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	Civil Action No. 2011 CA 003727 Next Event: Deadline for Proponent's 26(b)(4) Statements - 4/16/2012 Calendar No. 7 Honorable Michael Rankin
JAMES F. HUNTINGTON Counter-Plaintiff v. ARTHUR G. NEWMYER, Counter-Defendant	

COUNTER-DEFENDANT ARTHUR G. NEWMYER'S REPLY
IN SUPPORT OF SPECIAL MOTION TO DISMISS PURSUANT
TO THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT

Counter-Defendant Arthur G. Newmyer respectfully submits this reply in support of his special motion to dismiss the counter complaint pursuant to the District of Columbia Anti-SLAPP Act of 2010 ("Anti-SLAPP Act"), D.C. Code § 16-5502(a), and in support thereof states as follows:

PRELIMINARY STATEMENT

The opposition brief filed by Dr. Jack Huntington completely ignores the plain language of the Anti-SLAPP Act and the principles established in a recent D.C. Anti-SLAPP Act case, *3M Co. v. Boulter*, No. 11-cv-1527, 2012 U.S. Dist. LEXIS 12860 (D.D.C. Feb. 2, 2012). While Dr. Huntington is familiar with the *3M* case -- having cited it in another section of his brief -- he failed to cite the correct standard of proof which, as Judge Robert Wilkins pointed out, "places a higher procedural burden on plaintiff than is required to survive a motion for summary judgment under Rule 56." *Id*. at *45. Indeed, the District of Columbia, which intervened in that case, acknowledged that the Anti-SLAPP Act -- which requires plaintiffs to prove that they are *likely* to succeed on the merits -- places a "heightened burden of proof" on the plaintiff.

This heightened burden of proof is fatal to Dr. Huntington's counterclaims. In fact, the only evidence Dr. Huntington has submitted to support his counterclaims is a one-page letter from the D.C. Board of Psychology which, without any explanation or reasoning, concluded that Dr. Huntington did not provide psychological services to Mr. Newmyer's daughter, L.N. However, unlike the D.C. Board, which from the face of the letter does not appear to have considered any of the evidence in this case, Mr. Newmyer's expert, Dr. Donald Bersoff, has concluded that Dr. Huntington violated multiple professional standards, including the APA Ethical Principles of Psychologists and Code of Ethics. Dr. Bersoff is the President-Elect and a past general counsel of the American Psychological Association ("APA"). Notably, the factual basis for his expert opinion consists of statements made by Dr. Huntington and Tara Mehrbach (formerly Newmyer) -- whose sexual relationship lies at the center of Dr. Huntington's misconduct. Given that Dr. Huntington cannot overcome this evidence, it is not surprising that he incorrectly claims that "the required proof of the probability of success is low."

Because Dr. Huntington cannot satisfy the heightened burden of proof to withstand dismissal, he instead contends that Mr. Newmyer's motion to dismiss is untimely and that the Anti-SLAPP Act is not applicable. Both contentions are without merit. First, Dr. Huntington mischaracterizes the 45-day deadline, claiming that it is jurisdictional, like a request for appellate review, and therefore cannot be waived. Not only does this Court already have jurisdiction over this case, but the case law cited by Dr. Huntington himself demonstrates that the filing deadline for Anti-SLAPP motions is not jurisdictional and can be extended. Dr. Huntington conveniently omits from his opposition any reference to the fact that he granted an extension of time until March 4, 2012, and that Mr. Newmyer's special motion to dismiss was filed before that deadline. Thus the motion is clearly timely.

Second, in arguing that the Anti-SLAPP Act does not apply, Dr. Huntington again cites the wrong legal standard. In particular, Dr. Huntington incorrectly claims that the Anti-SLAPP Act does not provide a definition for "an issue of public interest," even though he cites the definition on page 7 of his brief. He then proceeds to pick-and-choose language from court decisions having nothing to do with Anti-SLAPP Act lawsuits. By ignoring the terms of this District of Columbia statute, Dr. Huntington has effectively conceded Mr. Newmyer's argument that his lawsuit involves an issue of public interest because it relates to "health or safety; community well-being [or] a public figure." D.C. Code § 16-5501(3). Nor does Dr. Huntington address the point that the allegedly defamatory statement by Mr. Newmyer "that Dr. Huntington was engaging in an unethical Doctor-patient relationship with his child, L.N.," clearly involves an issue that is already under consideration by this Court.[1] Therefore, for both of these reasons,

[1] As addressed in Mr. Newmyer's special motion to dismiss, the "official proceedings" requirement in Section 16-5501(1)(A)(i) is a separate and independent test for invoking the

continued

Mr. Newmyer has sufficiently made a *prima facie* showing that Dr. Huntington's counterclaims arise out of the type of public interest issues protected by the Anti-SLAPP Act.

