IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ARTHUR G. NEWMYER, individually and on behalf of his minor daughter, L.N Plaintiffs, v. THE SIDWELL FRIENDS SCHOOL And JAMES F. HUNTINGTON Defendants. and TARA MEHRBACH Intervenor.	Civil Action No. 2011 CA 003727 M Next Event: Deadline for Discovery - 05/29/2012 Calendar No. 7 Honorable Michael Rankin
JAMES F. HUNTINGTON Counter-Plaintiff v. ARTHUR G. NEWMYER, Counter-Defendant	

COUNTER-PLAINTIFF'S RESPONSE AND OPPOSITION TO SPECIAL MOTION TO DISMISS PURSUANT TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT, TO MOTION TO STAY DISCOVERY, REQUEST FOR ATTORNEYS FEES, AND REQUEST FOR HEARING

On May 12, 2011, Counter-Defendant, Arthur G. Newmyer (hereinafter "Mr. Newmyer") filed his Complaint against the Defendant/Counter-Plaintiff, James F. Huntington (hereinafter

"Dr. Huntington") alleging, inter alia, what he had been telling to others at least since the Fall of 2010 -- that Dr. Huntington had rendered psychological therapeutic services to Mr. Newmyer's daughter while acting as a middle school counselor at the Sidwell Friends School and while engaging in an illicit relationship with Mr. Newmyer's Wife, Tara Mehrbach.

As a result of those untruthful statements, and the threats that Mr. Newmyer had made to numerous persons, Dr. Huntington was terminated from his employment and he was, and continues to be economically and emotionally harmed. Dr. Huntington has been cast in an untruthful light by Mr. Newmyer, and Mr. Newmyer's efforts to disseminate this untruthful information to as wide an audience as possible has resulted in material damage to Dr. Huntington. On December 30, 2011, Dr. Huntington filed his Counter Complaint and sought redress for Mr. Newmyer's actions.

In response, Mr. Newmyer has specially moved to dismiss Dr. Huntington's claims alleging that the Counter Complaint violated the District Of Columbia Anti-SLAPP Act of 2010 ("Anti-SLAPP Act"), D. C. Code § 16-5502.

Because Mr. Newmyer's request to dismiss pursuant to the Anti-SLAPP Act is both untimely and misplaced, his Motion should be denied. [1] Furthermore, because this Special Motion is frivolous, or is solely intended to cause delay, Dr. Huntington seeks reasonable attorneys fees and costs[2].

[1] For the reasons set forth herein, Dr. Huntington also opposes Mr. Newmyer's Motion to Stay Discovery.
[2] See D.C. Code §16-5504(b).

INTRODUCTION

In this purely private lawsuit against Dr. Huntington otherwise barred by lawarising out his Wife's intimate relationship with Dr. Huntington[3], Mr. Newmyer has vigorously publicized his claims against Dr. Huntington for the sole purpose of destroying Dr. Huntington's reputation and Dr. Huntington's ability to support himself. What had been a purely private matter of private interest thereafter became a public circus through the specific actions of Mr. Newmyer and his agents. Within 2 hours of the filing of his Complaint[4], Mr. Newmyer distributed the "stamp-filed" copy of his Complaint to numerous media outlets giving rise to the dissemination of his unfounded allegations on television and on the Internet (See Exhibit 1). That same day, this purely private matter was reported to the public by The Washington Post (See Exhibit 2), the Washington City Paper (See Exhibit 3), Washingtonian Magazine (See Exhibit 4), the New York Times (See Exhibit 5), the Washington Examiner (See Exhibit 6), and literally hundreds of other news organizations. But for Mr. Newmyer's actions in retaining the services of a public relations firm or firms to immediately spread the word of his suit, the defamatory allegations contained in Mr. Newmyer's Complaint would be largely anonymous.

Mr. Newmyer now seeks to piggyback his malicious, ill-conceived and wrong-headed retention of a public relations firm to advertise his lawsuit as justification for relief through the Anti-SLAPP Act, arguing that this matter is "an issue of public interest". Because the filing of

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[3] Effective April 7, 1977, the District of Columbia enacted legislation which provided that "[c]auses of action for breach of promise, alienation of affections, and criminal conversation are hereby abolished." D.C.Law 1-107, Title I, § 111(a), 23 D.C.R. 8737. Mr. Newmyer's claims is nothing more than a glorified and restated alienation of affection action dressed up as a professional malpractice claim. "The gist of the action for the alienation of affections is said to be the loss of *consortium,* — that is, the loss of the conjugal fellowship, company, cooperation, and aid of the husband or wife. Loss of *consortium* is the actionable consequence of the injury, and alienation of affections is a matter of aggravation." Dodge v. Rush, 28 App.D.C. 149(1906).

