IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE S. BOLEY,

Plaintiff,

v.

ATLANTIC MONTHLY GROUP and JEFFREY GOLDBERG,

Defendants.

Civil Action No. 1:13-cv-00089 (RBW)

DEFENDANTS THE ATLANTIC MONTHLY GROUP, INC. AND JEFFREY GOLDBERG'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Laura R. Handman (DC Bar No. 444386)
Constance M. Pendleton (DC Bar No. 456919)
Micah J. Ratner (DC Bar No. 996955)
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, DC 20006-3401
(202) 973-4200
(202) 973-4499 (fax)
laurahandman@dwt.com
conniependleton@dwt.com
micahratner@dwt.com

Attorneys for Defendants The Atlantic Monthly Group, Inc. and Jeffrey Goldberg

Of Counsel:
Bruce Gottlieb (DC Bar No. 487596)
Aretae Wyler (DC Bar No. 994489)
The Atlantic Monthly Group, Inc.
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 266-7374
(202) 266-6001 (fax)

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In further support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and special motion to dismiss pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502, Defendants The Atlantic Monthly Group, Inc. and Jeffrey Goldberg (collectively, "Atlantic") respectfully submit this Reply.

PRELIMINARY STATEMENT

Rather than address the grounds advanced for dismissal of his Complaint, Plaintiff George Boley's ("Boley") Opposition and Declaration brim with dark charges of "lies," "fraud," and "fabricated tales" – each entirely baseless – confirming that his lawsuit is but a pretext to personally retaliate against award-winning journalist Jeffrey Goldberg ("Goldberg"), and resurrect and relitigate ancillary matters – including his role in leading the Liberian Peace Council in the Liberian civil war (Opp. at 22), Goldberg's 1995 *New York Times* Article (Opp. at 5-6), the Liberian Truth and Reconciliation Commission ("LTR Commission") (Opp. at 4, 7-9, 22-23), the U.S. State Department Report (Opp. at 4, 6-7), Boley's civil rights suits against the U.S. government (Opp. at 10-11), his failed libel suit against a human rights group (Opp. at 4, 7-10), and the judge's decision in his deportation proceedings (Opp. at 6, 10-11) – all of which are long-settled or non-justiciable and none of which are before this Court.

The only issues before this Court are whether Boley states a claim for defamation in his Complaint under Federal Rule of Civil Procedure 12(b)(6) – he does not – and whether his claim is "likely to succeed on the merits" under the D.C. Anti-SLAPP Act – it will not. Far from Boley's characterization of Goldberg's Article[1] and Post [2] as a "smear campaign of

[1] The "Article" refers to the article, entitled "George Boley, Liberian Warlord, Is Finally Under Arrest," which was written by Goldberg and published on *The Atlantic's* website on January 27, 2010. (Ratner Decl. Ex. 7 "Article.")

misinformation and delusional fabrications" (Opp. Decl. at 28), the Article and the Post reported accurately on Boley's arrest, detention, and investigation by U.S. authorities for alleged war crimes and an affidavit that Goldberg was compelled to file pursuant to a subpoena in one of Boley's prior, unsuccessful lawsuits. Nowhere among his invectives does Boley challenge the critical fact that Defendants accurately reported on these official documents and proceedings, bringing the statements squarely within the fair report privilege. Moreover, Boley's claims, based on publications nearly three-years old, are also time-barred and fail to allege facts that could plausibly state a claim, much less demonstrate likelihood of success, as to the elements of either falsity or fault, *i.e.*, knowledge of falsity or serious doubts as to truth, in the face of the official findings of war crime violations.

For the reasons set forth below, Boley's Complaint fails under both inquiries and should be dismissed in its entirety with prejudice.

ARGUMENT

I. The Publications Are Protected by the Fair Report Privilege

Boley does not seriously challenge – nor can he – that the Article and Post accurately report on court records, official statements, and official reports. Rather, Boley uses this suit, and the majority of his Opposition, as a mechanism to challenge the factual merit of court records, official statements, and official reports outside the ambit of this case – including the LTR Commission, the bail decision in his case, and the decision by the immigration judge to deport him. (Opp. at 4-14, 21-22.)