In short, Dr. Huntington's counter complaint should be dismissed with prejudice because Mr. Newmyer has satisfied his *prima facie* burden and Dr. Huntington cannot prove that he is likely to succeed on the merits. Accordingly, this Court should grant Mr. Newmyer's special motion to dismiss.

ARGUMENT

I. MR. NEWMYER'S SPECIAL MOTION TO DISMISS WAS TIMELY FILED

Dr. Huntington argues that Mr. Newmyer's special motion to dismiss was untimely because it was filed more than 45 days after his counter complaint, *see* Counter-Pl.'s Opp. at 4, but fails to point out that he consented to two extensions of time for Mr. Newmyer to respond to the counter complaint and that Mr. Newmyer filed the instant motion four days prior to the agreed-upon deadline of March 4, 2012. *See* Mot. at 2 n.1. Instead, Dr. Huntington apparently contends that his extensions are invalid because D.C.'s Anti-SLAPP Act deadline is jurisdictional and cannot be waived. This contention is inconsistent with the plain language of the statute and well-established case law.

Courts have established that the filing deadline for Anti-SLAPP motions is not jurisdictional. *See, e.g.*, *Madera Irrigation Dist. v. Pistoresi*, 2010 Cal. App. Unpub. LEXIS 268 (Cal. App. 5th Dist. Jan. 13, 2010) ("The 60-day time period is not jurisdictional; it grants the trial court the legal authority to allow the filing of an anti-SLAPP motion at any later time.") In

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protections of the Anti-SLAPP Act. *See* Counter-Def.'s Mot. at 5-6. Because Mr. Newmyer clearly satisfies this bright-line test, he is not required to separately demonstrate that the counterclaims fall within the definition of an "issue of public interest." *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 569 (Cal. 1999). However, he has also made this showing. *See* Counter-Def.'s Mot. at 7-9.

fact, one case cited by Dr. Huntington regarding the timeliness of Anti-SLAPP motions, *Lam v. Ngo*, 91 Cal. App. 4th 832, 840 (Cal. App. 4th Dist. 2001), fully supports Mr. Newmyer's position on this issue. Specifically, in *Lam*, the court held that the "time period set forth in [California's Anti-SLAPP Act] is not jurisdictional." *Id.* The court explained that the "nonjurisdictional nature of the time limit is also emphasized by the permissive 'may' in the setting forth of the time limit ('The special motion may be filed')." *Id.* This same permissive language is in D.C.'s Anti-SLAPP Act, *i.e.*, "A party *may* file a special motion to dismiss any claim." D.C. Code § 16-5502(a).[2] Therefore, the 45-day time period set forth in D.C. Code § 16-5502(a) is not jurisdictional.

The Anti-SLAPP Act does not confer jurisdiction but rather establishes a procedure for the quick and efficient dismissal of SLAPP lawsuits by permitting a defendant to file a special motion to dismiss. Unlike jurisdictional deadlines, the Anti-SLAPP Act's procedural deadline for filing a motion is subject to the defenses of waiver, estoppel, and equitable tolling. *See United States v. Locke*, 471 U.S. 84 (1985). Moreover, courts have extended statutory deadlines which are not jurisdictional. *See, e.g.*, *Wolfsohn v. Hankin*, 376 U.S. 203 (1964) (extending time to move for a rehearing where extension was granted within the statutory deadline); *Olson v. Lui*, 2011 U.S. Dist. LEXIS 127980, 18-20 (D. Haw. Nov. 4, 2011) (explaining that the deadline for objecting to defects in the removal may be tolled under certain circumstances); *Robinson v. Schafer*, 2008 U.S. Dist. LEXIS 36900 (M.D. Ga. May 6, 2008) ("Unless Congress states