[4] Mr. Newmyer filed his complaint at about 9:30 am on May 12, 2011. At 11:41 am, WJLA-TV reported in writing and visually on its website of the filing of the complaint, and included a stamp filed copy of the filing. See Exhibit 1.

his Motion is untimely and, in any event, inapplicable to Dr. Huntington's Counter Complaint, Mr. Newmyer's Special Motion to Dismiss should be denied. Furthermore, given the late filing along with the egregious circumstances giving rise to his misguided justification for relief under the Anti-SLAPP Act, Dr. Huntington should be awarded attorney fees and costs.

A. Mr. Newmyer's Special Motion To Dismiss Was Filed Too Late.

The Anti-SLAPP Act requires a party to seek relief timely. Specifically, the Anti-SLAPP Act states:

> § 16-5502. Special Motion to Dismiss.
>
> (a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim. (Emphasis added.)

Dr. Huntington filed his Counter Complaint on December 30, 2011. Within 45 days, or by on or before February 13, 2012, Mr. Newmyer was obligated to file his request for relief under the Anti-SLAPP Act. On February 29, 2012, Mr. Newmyer filed his Special Motion to Dismiss. This filing was untimely.

1. The Deadline For Filing The Special Motion To Dismiss Was Mandatory And Jurisdictional And Cannot Be Waived.

The Anti-SLAPP Act is clear regarding time limitations. If it is to be filed, a party may do so within 45 days after service of the claim giving rise to the request for relief. When determining whether the time limit is precatory or mandatory, the Court first looks to the plain meaning of the statutory language, and if it is clear and unambiguous and will not produce an absurd result, the Court looks no further. Citizens Ass'n of Georgetown v. District of Columbia Bd. of Zoning Adjustment, 642 A.2d 125, 128 (D.C. 1994) (citations omitted); Butler v. Butler, 496 A.2d 621, 622 (D.C.1985). "[W]here a statute is clear on its face, there is no need to engage in an analysis of legislative intent." *Id.* In re DH, 666 A. 2d 462, 470 (1995).

The time limit obligating a party to seek relief within 45 days is consistent with the statutory intent. Anti-SLAPP Acts were created to militate against the chill of public discourse regarding an issue of public interest, and is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of the constitutional right of petition or free speech. Rusheen v. Cohen, 37 Cal.4th 1048, 1055-1056, 39 Cal.Rptr.3d 516, 128 P.3d 713 (2006). The purpose of these timing requirements is to facilitate the dismissal of an action subject to a Special Motion to strike early in the litigation so as to minimize the cost to the Defendant. Morin v. Rosenthal, 122 Cal.App.4th 673, 681, 19 Cal.Rptr.3d 149 (2004). The Court has the discretion to deny a Motion filed after the filing deadline without considering the merits of the Motion. See Morin, supra, 122 Cal.App.4th at p. 681; see Lam v. Ngo, 91 Cal.App.4th 832, 840 [111 Cal.Rptr.2d 582 (2001). See also Chitsazzadeh v. Kramer & Kaslow, 199 Cal. App. 4th 676, 682 - Cal: Court of Appeal, 2nd Appellate Dist., 3rd Div. 2011.

The time requirement for filing within 45 days may not be extended by the parties or the Court, as the 45 day period is jurisdictional. "The time limits for filing appeals with administrative adjudicative agencies, as with Courts, are mandatory and jurisdictional matters." District of Columbia Pub. Employee Relations Bd. v. District of Columbia Metro. Police Dep't, 593 A.2d 641, 643 (D.C.1991). A failure to file a Notice of Appeal within the required time period divests the agency of jurisdiction to consider the appeal. Thomas v. District of Columbia Dep't of Employment Servs., 490 A.2d 1162, 1164 (D.C.1985). See also Zollicoffer v. DC Public Schools, 735 A. 2d 944, 946 (1999). Similarly, the failure to follow the statutory time limits mandated by law divests the Court of jurisdiction to hear the Special Motion. See, e.g., National Graduate University v. District of Columbia, 346 A.2d 740, 743

(D.C.1975), where the Court held that the timing imperatives for appeals of tax assessments are not merely statutes of limitation that may be waived, but are jurisdictional requirements that cannot be waived. Customers Parking v. District of Columbia, 562 A. 2d 651, 654 (1989).

