple of bids submitted to, the U.K. Ministry of Defence. Indeed, aside from 3M's U.S. counsel (whose short declaration pertains solely to 3M's meritless intimidation/blackmail and tortious interference claims), 3M's only fact witness is this one U.K. employee. 3M also submits a Declaration of Timothy Joseph Maloney ("Maloney Decl."). This London-based attorney represented 3M in the London High Court litigation ("London Litigation") between 3M and the Porton companies. He is not a percipient witness with firsthand knowledge of anything and his Declaration merely puts 3M's spin on the London Court's Approved Judgment ("London Judgment").

Other evidence submitted by 3M, even if admissible, is irrelevant. This material includes an announcement of a press conference (Gifford Decl., Ex. A), Questions and Answers exchanged between members of the U.K.'s Parliament and U.K. cabinet departments (*id.*, Ex.i

and ii), a page from the FDA's website entitled "Improving Public Health: Promoting Safe and Effective Drug Use" (*id*., Ex. jj), and a June 2010 order by the London High Court (*id.*, Ex. qq).

The desultory manner in which 3M requests discovery further undermines 3M's case. The Court's November 15 Order directed 3M to specifically identify *targeted* areas for discovery that 3M *needed* to oppose the Special Motion, particularly describe what 3M expected the discovery to show, and explain how 3M would be prejudiced without it. 3M instead has taken the same blunderbuss approach, retrofitting the October 31 Declaration of Kenneth Hickox with a couple of new sentences, and again requesting leave to serve each defendant and various non-parties with interrogatories, document requests, and requests for admission, and also to depose various persons with respect to the same 25 areas it previously identified. *See* Declaration of Kenneth Hickox filed December 15, 2011 ("Hickox Decl."). Indeed, 3M has not even bothered to change the signature page of this "new" Hickox Declaration, which (like the prior one) was signed on October 31. *See* Hickox Decl. at p.9.

3M's recently filed Amended Complaint further evidences this lawsuit's lack of merit. It contains four new claims—tortious interference with existing business advantage, tortious interference with existing contract, injurious falsehood and business disparagement—that were available to 3M when it filed its New York lawsuit in June. And 3M has presented *no* evidence to substantiate its new claim for breach of fiduciary duty against Davis—a claim based on nothing more than Davis's representation of 3M in some unspecified matter *eleven years ago*.

Finally, with virtually no evidence to support any of its claims, 3M makes a couple of new arguments that the Act does not apply to this action. These arguments are meritless; they conflict with the Act's language and purpose, and if accepted, would render the substantive

protections that the Act provides to persons exercising their First Amendment rights a dead letter.

In short, 3M has not come close to establishing a probability of success on its claims.

ARGUMENT

I. 3M Did Not "Win" the London Litigation, the Maloney Declaration Notwithstanding

As Davis explained in his Opposition to 3M's Motion to Strike the Special Motion to Dismiss (Dkt. Item 33), the London Judgment found that (1) BacLite was capable of detecting the presence of the deadly MRSA bacterium in six hours with 95% accuracy; (2) 3M made numerous mistakes in conducting the U.S. clinical trials for BacLite; (3) 3M pulled the plug on BacLite little more than a year after acquiring the technology because it was not yet generating sufficient revenue and 3M wanted to cut costs in a tough economy; (4) Acolyte (the company that sold BacLite to 3M) acted reasonably in refusing to relieve 3M of its obligations as to BacLite; (5) 3M breached its contractual obligations to obtain FDA approval for BacLite; and (6) 3M breached its contractual obligations to market BacLite in the U.K., E.U., U.S., Canada and Australia. These findings establish that Davis spoke the truth about 3M's conduct as to BacLite.

3M nonetheless presents the Maloney Declaration and tries to craft a story that 3M killed BacLite because it was not "commercially viable," claiming 3M actually won the London Litigation. Incredibly, however, the Maloney Declaration does not include even one citation to the 65-page London Judgment. Nor does 3M's Opposition substantiate this tale. It repeatedly cites the same 11 paragraphs of the 358-paragraph London Judgment. *See* Opp. 3 n.23 (citing London Judgment, ¶¶ 259, 261, 264-67, 278-79, 282-83, 295); *id.* 5 n.20 (same); *id.* 6 n.23

(same); *id.* 7 n.29 (same); *id.* 8 n.34 (same); *id*. 12 n.59 (same); *id.* 24 n.109 (same).[1] These paragraphs, however, are part of the London Court's *damages* analysis, which sets forth the reasons for the London Court's damages award, not its *liability* (*i.e.*, breach of contract) findings. London Court Judgment, ¶¶ 237, *et seq*. Davis's Opposition to 3M's Motion to Strike (at 7-9) shows (with numerous citations to the London Judgment), 3M's business executives abandoned BacLite—including 3M scientists' proposals for developing an improved second generation product—despite its contractual obligations for the sake of short-term profits. The damages award may be a victory to Wall Street analysts, but it is hardly a win for persons who may be exposed to MRSA.

II. Davis's Statements Were Not "Directed" at a Personal Commercial Interest and Are Protected by the Anti-SLAPP Act

Davis's Opening Memorandum (at 21-23) showed that his statements fall squarely within the Act's definition of "acts in furtherance of the right of advocacy on issues of public interest" because they concerned matters of keen public interest (*i.e.* matters currently before a court and administrative agency, and concerning a public health issue). 3M's principal argument (Opp. 23-25) is that the Act does not protect his statements because they were "statements directed primarily toward protecting the speaker's commercial interests." (Opp. 23). 3M asserts that the "Defendants have made intentionally false statements whose *only possible purpose* was to advance Davis's and the Porton Defendants' commercial interests, because they knew them to be false when made." As a matter of fact, as shown *infra,* 3M has adduced no evidence establishing that Davis *knew* any statement was false when made. And as in 3M's Motion to Strike, 3M here nowhere identifies, much less provides evidence of, a "commercial interest" *of Davis* toward which the statements were directed.