[2] Dr. Huntington relies on *In re DH*, 666 A.2d 462 (1995) to support his claim that it is clear on the face of the statute that the 45-day deadline is mandatory. But that case is distinguishable because, as the court explained, the applicable statute -- which involved the deadline for filing a petition in a child delinquency case -- provided that the petition "shall" be filed, and thus indicates a mandatory intent. In contrast, the Anti-SLAPP Act explicitly states that a party "may" file a special motion to dismiss. D.C. Code § 16-5502(a). This permissive language demonstrates that the 45-day deadline is not mandatory.

otherwise, equitable tolling should be read into every federal statute of limitations."). Given that Dr. Huntington consented to an extension until March 4, 2012, he is estopped from arguing that Mr. Newmyer's motion was not timely filed.

None of the cases cited by Dr. Huntington supports the proposition that a statutory deadline for filing a motion cannot be extended. Rather, three cases he cites involving the filing deadline under California's Anti-SLAPP Act all demonstrate that an extension of the 45-day deadline is permitted. *See, e.g.*, *Lam*, 91 Cal. App. 4th at 840; *Chitsazzadeh v. Kramer & Kaslow*, 199 Cal. App. 4th 676 (2011) (explaining that the court may consider an untimely motion); *Morin v. Rosenthal*, 122 Cal. App. 4th 673, 681 (2004) (noting that "defendants could have but didn't bring a motion requesting the court to exercise its discretion to permit a late filing of the motion"). The other cases cited by Dr. Huntington are inapposite because they involve time limits for filing a request for appellate review, and thus jurisdiction was dependent upon on compliance with the statutory deadline. *See, e.g.*, *Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651, 654 (D.C. 1989) (holding that "subject matter jurisdiction of the Superior Court does not attach until that prerequisite [of filing a complaint to the Board] has been satisfied.") In contrast, in the instant case, the Anti-SLAPP Act deadline relates to the time limit for filing a motion at the trial court level in a case which is already subject to the court's jurisdiction.[3]

As shown above, the plain language of the statute and relevant case law establish that the 45-day deadline is not jurisdictional. Therefore, Dr. Huntington's extension is enforceable and he is estopped from arguing that the motion is untimely. *See Lacek v. Wash. Hosp. Ctr. Corp.*,

[3] Dr. Huntington waived any jurisdictional defense by filing an answer and counter complaint in this case.

978 A.2d 1194, 1201 (D.C. 2009) (finding that "a defendant is estopped from raising the statute of limitations as a defense if that defendant has done anything that would tend to lull the plaintiff into inaction and thereby permit the statutory limitation to run against him").

II. MR. NEWMYER HAS MADE A PRIMA FACIE SHOWING THAT THE ANTI-SLAPP ACT APPLIES TO THE COUNTER COMPLAINT

Dr. Huntington contends that the "D.C. Anti-SLAPP Act does not provide a definition for 'an issue of public interest.'" Counter-Pl.'s Opp. at 10. This contention is incorrect. Not only did Mr. Newmyer explain in his motion that the statute defines the term "issue of public interest" to encompass, *inter alia*, the public discussion of "issue[s] related to health or safety . . . community well-being [or] a public figure" (D.C. Code § 16-5501(3)), but Dr. Huntington himself quotes the entire statutory definition in page 7 of his opposition brief.[4] Therefore, Dr. Huntington's entire argument regarding the applicability of the Anti-SLAPP Act to this case is based on his misreading of the statute.

Dr. Huntington argues that the Anti-SLAPP Act does not apply because publicizing the allegedly defamatory statements neither makes him a public figure nor transforms a private matter into one of public interest. In doing so, Dr. Huntington completely overlooks the plain

[4] Dr. Huntington inexplicably ignores the statutory definition of public interest and instead relies on cases that do not involve an Anti-SLAPP Act lawsuit. For example, he cites a 1971 California case, *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529 (Cal. 1971), which involved an invasion of privacy claim where a magazine company published an article about the plaintiff's past crime. There, the court found that the magazine did not have an absolute privilege to satisfy the curiosity of the public after the plaintiff had rehabilitated himself, but it did not, as Dr. Huntington suggests, conclude that "public interest does not equate with mere curiosity." In another case, *Connick v. Myers*, 461 U.S. 138 (U.S. 1983), which involved a wrongful termination claim, the court found that an employee's statements to co-workers regarding her transfer to another section of the District Attorney's office was not a matter of public concern but that informing the public about any actual or potential wrongdoing by the District Attorney and others would have been. If anything, *Connick* supports Mr. Newmyer's position here.