[2] The "Post" refers to the short follow-up, linking to the Article, entitled "Pat Robertson, Friend of Warlords," which was also written by Goldberg and was published on the *The Atlantic's* website on February 11, 2010. (Ratner Decl. Ex. 8 "Post.")

Although there is little truth in Boley's account of the underlying facts, Defendants will not engage in a point by point factual rebuttal, because Boley's arguments are not only meritless, but also irrelevant to the merits of this motion. The fair report privilege protects reporting when, as here, it disseminates fair and accurate accounts of official actions and proceedings – even if those actions and proceedings are based on information that ultimately proves to be false. *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985) ("The availability of the privilege encourages the media to disseminate official records – whether verbatim or in fair summaries – without fear of liability for any false, defamatory material that they might contain."); *Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) ("'[A]ccuracy' for fair report purposes refers only to the factual correctness of the events reported and not to the truth about the events that actually transpired."). Thus, the salient fact is not whether Boley is correct in his assessment of the accuracy of the court records, official statements, and official reports that underlie the Post and the Article, but whether the Post and the Article accurately report those records.

As is amply explained in Defendants' Memorandum in support of its motion, the Post and the Article draw directly from court records, official statements, and official reports. Boley's sole claim to the contrary incorrectly asserts that Goldberg's statement, "I knew, from firsthand observation, that his organization, the grossly-misnamed Liberian Peace Council, recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill" cannot be attributed to an official source. (Opp. at 18-19.) But Boley's claim ignores controlling law and takes this statement out of context. The fair report privilege does not require "direct quotation from a complaint," official document or proceeding, as Boley suggests. (Opp. at 19.) The privilege applies where, as here, it is "apparent either from specific attribution or *from the*

overall context that the article is quoting, *paraphrasing, or otherwise drawing upon* official documents or proceedings." *Dameron*, 779 F.2d at 739 (emphasis added); *see also Ditton v. Legal Times*, 947 F. Supp. 227, 230 (E.D. Va. 1996) ("A publisher properly attributes a report if the average reader is likely to understand that the report summarizes or paraphrases from the judicial proceedings."), *aff'd*, 129 F.3d 116 (4th Cir. 1997).

It is apparent from the full sentence (rather than Boley's cherry-picked portion) that Goldberg's statement, "I eventually provided a sworn affidavit in the case, in which I detailed what I knew of Boley's activities in the civil war, which is a lot -- I knew, from firsthand observation, that his organization, the grossly-misnamed Liberian Peace Council, recruited and armed child soldiers; fed them drugs; and ordered them to rape and kill," paraphrases his affidavit filed pursuant to a subpoena in a judicial proceeding. (Ratner Decl. Ex. 7.) (emphasis added). The attribution is also apparent from the overall context of the paragraph, in which Goldberg introduces this reference to his affidavit by explaining that he had been "subpoenaed . . . to testify against Boley" in Boley's lawsuit against Minnesota human rights advocates, and then summarizes the disposition of that case, stating "(The lawsuit, unsurprisingly, was dismissed earlier this month.)." (*Id.*) In the context of discussing Goldberg's affidavit, repeating that he "had seen him actually in command of child soldiers in the war zone" while debunking Boley's side of the story, is undeniably attributed to his affidavit as well. (Opp. at 19.) Goldberg's reporting on the facts stated in his own affidavit filed in a judicial proceeding (an affidavit that is itself protected from suit by the absolute judicial privilege) is covered by the fair report privilege. (*See* cases cited Mem. at 12-13 & n.8.)[3]

[3] Boley's *ad hominems* against Atlantic and its counsel for calling this lawsuit what it is, "retaliate[ion] against a journalist for his compelled testimony in a prior lawsuit" (Mot. at 2),