[1] Although the Gifford Declaration indicates that it has submitted the London Judgment, 3M has forgotten to attach it to his Declarations. Davis attaches it to this Memorandum as Exhibit 17.

As a matter of law, commercial speech is "'expression related *solely* to the economic interests of the speaker and its audience' or speech proposing a certain commercial transaction." *Career College Ass'n v. Duncan*, 2011 U.S. Dist. LEXIS 74616, at *52 (D.D.C. July 12, 2011) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)) (emphasis added). Courts apply this definition flexibly and will consider as "commercial speech" expressions made where "the format is not one that explicitly proposes a particular commercial transaction" but which nevertheless "is designed to persuade the public to purchase a speaker's products." *Id.* at *53 (citing *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009); *see also Bryant v. Rumsfeld*, 2007 U.S. Dist. LEXIS 97521, at *22 n.6 (D.D.C. March 12, 2007). Nothing Davis said qualifies as commercial speech.

Moreover, 3M's argument fights the Act's plain language, which exempts speech "directed primarily toward" a private interest, such as a commercial interest. The Act nowhere uses the word "purpose." Indeed, whether speech involves a matter of public concern is an issue of law decided by the court. *See LeFande v. District of Columbia*, 613 F.3d 1155, 1160 (D.C. Cir. 2010). "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community[.]'" *Snyder v. Phelps*, 131 S.Ct. 1207, 1216 (2011); *see also Connick v. Myers*, 461 U.S. 138, 146 (1983); *LeFande* 613 F.3d at 1161; *Taylor v. FDIC*, 132 F.3d 753, 769 (D.C. Cir. 1997).

For First Amendment protections—which the Act is intended to further—a speaker's purpose in making a statement is irrelevant. As the Seventh Circuit has observed "[w]rongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing the wrongdoing." *Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990). The D.C. Circuit has echoed this truism in cases involving public employees, stating that "[i]ndeed, it may

be that those employees who are dissatisfied with their workplaces are precisely those who are likeliest to notice malfeasance, and be willing to speak up about it." *LeFande*, 613 F.3d at 1162 (quoting *O'Donnell v. Barry*, 148 F.3d 1126, 1134 (D.C. Cir. 1998)). And the Supreme Court observed in striking down a Vermont regulation restricting commercial speech, "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011).

Courts consider a speaker's purpose only in cases in which an employee sues a government employer claiming adverse employment action based on the exercise of First Amendment rights. *See, e.g., LeFande*, 613 F.3d at 1158-59; *O'Donnell*, 148 F.3d at 1133-35; *Taylor*, 132 F.3d at 769. The adverse action typically affects the employee's compensation. Even in those cases, however, the employee's motivation is only one factor to consider. *See, e.g., LeFande*, 613 F.3d at 1158-59; *O'Donnell*, 148 F.3d at 1133. Content is the most important factor. *Breuer*, 909 F.2d at 1039. "[A] personal motivation for an employee's speech, although certainly a factor in the public-concern analysis, need not destroy the character of the communication as one of public concern." *O'Donnell*, 148 F.3d at 1133. Indeed, the D.C. Circuit will hold an employee's speech involves a matter of public concern where "an employee's speech aimed at resolving a personnel dispute may touch upon an issue of public concern." *Tao v. Freeh*, 27 F.3d 635, 639-40 (D.C. Cir. 1994) (citing *Connick v. Myers*, 461 U.S. at 148)); *see also Williams v. Johnson*, 537 F. Supp. 2d 141, 152-533 (D.D.C. 2008).

The statements about which 3M complains on their face involved matters of public interest as defined by the Act and federal constitutional law. 3M's assertion as to the purpose for which they were made, even if true, is irrelevant, and even if relevant, doesn't defeat their status.

III. 3M has Failed to Present Evidence that Any of Davis's Statements Were False and Made with Actual Malice

As explained in Davis's opening Memorandum (at 23), the allegedly defamatory statements fall into three categories: (1) statements about 3M's abandonment of BacLite, (2) statements about the effects of 3M's abandonment of BacLite, and (3) statements about the BacLite Report and 3M's failure to send it to the FDA. 3M confirms that the statements fall into these categories, and in a footnote identifies specific statements it claims were false. Opp. 32 and ns. 154, 155, 156. 3M does not, however, establish a probability of success on the merits.

A. Applicable Legal Standards

Borrowing from California anti-SLAPP cases, 3M would have the Court believe that it need only make a minimal showing. 3M's burden is more stringent, however. To establish a probability of success a plaintiff must "show that they have a *legally sufficient claim*, which is supported by *competent admissible evidenc*e." *Vargas v. City of Salinas*, 135 Cal. App. 4th 361, 380-81 (2005) (citing *CoputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1010 (2001) and *Church of Scientology v. Wollersheim*, 42 Cal. App. 4th 628, 654, 55 (1996)) (emphasis added).[2] "[T]he court considers whether the plaintiff has made a *prima facie* showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor." *Mann v. Quality Old Time Serv., Inc.*, 120 Cal. App. 4th 90, 106 (2004).