Because Mr. Newmyer was obligated to file his Special Motion within 45 days, and he failed to do so, he is not entitled to any relief obtainable under the Anti-SLAPP Act.

2. Dr. Huntington Does Not Need To Show Prejudice Because Of The Late Filing.

Dr. Huntington does not have to demonstrate "prejudice" arising from an untimely filing. In Olsen v. Harbison, 134 Cal.App.4th 278, 283 (2005), the Appellate Court affirmed the denial of an Anti-SLAPP Motion as untimely. The Court ruled that, although a Trial Court might "peek" at the strength of a Motion's merits, "[d]iscretion to permit or deny an untimely Motion cannot turn on the final determination of the merits of the Motion." Here, Mr. Newmyer's simple failure to timely file his Special Motion is sufficient for it to be denied.

B. Even If Timely Filed, The Anti-SLAPP Act Does Not Apply To This Proceeding.

Even if the Court determines that the Special Motion to Dismiss was timely filed, the Special Motion should be denied because this dispute is not an issue of public interest, and Dr. Huntington has a substantial likelihood of succeeding on the merits of his Counter Complaint.

1. The Legislative Purpose For Enacting This Law Does Not Apply To Dr. Huntington's Counter Complaint.

The Anti-SLAPP Act provides:

"§ 16-5501. Definitions.

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(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.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means 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."

Prior to the creation of Anti-SLAPP statutes, there existed a widespread pattern of abusive lawsuits, generally filed by wealthy, powerful interests against individuals or community organizations that had spoken out against them. These suits were given the moniker "Strategic Lawsuits against Public Participation," or "SLAPPs." See George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press, 1996).

A defining feature of SLAPPs is that "winning is not a SLAPP Plaintiff's primary motivation (emphasis added)." Blumenthal v. Drudge, Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001):

> [L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective... Thus, while SLAPP suits 'masquerade as ordinary lawsuits'the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so.

Id. (quoting Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446, 450 (1994)). As the D.C. Council recognized:

> [T]he goal of the litigation is not to win the lawsuit but to punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony, ""litigation itself is the plaintiff's weapon of choice."

Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, "Anti-Slapp Act of 2010," November 19, 2010 (Hereafter "Committee Report"), at 4.[5] The Committee further explained the need for the bill:

> Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights...The impact is not limited to named defendants [apostrophe] willingness to speak out, but prevents others from voicing concerns as well. To remedy this [,] Bill 18-893... incorporat[es] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Committee Report at 1.

Mr. Newmyer has turned the concept of the anti-SLAPP Act on its head. None of the purposes underlying the Anti-SLAPP Act are present in Dr. Huntington's Counter Complaint. In fact, Dr. Huntington seeks relief because he has been damaged and he wants Mr. Newmyer to pay. Mr. Newmyer's Anti-SLAPP claims against Dr. Huntington are without merit; to the extent that this issue has become one "of public interest", it is because Mr. Newmyer has made it so. In fact, Mr. Newmyer is the wealthy[6] individual who has brought a meritless suit, and who seeks to deter this common citizen (Dr. Huntington) from litigating Mr. Newmyer's abuses. He is using his lawsuit to try to bully Dr. Huntington; and because Dr. Huntington has, in fact, been

[5] The Committee Report is online at http://www.dccouncil.us/images/00001/20110120184936.pdf.
[6] Mr. Newmyer's net worth is at least 17 million dollars (See Exhibit 7, pp. 6-7).

materially damaged, Dr. Huntington seeks redress for Mr. Newmyer's wrongs. Dr. Huntington is seeking monetary damages – he is not trying to chill Mr. Newmyer's "constitutionally protected rights".