Moreover, the Article's reference to Boley as "evil," attacking his "absurd line of argument," and using other such subjective, figurative language is protected non-defamatory opinion and rhetorical hyperbole that does not reasonably express or imply facts that would support a libel claim. (Opp. at 19); (Compl. ¶ 21); *see Underwager v. Channel 9 Australia*, 69 F.3d 361, 367 (9th Cir. 1995) (concluding that statement that plaintiff was "intrinsically evil" was protected opinion under the First Amendment because "such an assertion is not capable of verification"); *Obsidian Fin. Grp., LLC v. Cox*, 812 F. Supp. 2d 1220 (D. Or. 2011) (finding that "statements [in a blog post] accusing plaintiffs of being . . . 'evil,' are evaluative, subjective expressions not subject to proof" and are not actionable as libel under the First Amendment); (*see also* cases cited Mem. 14-15 n.9). And telling Boley's side of the story, even while debunking it, does not transform the report into one that is unfair or inaccurate (Opp. at 19). *See, e.g.*, *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1437, 1440 (9th Cir. 1992) (tabloid "did not exceed the degree of flexibility and literary license accorded newspapers in making a 'fair report'" by reporting that petition filed against entertainer stated that entertainer had AIDS; last paragraph of report included statement by entertainer that charge was an "utter fabrication"). Therefore, Boley's defamation claim should be dismissed in its entirety because the Post and the Article are privileged under the fair report privilege.

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should be forcefully rejected. (*See* Opp. at 4-5; Opp. Decl. at 27.) Although Boley repeatedly insists that Goldberg did not testify (Opp. at 5; Opp. Decl. at 27, 29), Atlantic was obviously referring to Goldberg's affidavit, a type of testimony. *See, e.g.*, *Lans v. Adduci Mastriani & Schaumberg L.L.P.*, 786 F. Supp. 2d 240, 293 (D.D.C. 2011) (Walton, J.) (referring to "affidavit testimony") (quoting *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550 n.14 (5th Cir. 1991)).

II. Boley Cannot Rebut Atlantic's Arguments That Boley Has Not and Cannot Plead a Plausible Claim for Defamation

As an additional independent basis for dismissal, Boley relies on pre-*Twombly* and *Iqbal* cases (Opp. at 20-21) and fails to comply with the standard that requires Boley to plead facts to state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570, 127 S. Ct. 1955, 1959, 1974 (2007) (citation omitted). Boley offers mere labels and conclusory allegations that do not raise the right to relief above the speculative level. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

A. Boley Is Unquestionably a Public Official or Limited Purpose Public Figure

As a threshold matter, having "inject[ed]" himself into and been "drawn into" the public controversy about his alleged war crimes, Boley is without question a limited purpose public figure and a public official in the U.S. with regard to statements "germane" to Boley's participation in that controversy. As such, Boley must plausibly plead actual malice, which he has not done and cannot do. (Mem. at 18-19 n.10); *Tavoulareas v. Piro*, 817 F.2d 762, 772-73 (D.C. Cir. 1987) (en banc); *see also LaPointe v. Van Note*, No. Civ. A. 03-2128(RBW), 2006 WL 3734166, at *6, *9 (D.D.C. Dec. 15, 2006) (Walton, J.) (finding secretary general of the U.N.'s conference on endangered species who publicly opposed a complete ban on African ivory trade was a limited purpose public figure).

Boley's attempt to draw a distinction between his notoriety in Liberia and his reputation in the U.S. should be rejected. Federal courts regularly find that current and former foreign public officials are public officials or public figures in U.S. libel suits. (*See* cases cited Mem. 18-19 n.10.) The Supreme Court and the D.C. Circuit "define[] a limited-purpose public figure not in terms of geography but in terms of the controversy that he has stepped into." *Lleberes v.*

Uncommon Prods., LLC, 663 F.3d 6, 20-21 (1st Cir. 2011) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S. Ct. 2997 (1974) and *Tavoulareas*, 817 F.2d at 772 ("[T]he scope of the controversy in which the plaintiff involves himself defines the scope of the public personality.")) (emphasis removed). Geography is especially irrelevant here because the Article and Post were admittedly published on the Internet where they are available and subject to "curiosity and debate" (Opp. Decl. at 28) around the world.[4]

In any event, Boley, who, by his own account, resided in the U.S. until he was deported (Opp. at 4, 10, 14-15), has gained notoriety in the U.S. by voluntarily assuming a prominent role in the Liberian civil war and its aftermath, as demonstrated by the State Department Report, the 1995 *New York Times* Article, the interest of U.S. human rights groups in Boley, and the book, *The Mask of Anarchy: The Destruction of Liberia and the Religious Dimension of an African Civil War*, which Boley admits refers to his war activities (Opp. Decl. at 28).[5] His activities on