"An assessment of the probability of prevailing on the claim looks to *trial*, and the evidence must that will be presented at that time." *Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist*., 106 Cal. App. 4th 1219, 1236 (2003) (quoting *Evans v. Unkow*, 38 Cal. App. 4th 1490, 1497-98 (1995)). "[D]eclarations that lack foundation or personal knowledge, or that

[2] Further, the evidence must negate defendants' constitutional defenses. *Id.* at 381.

are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." *Albergo v. Innunosyn Corp.*, 2011 U.S. Dist. LEXIS 5455, at *11 (S.D. Cal. Jan. 19, 2011) (quoting *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 26 (2007)). In *Tuchscher*, the court was "compelled to disregard a substantial portion of [the plaintiff's] evidence" because the evidence was either hearsay, based on information or belief and not personal knowledge, without foundation, argumentative, or speculative. *Tuchscher*, 106 Cal. App. 4th at 1238.

3M does not dispute that it is a public figure. The First Amendment thus requires 3M to "show the falsity of the statements at issue in order to prevail in a suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *see also Tavoulareas v. Piro*, 817 F.2d 762, 783 (D.C. Cir. 1987) (*en banc)*; *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 112, 153 (D.D.C. 2009). Before a court can determine that a statement was made with actual malice, it must first determine that it was false. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988) (citing *Hepps*, 475 U.S. at 775-78 and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers AFL-CIO v. Austin*, 418 U.S. 234, 284 (1974)). Further, 3M must establish, by clear and convincing evidence, actual malice, *i.e.*, that Davis knew the statements were false, or was reckless as to their truth or falsity, when he made them.

"In the context of an anti-SLAPP suit, courts must consider the pertinent burden of proof in ascertaining whether the plaintiff has shown a probability of prevailing. Thus, … public figures … who sue for defamation must establish a probability that they can produce clear and convincing evidence that the allegedly defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity. To meet this clear and convincing standard, the evidence must be such 'as to command the unhesitating assent of every reasonable mind." *Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1578-79 (2005) (internal citations and

quotations omitted); *see also Oao Alfa Bank v. Center for Public Integrity*, 387 F. Supp.2d 20, 49 (D.D.C. 2005) (quoting *Liberty Lobby v. Rees*, 852 F.2d at 598) (on summary judgment, a court must decide whether a plaintiff has "identified evidence that 'could support a … finding, by clear and convincing evidence, that the defendants acted with actual malice in publishing'"). Actual malice cannot be abstract; it must be connected to certain statements. *Piro*, 817 F.2d at 794.

B. Statements about 3M's Abandonment of BacLite

3M claims that Davis stated that "3M abandoned BacLite in order to promote a competing product" and cites a June 12, 2011 press release (Gifford Decl., Ex. O) issued the day before the commencement of the London trial, and a May 17, 2011 article (the "Parmar Article") published on MINNPOST.COM by Arundhati Parmar about the FDA petition and the May 11 press conference. (Gifford Decl., Ex. C).[3] 3M does not deny that it has been developing FastMan to detect MRSA, or that it announced FastMan's development in May or June of 2009. And the London Judgment establishes that by December 2008, 3M has ceased efforts to market, and obtain FDA approval for, BacLite.

1. Lack of Evidence of Falsity

First, the press release upon which 3M relies (Gifford Ex. O) says nothing about FastMan or any competing product. Second, the Parmar Article does not quote Davis. It is the author's report of the press conference and does not accurately report what was said. Significantly, 3M does not cite the transcript of the press conference (Gifford Decl., Ex. J), probably because it shows Davis made no such statement. Davis said: "So they had FastMan in the process of development. *It looks like* they wanted to buy BacLite as a transition until they could finish their development of FastMan. *I don't know that; it just looks that way*." Gifford Decl., Ex. J at 27

[3] Other statements in this category are statements 1, 2, and 7 in Davis's Supplement Memorandum in Support of his Motion to Dismiss pursuant to Rule 12(b)(6) (Dkt. Item 50) at 1-2.

(emphasis added).[4] The language makes clear this was Davis's opinion. His opinion, and request that a government agency investigate its correctness, cannot be false as a matter of law.

2. Lack of Evidence of Actual Malice

Even if 3M has met its evidentiary burden to show the statements were false, its evidence of actual malice does not meet the preponderance of the evidence or clear and convincing evidence standards. 3M relies on the London Judgment and the Maloney Declaration.

3M first cites to paragraph 5 of the London Judgment as evidence that Davis knew 3M did not abandon BacLite in favor of FastMan. Opp. 5 n.20, 24 n.108, 35, n 171. The *November* London Judgment cannot possibly show what Davis knew seven months earlier, in *May*. Further, paragraph 5 merely recites the issues the London Court considered and says nothing about whether there was a relation between FastMan and 3M's abandonment of BacLite.

3M reliance on the Maloney Declaration, which is inadmissible, is no more relevant. Maloney first purports to quote a December 2008 Porton pleading in the London Litigation stating that Porton "will contend that [3M's] decisions in regards to BacLite are consistent with a decision to undermine BacLite and breach its undertakings in the SPA, and instead to support and market a competitor product from 3M it called FastMan … ." Maloney Decl., ¶ 17. Maloney then says Porton withdrew the allegation because, after "extensive document disclosure by 3M on the issue" there was "no evidence to support it." *Id.* ¶ 18. Maloney does not say that *Porton or its attorneys* said this however, and after three years of litigation in London, one would expect Maloney to say this if it were true. Absent such a statement, Maloney cannot know why

[4] Attorney Hopper said that "we *believe* that there is a significant relationship between 3M's apparent investment and their involvement and their financial interests in Fastman/Simplexa and with the purchase of BacLite … ." Gifford Decl., Ex. J at 24. 3M's Amended Complaint alleges (at ¶ 70 n.3) that Hopper was Davis's employee. 3M's own evidence shows this is false; Hopper is the principal of the Medina, Minnesota firm Robert R. Hopper & Associates, LLC. Gifford Decl., Ex. rr.