2. The Court May Consider Matters Outside Dr. Huntington's Counterclaim.

When considering a Special Motion to Dismiss, § 16-5502 (b) and § 16-5502 (d) of the Anti-SLAPP Act require the Court to grant the Motion and dismiss the claim with prejudice if Mr. Newmyer makes a "prima facie showing" that the claim he is seeking to dismiss "arises from an act in furtherance of the right of advocacy on issues of public interest" and Dr. Huntington fails to "demonstrate that the claim is likely to succeed on the merits." Given this statutory predicate, consideration of the Anti-SLAPP Act requires "consideration of extra-pleading materials in some instances to determine whether the movant has made his prima facie showing or whether the Plaintiff can demonstrate a likelihood of success on the merits." See 3M Company v. Boulter, Civil Action No. 11-cv-1527 (RLW), USDC DC, Memorandum Opinion, at P. 29.

Consideration of matters outside the pleadings support Dr. Huntington's contention that the Special Motion to Dismiss should be denied.

3. Dr. Huntington Is Not A Public Figure And The Claims Asserted Are Private Interest Claims.

By definition, 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." (Emphasis added) § 16-5501(3). Unquestionably, Dr. Huntington is a private, not a public, figure. See, e.g., Moss v. Stockard, 580 A. 2d 1011 (1990). He was privately employed

by a private school; the predicate giving rise to Mr. Newmyer's complaints is the allegation of the existence of a private consensual relationship between two adults, and the assertion that private therapeutic services were rendered for Mr. Newmyer's daughter privately. In no way could Dr. Huntington be deemed to be a public figure or having performed actions in the public interest; and the claims asserted relate solely to the private interests of the parties involved.

4. Mr. Newmyer's Claims Are Not "Issues Of Public Interest".

The D.C. Anti-SLAPP Act does not provide a definition for "an issue of public interest." However, the California Anti-SLAPP statute, which is the most broadly interpreted Anti-SLAPP Act in the country, Hilton v. Hallmark Cards, 599 F. 3d 894 (9th Cir. 2010) requires that there be some attributes of the issue which make it one of public, rather than merely private, interest. In construing what is an "issue of public interest", the California Courts set forth a few guiding principles. First, "public interest" does not equate with mere curiosity. Briscoe v. Reader's Digest Association, Inc., 4 Cal.3d 529, 537, 93 Cal.Rptr. 866, 483 P.2d 34 (1971). Second, a matter of public interest should be something of concern to a substantial number of people. Dun & Bradstreet v. Greenmoss Builders, 472 US 749 (1985). Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Hutchinson v. Proxmire, 443 U.S. 111, 135, 99 S.Ct. 2675, 2688, 61 L.Ed.2d 411, 431 (1979). Third, there should be some degree of closeness between the challenged statements and the asserted public interest. Connick v. Myers, 461 U.S. 138, 148-149, 103 S.Ct. 1684, 1690-1691, 75 L.Ed.2d 708, 720-721(1983) and the conclusory assertion of a broad and amorphous public interest is not sufficient. See Hutchinson, supra, 443 U.S. at p. 135, 99 S.Ct. at p. 2688, 61 L.Ed.2d at p. 431.

Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy..." Connick v. Myers, supra, 461 U.S. at p. 148, 103 S.Ct. at p. 1691, 75 L.Ed.2d at p. 721.)

Mr. Newmyer's Special Motion presents none of the elements sufficient to satisfy these guiding principles. In this matter, and only as a result of Mr. Newmyer's filing, and his strategic and intentional dissemination of his lawsuit through media channels and elsewhere, he has managed to make this lawsuit, at best, a public "curiosity." There is nothing of public interest in this purely private matter. Second, what allegedly occurred in this matter is of interest to an extremely limited number of people who make up a relatively small and specific audience. Third, there is no degree of closeness between what Mr. Newmyer alleges occurred in the asserted public interest. Finally, the focus of Mr. Newmyer's conduct is not of public interest. Rather, the claims and allegations became exposed and advertised to the public by Mr. Newmyer in order to elevate this private controversy. Accordingly, there is no issue of public interest.

5. Mr. Newmyer's Claims, And Any Issues Related To His Claims, Are In The Public Domain Because Of Mr. Newmyer's Actions.