language of the statute which provides that an "[i]ssue of public interest" includes, *inter alia*, an "issue related to health or safety; community well-being [or] a public figure." D.C. Code § 16-5501(3).[5] More importantly, Dr. Huntington does not dispute that the allegedly defamatory statements involve the ethical violations of a psychologist at The Sidwell Friends School -- a public figure -- who treated young children at the school and in the surrounding D.C. community. Nor does he dispute that the type of unethical professional relationship alleged in this case has a negative impact on the public at large. Clearly, Dr. Huntington's misconduct relates to the "health or safety" of any child who attends Sidwell or could be treated by Dr. Huntington, and the failure of a well-known private school to supervise its psychologist and to implement policies which prohibit this type of conduct is an important issue to "community well-being."

Moreover, Dr. Huntington has failed to refute the argument that Mr. Newmyer meets a separate and independent test for application of the Anti-SLAPP Act in Section 16-5501(1)(B). Such failure, by itself, establishes that Mr. Newmyer has met his *prima facie* burden. Specifically, the Anti-SLAPP Act applies to any written or oral statement made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(B). This bright-line test does not require Mr. Newmyer to satisfy the definition of "an issue of public interest" because

[5] Dr. Huntington cites two cases that have applied California's Anti-SLAPP Act, *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal. App. 4th 913, 928 (Cal. App. 1st Dist. 2003) and *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385 (2003), but they are inapplicable because California's Anti-SLAPP Act does not define "an issue of public interest" and because D.C.'s statutory definition is broader than California courts' construction of that term.

the D.C. Council determined that *any* issue under consideration or review would be sufficient to invoke the protections of the Anti-SLAPP Act.

Dr. Huntington has not and cannot contest that the alleged statement by Mr. Newmyer "that Dr. Huntington was engaging in an unethical Doctor-patient relationship with his child, L.N," involves an issue that is already under consideration by this Court. Regardless of how Dr. Huntington attempts to characterize what constitutes an issue of public interest, Mr. Newmyer has clearly made a *prima facie* showing that Dr. Huntington's counterclaims arise out of the type of public interest issues protected by the Anti-SLAPP Act. *See* D.C. Code § 16-5502(b).

III. DR. HUNTINGTON HAS FAILED TO PROVE THAT HE IS "LIKELY TO SUCCEED ON THE MERITS" OF HIS COUNTERCLAIMS

A. Dr. Huntington Has to Carry a Heavy Burden to Avoid Dismissal

As shown above, Mr. Newmyer has satisfied his *prima facie* burden of showing that Dr. Huntington's counterclaims "arise from an act in furtherance of the right of advocacy on issues of public interest." *See supra* Part II. The only way that Dr. Huntington can avoid dismissal of his lawsuit is by satisfying the heavy burden of proving that he is "likely to succeed on the merits" of his counterclaims. D.C. Code § 16-5502(b). If he cannot meet this burden, the Anti-SLAPP Act requires that the claims be dismissed with prejudice. D.C. Code § 16-5502(d).

The D.C. Council clearly intended to impose a heavy burden on SLAPP plaintiffs, like Dr. Huntington, when it required them to prove that they are likely to succeed on the merits of their claim. In fact, the only D.C. Anti-SLAPP Act case cited by Dr. Huntington, *3M Co. v. Boulter*, demonstrates this point. In *3M*, the District of Columbia -- which intervened for the purpose of defending the validity and applicability of the D.C. Anti-SLAPP Act -- "expressly acknowledge[d] that the Act places a 'heightened burden of proof' on a plaintiff" and conceded that the complaint must show that the plaintiff "is more likely than not to succeed on the merits."

3M, 2012 U.S. Dist. LEXIS 12860.[6] This is further supported by the common definition of the term "likely." *See, e.g.*, Merriam-Webster Dictionary (online ed. 2012) ("likely" defined as "having a high probability of occurring or being true"). Given that the Act is a remedial statute, this term should be construed liberally in accordance with its plain meaning. *See McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983). As such, Dr. Huntington must prove a high probability of success on the merits.