Porton did not include the allegation in the 2010 pleading. "[A] witness can't testify to the fact of another's state of mind[.]" *United States v. Heldt*, 668 F.2d 1238, 1284 (D.C. Cir. 1981).[5]

Even if this were *some* evidence that Davis acted with actual malice—which it is not—it is woefully inadequate. As explained in Davis's Opening Memorandum (at 28), the actual-malice standard is a "daunting one" that is subjective, requiring 3M to prove that Davis in fact entertained serious doubts about the truth of the statement, and came close to willfully blinding himself to its falsity. As explained in *Klayman v. Judicial Watch, Inc.*:

> The test for the reckless disregard of the truth is not whether a reasonably prudent person would have published the statement, but rather, whether there is sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

Klayman v. Judicial Watch, Inc., 628 F. Supp. 2d 84, 153 (D.D.C. 2009) (internal quotation marks and citations omitted).

The mere fact that Porton and Ploughshare did not include the 2008 allegation about FastMan in its 2010 amended pleading is not clear and convincing evidence that Davis knew, or entertained a serious doubt about whether, the statement was false. Maloney's conclusion as to why Porton withdrew the allegation is speculation. *See Brown v. Brody*, 199 F.3d 446, 459 (D.C. Cir. 1999) ("a plaintiff's mere speculations are insufficient to create a genuine issue of fact regarding [an employer's] articulated reasons for [its decisions] and avoid summary judgment"); *Hovsepyan v. Blaya*, 770 F. Supp. 2d 259, 268 (D.D.C. 2011). And to conclude, on this basis, that Davis knew his statement was false merely piles speculation on top of speculation. 3M has not come close to establishing actual malice.

[5] Porton's attorneys might have withdrawn the allegation for a number of reasons. They might have believed, but could not prove, that 3M had not produced all of the relevant documents, and decided not to pursue the evidence. Or there might have been evidence supporting the allegation, but the attorneys might have concluded it was not for some reason admissible. Or the attorneys might have made a tactical decision that the allegation was not needed to establish a breach of contract—a decision that, if made, is borne out by the London Judgment.

C. Statements About the Effect of 3M's Abandonment of BacLite

3M complains about statements that "3M's decision to stop marketing BacLite lead to the infection from MRSA, and death, of 'thousands' of people." Opp. 32 and n. 154.[6] In particular, 3M claims (*id.*) that Davis defamed it at the May 11, 2011 press conference when, in responding to a question about a new MRSA-detecting product that MicroPhage Corporation had just announced, he said:

> So MicroPhage has not indicated yet whether it is comparable to BacLite in price. It looks like its [sic] comparable in speed.
>
> But a five-hour – a five year leap ahead that would have occurred had 3M gotten the FDA to approve by simply redoing the tests that were done in Europe and achieve 95 percent starting in 2007, '8, '9 '10 and '11, thousands and thousands of people who died *might* be alive today had there been a BacLite before MicroPhage.
>
> And we don't yet know whether MicroPhage is inexpensive enough to be widely used, but we certainly, on grounds of US public health, welcome the MicroPhage development. We're just sorry that it wasn't BacLite.

Gifford Decl., Ex. J. at 35-36 (emphasis added).

3M also contends (Opp. 32 n.154) that the headline of the press release announcing the FDA petition falsely stated that "3M Corporation today was alleged by the private equity partner of the British Ministry of Defence, the Porton Group, to have exhibited 'negligence and possible recklessness putting lives at risk' due to 3M's 'botched' 2007 clinical trials of a medical device called 'BacLite,' which can detect within five hours the presence of the potentially deadly MRSA/staph 'superbug.'" Gifford Decl., Ex. P.

[6] Other statements in this category are statements 3, 4, 5, 6, and 8 in Davis's Supplemental Memorandum in Support to his Motion to Dismss pursuant to Rule 12(b)(6) (Dkt. Item 50) at 1-2.

1. Lack of Evidence of Falsity

Davis's Opening Memorandum (at 6, 31) pointed to (1) a 2007 study published in the Journal of the American Medical Association ("JAMA"), in which the Centers for Disease Control ("CDC") estimated that in 2005 alone, there were more than 94,000 new cases of MRSA infections in the U.S., with these infections associated with 18,650 deaths in 2005, and (2) a presentation by Dr. Elik Perencevich to the World HAI Forum that the U.S. federal research establishment awards research grants of approximately $570 per each MRSA-related death, while awarding $69,000 per each AIDS-related death. Ex. 3.[7] More recently, Davis noted (in his Opposition to 3M's Motion to Strike (at 10)), a 2010 CDC study published in the JAMA in which the CDC found (1) a decrease in the incidence of onset of MRSA via hospitals and health-care facilities, and (2) numbers that are still alarmingly high, with an estimated 99,000 deaths per year associated with health-care associated infections, principally MRSA.[8]

3M ignores Dr. Parencevich's presentation and the 2010 CDC study, and instead argues that the 2007 CDC study does not prove that Davis's statement was true. But it is 3M's burden to show the statement was false. *Hepps*, 475 U.S. at 775; *Piro*, 817 F.2d at 783. And the dispositive fact is that 3M cannot do so. A statement that cannot be proven false is not actionable. *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990).