As argued herein, Mr. Newmyer has tried to elevate public interest in his claims because of his intentional desire to disseminate the defamatory allegations, with the help of a public relations firm, using mass media and the Internet. "Those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Hutchinson v. Proxmire, supra, 443 U.S. at p. 135, 99 S.Ct. at p. 2688, 61 L.Ed.2d at p. 431. Similarly, a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO, 105 Cal.App.4th at p. 926,130 Cal.Rptr .2d 81. As the

Court stated in Rivero, "If the mere publication of information in a union newsletter distributed to its numerous members were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect." (*Id.* at p. 926, 130 Cal.Rptr.2d 81.) Because Mr. Newmyer cannot artificially turn a private matter into a public interest[7] and then seek statutory protection under the Anti-SLAPP Act, his "special" claim fails. Also see, e.g., Weinberg v. Feisel, 2 Cal. Rptr. 3d 385 (Cal. App. Ct., 3rd Appellate Dist. (2003).

C. Dr. Huntington Has A Substantial Likelihood Of Succeeding At The Trial Of This Matter.

Even if the Court were to determine that the filing of this Special Motion to Dismiss is appropriate, Dr. Huntington has established that his counter claims are likely to succeed on the merits. See D.C. Code, § 16-5502 (b). This is so because Mr. Newmyer's actions have given rise to substantial wrongs suffered by Dr. Huntington.[8]

In determining whether Dr. Huntington is likely to succeed on the merits, the required proof of the probability of success is low. Taking the California Anti-SLAPP Act as guidance, "the required probability that [a party] will prevail need not be high. The California Supreme Court has sometimes suggested that suits subject to being stricken [at this preliminary stage] are those that lack [] even minimal merit." Hilton v. Hallmark Cards, 599 F. 3d 894, 908 (9th Cir. 2010) (internal punctuation omitted).

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[7] For Anti-SLAPP Act purposes, a "public controversy" does not equate with any controversy of interest to the public. For example, a divorce action between the scion of one of America's wealthier industrial families and his Palm Beach society wife may have piqued the public's interest but was not a public controversy. See Time, Inc. v. Firestone, 424 U.S. 448, 454, 96 S.Ct. 958, 965, 47 L.Ed.2d 154, 163. at pp. 454-455, 96 S.Ct. at pp. 965-966, 47 L.Ed.2d at p. 163 (1976).

[8] Dr. Huntington incorporates herein by reference his Response and Opposition to Motion to Dismiss filed contemporaneously.

Once an action is subjected to Anti-SLAPP scrutiny, even in broadly applied and interpreted jurisdictions such as California, the Court merely determines whether the Plaintiff has presented sufficient facts to establish a prima facie case, i.e., evidence to support a judgment in the Plaintiff's favor. E.g., Kashian v. Harriman, 98 Cal. App. 4th 892, 906 (2002). The showing required at this stage must simply raise a triable issue of fact as to whether he can prevail. Taus v. Loftus, 40 Cal. App 4th 683, 714 (2007). The Court must accept the Plaintiff's evidence as true and draw all inferences from the evidence in favor of the Plaintiff. Soukop v. Hafif, 39 Cal. 4th 260, 269 n.3 (2006). The balancing act reflected in these SLAPP Act statutes is between a Plaintiff's right to access the Court and a Defendant's interest in avoiding litigation costs and distractions.

Mr. Newmyer begins his diatribe against Dr. Huntington by implying that Mr. Newmyer and his Wife were happily married, that Dr. Huntington alienated his Wife's affections and interfered in his marriage while unethically rendering psychological care to his daughter while having sexual relations with his Wife. However, before Mr. Newmyer's daughter was ever enrolled at Sidwell Friends School, Mr. Newmyer and his Wife had executed a Marital Settlement Agreement which provided that each could act as if he or she were single and unmarried, and free from the interference, annoyance and harassment of the other. (See Exhibit 8). In fact, shortly after execution of the Agreement, Mr. Newmyer engaged in sexual contact with at least two individuals not his Wife (See Exhibit 9, p. 37).

Mr. Newmyer was well aware of what constituted the creation of a patient-psychologist relationship. At all times, because he had been treated for decades by mental health practitioners (See Exhibit 9, pp. 73-109), he knew that no patient-psychologist relationship had ever been

created between Dr. Huntington and his daughter. In fact, the District of Columbia Licensing Board has confirmed, after investigation, that "there is no evidence to indicate that Dr. Huntington provided psychological services" to Mr. Newmyer's daughter. (See Exhibit 10).