B. Dr. Huntington's Counterclaims Are Entirely Without Merit

Dr. Huntington claims that he must only present "sufficient facts to establish a prima facie case" and that this Court must accept Dr. Huntington's "evidence as true and draw all inferences from the evidence" in his favor. Counter-Pl.'s Opp. at 13. In doing so, he misstates the standard in D.C.'s Anti-SLAPP Act which, as the District of Columbia did not dispute in *3M*, requires the court to "grant the special motion to dismiss even where matters outside the pleadings are considered, and even where the plaintiff has or can raise a genuine issue of material fact on its claim." *3M*, 2012 U.S. Dist. LEXIS 12860, at *44-45. As Judge Robert Wilkins pointed out in *3M*, "[i]f a plaintiff is obligated to demonstrate a likelihood of success on the merits under Section 16-5502 (most likely with little to no discovery), this places a higher procedural burden on plaintiff than is required to survive a motion for summary judgment under Rule 56." *Id*. at *45.

[6] Dr. Huntington's reliance on *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2010) for the requisite level of proof is misplaced because the California statute uses different language and courts have construed that language as only requiring plaintiffs to show that their claim is not meritless. *See, e.g.*, *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 63 (Cal. 2002). This is completely different from the heightened standard in D.C.'s Anti-SLAPP Act in which plaintiffs must prove that they are "likely to succeed on the merits" of their claim. *See 3M*, 2012 U.S. Dist. LEXIS 12860, at *45.

Dr. Huntington's entire merits argument -- which consists of only two paragraphs -- fails to prove that he is "likely to succeed on the merits," as required under the Anti-SLAPP Act. D.C. Code § 16-5502(b); Counter-Pl.'s Opp. at 13-14. In fact, the first paragraph, which focuses on the Newmyers' marriage, does not have anything to do with the allegedly defamatory statement by Mr. Newmyer "that Dr. Huntington was engaging in an unethical Doctor-patient relationship with his child, L.N." Moreover, Dr. Huntington's contention is contrary to the Florida court's recent finding that the Newmyers "decided to remain married and to continue as husband and wife." As a result of that decision, there is no dispute about the "state" of the Newmyers' marriage when defendant Dr. Huntington began the extra-marital affair with plaintiff L.N.'s mother. Ex. 1, Florida Order at ¶ 13.

The only other evidence presented by Dr. Huntington to support his counterclaims is that Mr. Newmyer -- having previously been treated by mental health practitioners -- knew that a professional relationship did not exist between Dr. Huntington and his daughter, L.N., and that the D.C. Board of Psychology concluded that they did not find any "evidence to indicate that Dr. Huntington provided psychological services to Mr. Newmyer's daughter." Counter-Pl.'s Opp. at 14. This evidence is not sufficient to establish that Dr. Huntington is likely to succeed on the merits of his counterclaims for several reasons. First, Mr. Newmyer's prior experience of being treated by psychiatrists in a traditional office setting has no bearing on whether a professional relationship existed between his daughter and a school psychologist. Not surprisingly, Mr. Newmyer is not an expert on ethical standards in the field of psychology.

Second, the D.C. Board of Psychology's conclusion in a one-page letter -- which contains all of two sentences -- is completely contradicted by the record in this case and by expert opinion. The letter does not contain any findings of fact and does not reference any witness

testimony or cite to any evidence that the D.C. Board considered in reaching its decision. Nor does the letter provide any reasons to support its conclusion. As a result, it is prejudicial and would likely be excluded as inadmissible hearsay. *See* Fed. R. Evid. 403; *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1347 (3d Cir. 2002) (holding that an agency determination was properly excluded as more prejudicial than probative because it was conclusory and failed to reference any specific evidence); *see also HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (Cal. App. 2d Dist. 2004) (finding that in opposing an Anti-SLAPP motion, the plaintiff "must produce evidence that would be admissible at trial"). In short, this letter does not provide Dr. Huntington with an evidentiary short-cut in this proceeding.