The two items of evidence proffered by 3M are insufficient. The first is a February 2011 answer of the U.K Secretary of Health to a written question from Member of Parliament Tom

[7] The CDC study is attached as Exhibit 2 to Davis's Special Motion, while an article discussing Dr. Perencevich's presentation is attached to the Special Motion as Exhibit 3.

[8] The 2010 study published in the JAMA, *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), is attached hereto as Exhibit 18.

Watson, in which the Secretary states that there have been several products available to U.K Hospitals to detect MRSA. The idea behind BacLite, however, was that it was faster than cheaper methods, and cheaper than faster methods. Availability of these other products does not establish that (1) these other tests were widely used in the U.K., E.U., U.S., Canada and Australia, or (2) hospitals which had not tested for MRSA would have refused to use BacLite had it been available. In this latter regard, the 2010 CDC study suggests that, at least in the U.S., availability of alternative tests has not made a significant dent in preventing the onset of MRSA. That study discusses the debate among health care experts as to whether the decrease in healthcare-facility onset of MRSA is the result of more conscientious use of disease prevention procedures, or testing for the presence of MRSAs upon admission. Ex. 18 at 646.

Nor does the London Court's finding that BacLite would not have been "commercially viable" assist 3M in establishing that the statements were false. That finding came with an important qualification: BacLite "as it was" would not have been commercially successful (Ex. 17, ¶ 296). To be sure, 3M had no contractual obligation to develop or make salutary changes to BacLite. But the larger point is that further development may well have been helpful and life saving to future patients. Indeed, the London Court found that 3M's St. Paul-based director of clinical studies wanted to develop a second generation product if problems with the clinical trials continued. Ex. 17, ¶¶ 83, 84. It also found that as a result of the BacLite Technical Committee Report, 3M's scientists decided "to look at improving the product or developing a new generation of it" and "continued on planning the next developments with a view to creating a viable product." Ex. 17, ¶¶ 151, 152. Instead, 3M abandoned BacLite to boost short-term profits. *See* Ex. 17, ¶¶ 78, 79, 81, 82, 84, 85, 174(ii), 195, 209, 218.

In the final analysis, it is impossible to prove whether the statement that "thousands and thousands and thousands of people who died might be alive today had there been a BacLite before MicroPhage" is false. What is certain, however, is that a person cannot be held liable for making a statement that cannot be proven false. *Oparaugo*, 884 A.2d at 76; *Milkovich*, 497 U.S. at 19-20. And even if the statement could be proven false, 3M's evidence fails to do so.

2. Lack of Evidence of Actual Malice

The CDC studies negate an inference that Davis made the statements with actual malice. Given the nature of the statements and 3M's failure to produce any evidence that they were false, 3M cannot possibly prove that Davis acted with actual malice when the statements were made.

D. Statements Concerning the BacLite Technical Committee Report

3M claims that a number of statements Davis made about the BacLite Report were false and defamatory, particularly statements made by Davis in the May 11 press release and press conference concerning Porton's FDA petition. Opp. 32 n.156.[9]

1. Lack of Evidence of Falsity

Davis established in his Opening Memorandum (at 11, 31-32), that the BacLite Report exists, attaching it as Exhibit 8, and also that 3M itself has never made the report public. In its Opposition, 3M finally admits the BacLite Report exists (even though it is not a 3M exhibit). 3M nowhere denies it has not made the Report public, or has not given it to the FDA.

3M nonetheless complains that "Davis accused 3M at a press conference of 'hiding the technical report' and suggested that this meant that 3M *must have been* 'motivated by other things besides selling BacLite under its contract'" *Id.* (quoting Gifford Decl., Ex. J) (emphasis added). Davis did not say this, however. His full statement was:

[9] Other statements in this category are statements 9, 10, 11, 12, and 13 in Davis's Supplement Memorandum in Support to his Motion to Dismiss pursuant to Rule 12(b)(6) (Dkt. Item 50) at 2-3.

> And for us to be told in this morning's newspapers that they discovered the product wasn't any good when they touted it throughout 2007, had done due diligence, and then failed to achieve anything better than 50-percent results and won't tell us the reasons why because they're hiding the technical report *leads us to the suspicion* that they were motivated by other things besides selling BacLite under the contract.

Gifford Decl., Ex. J at 29 (emphasis added). Davis did not "accuse" 3M of anything, but merely stated his "suspicion." Further, the factual premises for his "suspicion" have been confirmed. 3M did perform due diligence before acquiring BacLite (Ex. 17, ¶¶ 36-43). 3M did tout BacLite after acquiring it in 2007 (Ex. 17, ¶ 59). 3M did say that BacLite was no good (Ex. 17, ¶ 151). 3M did achieve only 50% reliability rates in its botched testing (Ex. 17, ¶75). As established here, 3M has never voluntarily made the BacLite Report public, and thus has not said why it achieved these low results. And as shown, 3M was "motivated by other things besides selling BacLite under the contract;" 3M abandoned BacLite to enhance its short-term bottom line.

3M has no reason to complain about Davis's characterization of the BacLite Report as "secret." To this day, 3M has not voluntarily made it public. 3M's suggestion that Davis's statements were false because 3M was not required to provide the BacLite Report to the FDA also misses the mark. (3M admits it did not provide the Report to the FDA.) Davis's comments concerned the Petition's request that the FDA investigate whether 3M had given it the BacLite Report, and whether, if it had not, 3M had violated an FDA law or regulation. The Petition cited various FDA regulations authorizing the petition. *See* Gifford Decl., Ex. rr. In particular, the Petition cited 21 C.F.R. § 10.25, which permits the filing of a citizen's petition to request "the Commissioner … to take or refrain from taking any other form of administrative action." 21 C.F.R. § 10.25(a). It also cited 21 C.F.R. parts 12, 13, 14, 15, and 16, which deal with various types of administrative proceedings. Gifford Decl., Ex. rr. A request for such an investigation cannot be false.