Immediately upon the filing of his Complaint, Mr. Newmyer acted to disseminate his defamatory statements to as broad an audience as possible. It is believed, and therefore averred, that Mr. Newmyer retained the services of a public relations firm to assist him in disseminating this information.[9] A copy of his stamp-filed Complaint was published on the WJLA-TV website within 2 hours of the filing of his Complaint. As stated earlier, Mr. Newmyer distributed the "stamp-filed" copy of his Complaint to numerous media outlets giving rise to the dissemination of his unfounded allegations on television and on the Internet (See Exhibit 1); and that same day, The Washington Post (See Exhibit 2), the Washington City Paper (See Exhibit 3), Washingtonian Magazine (See Exhibit 4), the New York Times (See Exhibit 5), the Washington Examiner (See Exhibit 6), and literally hundreds of other news organizations followed up with the story. Dr. Huntington was terminated from his employment with the psychological practices with which he had previously been affiliated, and he has suffered material distress and financial harm.

Based on the foregoing, there is a substantial likelihood that Dr. Huntington will succeed on the merits of his claims. Accordingly, even if the Court finds that the Anti-SLAPP Act applies, Dr. Huntington has carried his burden and should be allowed to proceed with his claims.

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[9] Mr. Newmyer has refused to answer questions regarding who he retained within the public relations community to assist him in disseminating this information. See Motion to Compel filed by Sidwell Friends School with respect to Answers to Interrogatories. Furthermore, it is believed that the public relations firm known as Anne Schroeder Mullins Company, LLC and/or ASM & Company, LLC acted on his behalf to publicize his filing. A Notice of Deposition and Subpoena were served upon the principle of that company but she failed to attend her deposition. Dr. Huntington has been unable to enforce the Subpoena as a result of the automatic stay of discovery now currently pending.

D. Dr. Huntington Should Be Awarded Attorneys Fees

The Anti-SLAPP Act allows for an award of reasonable attorneys fees and costs to the responding party "only if the court finds that a motion brought under § 16-5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504. As Dr. Huntington argues, this Special Motion was filed late; there is no statutory basis for the bringing of this Special Motion; the issues raised are purely private; there is no constitutionally protected speech which is being chilled; and Dr. Huntington's counterclaim has no other indication that it is a SLAPP suit. The only effect that the Special Motion has had is to delay Mr. Newmyer from answering interrogatories and producing documents that will affirm Dr. Huntington's allegations of Mr. Newmyer's wrongful behavior.[10] In such a situation, this Special Motion is frivolous or was brought for delay purposes only.

Attorneys fees and costs have been awarded in similar cases in California. In Olsen v. Harbison, 35 Cal. Rptr. 3d 909 (Cal. Ct. App., 3rd App. Dist. 2005), the California appellate court affirmed the denial of an anti-SLAPP motion as untimely. The Court further found that the appeal of the Court's determination regarding timeliness was frivolous since appellant had "made no colorable showing that the trial court's exercise of discretion in denying his untimely anti-SLAPP motion was whimsical, arbitrary, or capricious." The Olsen court awarded almost $17,000 in sanctions to the respondent for his appellate attorney fees and awarded $2,500 for expenses. Furthermore, the trend of awarding sanctions to responding parties is becoming more prevalent. See, e.g., Gerbosi v. Gaims, Weil, West & Epstein LLP, 193 Cal.App.4th 435 (2011),

[10]Although Dr. Huntington is stayed in seeking discovery on his Counterclaim, Mr. Newmyer has now issued over Seventeen (17) Notices of Depositions and Subpoenas to gather information in defending his Counterclaim. This strategy is intentional – delay Dr. Huntington in obtaining discovery to a date beyond the discovery cut-off date, but gather information that purports to affirm his contentions.

where the appellate court partially affirmed the granting of $220,000 in sanctions to the prevailing plaintiffs on an anti-SLAPP motion, finding that the Special Motion was frivolous.

CONCLUSION

For these reasons, and for such other and further reasons as may be made apparent at the hearing of this matter, Dr. Huntington respectfully requests this Court to deny Mr. Newmyer's Special Motion to Dismiss and his Motion to Stay Discovery, award him his fees and costs incurred herein, and for such other relief as the nature of the cause may require.

Respectfully submitted,

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REQUEST FOR HEARING

MR. CLERK:

YOU WILL PLEASE NOTE that the Counter-Plaintiff hereby requests a hearing on his Response and Opposition to Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act.

Barton D. Moorstein, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of April, 2012, a copy of the foregoing Counter-Plaintiff's Response and Opposition to Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act was electronically filed and mailed, postage prepaid, upon:

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