Third, Mr. Newmyer's expert, Dr. Donald Bersoff, who is President-Elect and former general counsel of the American Psychological Association ("APA"), has concluded that Dr. Huntington's conduct was, in fact, a violation of several provisions of the APA Ethical Principles of Psychologists and Code of Ethics. *See* Ex. 1, Declaration of Donald N. Bersoff ("Bersoff Decl.") ¶ 5.[7] This expert opinion is based on statements and remarks made by Dr. Huntington and Tara Mehrbach and demonstrates that Dr. Huntington engaged in unethical behavior. Bersoff Decl. ¶ 4.[8] Specifically, Ms. Mehrbach testified in the Florida case that Dr. Huntington

[7] Dr. Bersoff received a master's degree in educational psychology and a Ph.D. in school psychology from New York University and also received a JD from Yale University Law School. *See* Bersoff Decl. ¶ 2. He currently serves as Director of the JD/PhD Program in Law & Psychology cosponsored by Drexel University's Earle Mack School of Law and the Department of Psychology. *Id*. Dr. Bersoff's opinions in this matter are based upon his education, knowledge, training, and experience in the fields of clinical psychology, school psychology and forensic psychology as well as his review of case materials. *Id*. at ¶ 1. The field of school psychology involves providing psychological services to children, parents, teachers and administrators in public and private schools. *Id*.

[8] The statements and remarks made by Dr. Huntington and Ms. Mehrbach were affirmed under oath at their depositions.

went to her home and observed L.N. engaged in different activities, such as reading and playing, and that he then asked her "a zillion shrink questions" about L.N. *See* Ex. 2, Record Materials.[9] More importantly, Dr. Huntington himself admitted that he observed L.N. and that he contacted Sidwell's Resource Teacher to make a recommendation on her behalf. *Id*. In fact, the evidence also shows that Dr. Huntington contacted the resource teacher about L.N. at least one other time and reviewed a portion of L.N.'s psychological evaluation provided by Ms. Mehrbach. *Id*.

Fourth, as the Florida court recently found, "[o]n January 22, 2010, the mother invited Dr. Huntington to her home where he observed and evaluated L.N., including her reading and academic skills [and] Dr. Huntington agreed to intervene on L.N.'s behalf with the school." Ex. 3, Florida Order at ¶ 17. It is undisputed that shortly after this first visit with L.N., Dr. Huntington commenced a sexual relationship with her mother, Ms. Mehrbach. Accordingly, based on the evidence and Dr. Bersoff's expert opinion, any alleged statement that Dr. Huntington engaged in an unethical relationship with L.N. is not defamatory and therefore cannot provide the basis for Dr. Huntington's counterclaims.

Finally, as addressed in Mr. Newmyer's motion to dismiss for failure to state a claim, Dr. Huntington cannot satisfy the *prima facie* elements of a defamation claim. Specifically, Dr. Huntington has failed to refute Mr. Newmyer's argument that any allegedly defamatory statement is protected by the judicial proceedings privilege. Nor does Dr. Huntington address Mr. Newmyer's argument that the alleged statement that Dr. Huntington engaged in an unethical relationship with Mr. Newmyer's daughter is a conclusion of law, and therefore cannot form the basis of a defamation claim because it is not provable as false.

[9] This exhibit includes certain documents which were produced in discovery as well as portions of the deposition transcripts of Ms. Mehrbach and Dr. Huntington from the Florida divorce case.

Given the lack of evidence presented by Dr. Huntington to support his counterclaims and his inability to refute the defenses raised by Mr. Newmyer, Dr. Huntington has failed to prove that he is "likely to succeed on the merits" of his counterclaims.[10] Mr. Newmyer's special motion to dismiss should therefore be granted.

CONCLUSION

For the foregoing reasons, and those set forth in Counter-Defendant's previously-filed memorandum, the Court should dismiss the counter complaint with prejudice.

Dated: April 12, 2012

Respectfully submitted,

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[10] Dr. Huntington seeks attorneys' fees on the special motion to dismiss which under the Anti-SLAPP Act are only available if the motion "is frivolous or is solely intended to cause unnecessary delay." D.C. Code ¶ 16-5504(b). For the reasons explained in the special motion to dismiss and in this reply, the provisions of the Anti-SLAPP Act apply to the counterclaims and Dr. Huntington has failed to show that he is likely to succeed on the merits. Therefore, by definition, Mr. Newmyer's motion is not frivolous and there is no basis whatsoever for attorneys' fees being awarded to Dr. Huntington.

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CERTIFICATE OF SERVICE

I certify that on April 12, 2012, a true and correct copy of the foregoing was served on the following by e-mail via the Court's electronic filing system:

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