2. **Lack of Evidence of Actual Malice**

As shown above, Davis's statements about the BacLite Report were true. Assuming 3M has shown it was not required to submit the BacLite Report to the FDA (and it does not submit any evidence on this), it has not shown that Davis knew this, or knew that the FDA would not be interested in investigating 3M's conduct given the FDA regulations.

E. Lack of Damages

3M has failed to present evidence showing a likelihood of success in establishing damages on its defamation claim. "[A] corporation suing for defamation … may only recover actual damages in the form of lost profits." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985); *see also American Petroleum Inst. v. TechnoMedia Int'l, Inc.*, 699 F. Supp. 2d 258, 2667 n.7 (D.D.C. 2010) (same); *Martin Marietta Corp. v. The Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) ("The law of libel has long reflected the distinction between corporate and human plaintiffs by limiting corporate recovery to actual damages in the form of lost profits"). "This traditional doctrine does no more than recognize the obvious fact that a libel action brought on behalf of a corporation does not involve 'the essential dignity and worth of every human being'" and thus is not "'at the root of any decent system of ordered liberty.'" *Martin Marietta*, 417 F. Supp. at 955.

3M's only evidence of lost profits is a two-page declaration in which a 3M U.K. employee states that between 2010 and 2011, revenue from contracts with the MoD has declined. There is no evidence, however, that anything Davis said caused this decline. Indeed, the Declaration submitted by this same 3M employee in support of 3M's Motion to Strike (attached hereto as exhibit 19), indicates that the 2011 decline is part of a trend that began before Davis made any statements. Moreover, 3M is only entitled to lost profits. There is no evidence that

any contract 3M has or had with the U.K. MoD is or was profitable or the amount of such profit. If these facts exist, they are in the possession of 3M, not Davis.

Finally, even 3M chairman and CEO Sir George Buckley thinks there is no causal relationship between Davis and any purported loss of business. An interview published after the London Judgment reports: "Some suggest that sales to the MoD have slipped. Buckley shrugs, 'Our sales to the MoD are small. And just because there is correlation doesn't mean there is causality.'" Ex. 20 ("The Andrew Davidson Interview," *The Sunday Times*, Nov. 13, 2011).

IV. 3M Has Not Established a Probability of Success on its Other Tort Claims

3M's claims for "intimidation/blackmail," tortious interference with existing and prospective business advantage, tortious interference with contract, injurious falsehood and business disparagement, conspiracy, and aiding and abetting must also be dismissed.

A. The Act's Applicability to 3M's Other Tort Claims

Davis's Opening Memorandum (at 21-23) showed that the Act applies to 3M's other tort claims. 3M claims to the contrary are meritless. First, to the extent D.C. law recognizes "business disparagement" as a tort, it is virtually identical to defamation, whose elements also overlap with those of injurious falsehood. *See Farouki v. Petra Int'l Banking Corp.*, 2011 U.S. Dist. LEXIS 106211, at *32 n.1 (D.D.C. Sept. 20, 2011); *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 53 n.23 (D.D.C. 2010). Tortious interference with prospective business advantage is loosely allied to the tort of defamation. *See Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978); *see also Pope v. Romac Int'l*, 829 A.2d 945 (D.C. 2003). Injurious falsehood, business disparagement and tortious interference with contract have a similar pedigree. *See* D.B. Dobbs, R. E. Keeton, D.G. Owen, *Prosser and Keeton on Torts*, §§ 128, 129 (5th Ed. 1984).

Second, the Act applies to any claim that "arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). As the California Supreme Court has explained with respect to California's statute:

> The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning. Evidently, '[t]he Legislature recognized that all kinds of claims could achieve the objective of a SLAPP suit—to interfere with and burden the defendant's exercise of his or her rights.'

Navellier v. Sletten, 29 Cal. 4th 82, 92-93 (2002) (quoting *Beilenson v. Superior Court*, 44 Cal. App. 4th 944, 949 (1996)) (emphasis in original). As its plain language makes clear, the D.C.'s Act's focus is the same. *See* D.C. Code § 16-5502(a).

Third, the Amended Complaint charges Davis as "the Architect of Defendants' Conspiracy" (Amended Complaint, Heading I at p. 20), with "masterminding" the conspiracy (*id.* ¶ 62) and refers to "Davis's scheme" (*id.* ¶ 63), and his "coordinat[ing] and implement[ing] a smear campaign" (*id.* ¶ 65). It then describes the "scheme" and "conspiracy" in terms making clear that the Act applies (*id.* ¶ 63): "Davis' scheme consisted of two simultaneous avenues of attack: (i) a comprehensive, international, and unrelenting bombardment of sensational and false accusations against 3M in the global media; and (ii) an attempt to leverage access to the U.K. MoD." Even 3M's spurious breach of fiduciary duty claim "aris[es] from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code §§ 16-5501(1), 5502(a). The Amended Complaint alleges (¶ 164):

> Davis breached the fiduciary duties he owes to 3M by, among other acts, using the confidential information he gained by virtue of his former representation of 3M to assist Defendants in developing and conducting *a false and defamatory media campaign* against 3M—which i*ncluded the dissemination of knowingly false and disparaging statements* about 3M … .

Finally, 3M cannot claim that the Act does not apply to its other tort claims because the statements were "defamatory" or intended to "extort" 3M or "interfere" with 3M's business relationships. "[A] plaintiff cannot frustrate the purposes of the [anti-]SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 308 (2001); *see also Salma v. Capon*, 161 Cal. App. 4th 1275, 1287-88 (2008). Thus, the Act's application does not rely on artful pleading; a plaintiff can only overcome the Act by "demonstrat[ing] that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b)).

B. 3M Has Failed to Establish A Likelihood of Success on its Other Tort Claims

Davis's Memorandum in Support of his Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. Item 30) ("First Mem.") and Supplemental Memorandum (Dkt. Item 50) ("Supp. Mem."), show that 3M's Complaint and Amended Complaint both fail to state claims for (1) "intimidation/blackmail" under U.K. law (First Mem. at 19-20; Supp. Mem. at 17);[10] (2) tortious interference with existing and prospective business advantage (First Mem. at 20-22; Supp. Mem. at 17-19); (3) tortious interference with contract (Supp. Mem. at 5-7); (4) injurious falsehood and business disparagement (Supp. Mem. 7-9); (5) breach of fiduciary duty (Supp. Mem. at 9-10); and (5) conspiracy and aiding and abetting (First Mem. at 22; Supp. Mem. at 19-20). A plaintiff cannot show a likelihood of success if its complaint does not state a claim. *See Vess v. Ciba-Geigy Corp*, 317 F.3d 1097, 1110 (9th Cir. 2002).

Even if 3M's pleadings did state claims, however, 3M has submitted no evidence suggesting it can succeed on any of them. First, as an evidentiary matter, 3M's new injurious

[10] The D.C. Court of Appeals has "found no law 'recognizing a civil cause of action for extortion in this jurisdiction … .'" *Goldschmidt v. Paley Rothman Goldstein Rosenberg & Cooper*, 935 A.2d 362, 381 n.13 (D.C. 2007) (quoting *Fischer v. Estate of Flax*, 816 A.2d 1, 5 (D.C. 2003)).

falsehood and business disparagement claim fails for the same reasons as 3M's defamation claim. *See TechnoMedia*, 699 F. Supp. 2d at 267 n.7 (holding that plaintiff's "disparagement (or injurious falsehood) claim fails for the same reasons as its defamation claims"). Indeed, for injurious falsehood, 3M must establish that Davis made an "unprivileged publication of false statements concerning plaintiff's *property or product*." *Whetstone Candy Co. v. National Consumers League*, 360 F. Supp. 2d 77, 81 (D.D.C. 2004) (emphasis added). Here, any disparagement of BacLite had been made by 3M, not Davis.

In *Goldschmidt v. Paley Rothman Goldstein Rosenberg & Cooper*, 935 A.2d 362, 375 (D.C. 2007), the D.C. Court of Appeals described the plaintiff's decision to sue a party's attorneys for tortious interference with prospective business as "extraordinary." As that court explained, "[a]n attorney who pursues in good faith his or her client's interests on a matter debatable in the law cannot be held liable to an opposing party." *Goldschmidt*, 935 A.2d at 381 (internal quotation marks omitted). 3M's evidence here establishes that its tortious interference claims against Davis are "extraordinary."

That evidence consists of two e-mails. The first is a June 9, 2011 e-mail exchange between Davis and William Brewer, 3M's U.S. attorney, in which Davis informed Brewer that Porton would rather go to trial than settle for less than $33 million, but suggested "let's keep talking." Gifford Decl., Ex. H. This e-mail exchange establishes nothing.[11]

The second is a June 17, 2011 e-mail from Davis to Brewer and Porton CEO Boulter in which Davis introduced the two to each other, authorized Brewer to speak to Boulter without Davis present, and listed their cell phone numbers so that "you two should meet each other next

[11] Brewer responded "We gave it a shot. We're not inclined to respond given the distance between us. See you in London. We'll be at the Lanesborough." Gifford Decl., Ex. H. There seems to be some distance between this response and Brewer's sworn testimony that he "told Davis" "that more discussions would not be helpful" and that "settlement discussions were terminated." *See* Declaration of William A. Brewer III, ¶ 4.

week in [sic] UK," discuss the London case, and "at least [reach] better understanding [of] the respective parties; [sic] perceptions." Gifford Decl., Ex. G. According to Brewer "Davis's e-mail was carefully crafted to preview, and bolster the significance of, the threat that Davis knew Boulter was about to deliver." Brewer Decl. ¶ 6. He apparently bases this on the highlighted parenthetical in the e-mail's statement, "Harvey - I believe Bill is a great lawyer, nice guy, and whether you reach a number or not **(and I know your meeting with UK Minister of Defense [sic] Dr [sic] Liam Fox has given you even stronger reason not to come down very [sic] in $34m [sic] position)**, I think your discussion can be productive – at least better understanding [sic] the respective parties; [sic] perceptions." Gifford Decl., Ex. G.

One thing that cannot be said about this long, run-on sentence—riddled with missing words, misspellings and grammatical errors—is that it was "carefully crafted." Further, the e-mail shows Davis trying to arrange an in-person meeting the following week in London. Brewer's statement that Davis "preview[ed], and bolster[ed] the significance of the threat that Davis knew Boulter was about to deliver" (Brewer Decl., ¶ 6) is speculation, not evidence.

Finally, 3M has presented no evidence supporting its breach of fiduciary duty claim.

V. Discovery is Not Likely to Develop Facts Establishing a Likelihood of Success with Respect to 3M's Claims

3M's plea for discovery "confirm[s] that [3M's] allegations were made without supporting facts in the hope that [3M] would be permitted to embark upon a classic fishing expedition." *Freeman v. Bechtel Constr. Co.*, 87 F.3d 1029, 1032 (8th Cir. 1996). In its prior Cross-Motion for Discovery, 3M sought to serve interrogatories, document requests, requests for admission and depositions with respect to 25 different topics. *See* October 31, 2011 Declaration of Kenneth N. Hickox, Jr. ("October Hickox Decl.") at ¶¶ 8(i) - 8(xxv) (Dkt. Item 16-3). In its November 15, 2011 Order, the Court directed that if, in responding to Davis's Special Motion to

Dismiss, 3M "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 specificity 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. If Plaintiff contends that it will be prejudiced by the inability to take discovery, it must set forth *with particularity* why it would suffer such prejudice[.]" Dkt. Item 29 (emphasis added).

3M has made no effort to comply with the Court's Order. The new Declaration of Kenneth J. Hickox, Jr. ("New Hickox Decl."), signed on October 31, eschews "targeted" discovery 3M "needs" to defeat the Special Motion and, as if tone deaf to the Court's Order, asks for the same 25 categories of information by means of interrogatories, document requests, requests for admission and depositions. *Compare* New Hickox Decl., ¶¶ 8(i) - 8(xxv) *with* October Hickox Decl., ¶¶ 8(i) - 8(xxv). 3M's only mention of prejudice comes in the new Hickox Declaration, which repeats virtually *verbatim* paragraph 7 of the October Hickox Declaration, but inserts into its first sentence the phrase "3M will be prejudiced if it is not granted, because it." *Compare* New Hickox Decl., ¶ 6 *with* October Hickox Decl., ¶ 7. Further, under the Act, 3M must show that "the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2). Not only is the volume of discovery 3M seeks "burdensome," 3M acknowledges that much of it will have to be taken pursuant to the Hague Convention. Hickox Decl., ¶ 7 n.7. 3M's cavalier approach alone is sufficient to deny 3M's request under the Act and Fed. R. Civ. P. 56(d).

In any event, discovery is unnecessary. First, any evidence that anything Davis said was false is in 3M's possession. Second, as shown above, a speaker's motivation for exercising First Amendment rights is irrelevant.

Finally, discovery is not needed to determine actual malice. "Because direct evidence of actual malice is rare, it may be proved through inference, and circumstantial evidence." *Piro*, 817 F.2d at 789-90 (citing *Bose Corp.*, 692 F.2d at 196 and *Connaughton*, 491 U.S. at 668). As explained in *Oao Alfa Bank*:

> Proof of actual malice may take the form of circumstantial evidence. However, the standard for actual malice is not what a reasonable person or a prudent publisher would do. To prevent the inquiry into the defendant's subjective state of mind from slipping into an open-ended review of the reasonableness of the defendant's investigation or his compliance with profeesional standards, the courts have identified only three scenarios in which the circumstantial evidence of subjective intent could be so powerful that it could provide clear and convincing proof of actual malice. These scenarios are where there is evidence that the story: (i) was "fabricated" or the product of defendants' imagination; (ii) is "so inherently improbable that only a reckless man would have put [it] in circulation"; or (iii) is "based wholly on a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call."

Oao Alfa Bank, 387 F. Supp. 2d at 50 (quoting *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1512-13 (D.C. Cir. 1996) and citing *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) (other quotations and citations omitted). Since the *en banc* decision in *Touolovareous v. Piro*, *supra*, courts have used these scenarios to determine whether a plaintiff has adduced clear and convincing evidence of actual malice on summary judgment. *See Lohrenz v. Donnelly*, 350 F.3d 1272, 1283-84 (D.C. Cir. 2003); *McFarlane*, 91 F.3d at 1512-13; *Stark v. Zeta Phi Beta Sorority, Inc*, 587 F. Supp. 2d 170, 178 (D.D.C. 2008); O*ao Alfa Bank, supra*.

3M asserts that "[t]he Supreme Court has held that, because the question of malice implicates a defendant's state of mind, it 'does not readily lend itself to summary disposition' in any circumstance." Opp. 42-43 (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979)). This, however, is *dicta*. 3M quotes a phrase in a footnote in which the Supreme Court felt "constrained to express some doubt" about a statement that deciding actual malice on summary judgment was "the rule," then noted the issue was not presented. *Hutchinson*, 443 U.S. 120 n.9.

More importantly, the Supreme Court held in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), that appellate courts do not review a district court's "actual malice" finding under the "clearly erroneous" standard, but are to conduct an "independent review" of the entire record. In so holding, the Supreme Court stated that whether the evidence satisfied the clear and convincing evidence standard "is not merely a question for the trier of fact," and emphasized the role of judges as "expositors of the Constitution." *Id.* at 511 Two years later, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court held that the clear and convincing evidence standard applied to summary judgment motions involving actual malice, stating that "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id*. at 255. The Court discounted the footnote in *Proxmire* as "simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws" *Id.* at 256 n.7 (quoting *Calder v. Jones*, 465 U.S. 783, 790-91 (1984)).

CONCLUSION

For the foregoing reasons, and those set forth in Davis's Opening Memorandum, the Court should grant Davis's Special Motion to Dismiss and dismiss this action with prejudice.

Dated: January 3, 2011

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CERTIFICATE OF SERVICE

I certify that on January 3, 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