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[4] *See OAO Alfa Bank v. Center for Public Integrity*, 387 F. Supp. 2d 20, 47 (D.D.C. 2005) (rejecting two Russian oligarchs' argument that "their fame is confined to Russia," not the United States, because "the defamation in this case was published on the Internet"; "[t]he audience for the [] article is not confined to the United States merely because that is where the authors of the piece choose to work, and it is not immediately apparent why the limited public figure inquiry should be so confined"); *Egiazaryan v. Zalmayev*, No. 11 Civ. 2670(PKC), 2011 WL 6097136, at *4-5 (S.D.N.Y. Dec. 7, 2011) (rejecting argument by Russian member of parliament and businessman that he was "a private figure leading a private life in the United States").

[5] *See Mzamane v. Winfrey*, 693 F. Supp. 2d 442, 497-505 (E.D. Pa. 2010) (holding that plaintiff's acceptance of a prominent position as the headmistress of the Oprah Winfrey Leadership Academy for Girls in South African made her a limited purpose public figure in the U.S. regarding a controversy over alleged mistreatment of students at the school); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 432, 434-35 (5th Cir. 1987) (holding that the head of Central American bottling company engaged in conflict with a union that garnered attention of human rights organizations and the State Department, and media reports published after the article at issue in the libel suit, was a limited purpose public figure in the U.S.); *Lleberes v. Uncommon Prods., LLC*, 740 F. Supp. 2d 207, 214-22 (D. Mass. 2010) (holding that managers of sugar plantations in the Dominican Republic were public figures in the U.S. because of

U.S. soil – his arrest, detention, and federal investigation, and lawsuits he filed here against the U.S. government and those who have spoken out about his activities during the Liberian civil war – have also made him a public figure with regard to those proceedings.[6]

B. Boley Fails to Plausibly Allege Falsity and Fault

Tacitly conceding that he is a limited purpose public figure, Boley includes a conclusory allegation of actual malice in his Complaint. (Compl. ¶ 27.) Yet, Boley ignores cases holding, under *Twombly* and *Iqbal*, that such a conclusory allegation of actual malice is insufficient. A plaintiff must plead facts to support a plausible claim of actual malice. *See Parisi v. Sinclair*, 845 F. Supp. 2d 215, 218-19 (D.D.C. 2012); (*see also* cases cited Mem. at 20). Accusing Defendants of "ill will" and "bad faith," Boley confuses common law malice – irrelevant here, even if it were present, which it is not – with constitutional actual malice, the standard of fault applicable where, as here, a public figure sues over statements of public concern. (Opp. at 21); *see Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (per curiam).

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investigations by human rights organizations, State Department interest, and media reports), *aff'd in relevant part*, 663 F.3d at 20-21.

[6] *See, e.g., Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 32 (D.C. Cir. 1990) (a public controversy, in which plaintiff became embroiled as public figure because he was associated with the mayor and lied to the press about his involvement in the death of a friend, was prompted by "the DEA, the U.S. Attorney's office, and the D.C. Police Department investigat[ion]"); *Logan v. District of Columbia*, 447 F. Supp. 1328, 1331 (D.D.C. 1978) (holding plaintiff was a limited purpose public figure because he was arrested in connection with a large undercover operation, accused of serious crimes, and voluntarily injected himself into the operation by telling an undercover agent he had committed murder while trying to obtain a position as a hit man); *Egiazaryan*, 2011 WL 6097136, at *4 (holding member of Russian parliament had access to the channels of effective communication and was a limited purpose public figure, in part, because he had hired attorneys to challenge the defendants' "smear campaign"); *Brueggenmeyer v. American Broad. Cos.*, 684 F. Supp. 452, 458 (N.D. Tex. 1988) (finding plaintiff was a limited purpose public figure because "the course of conduct in which [plaintiff] engaged generated consumer complaints, government legal actions, BBB investigations, and media attention").

As Atlantic established, and Boley ignores, Boley cannot plausibly plead actual malice because the facts he alleges – Goldberg's investigation, interviews with Boley and others, and inclusion of Boley's side of the story – show the absence of actual malice. *See, e.g.*, *LaPointe*, 2006 WL 3734166, at *10; (*see also* cases cited Mem. at 20-21). Boley cannot plausibly allege the facts were false, much less that Atlantic and Goldberg knew the facts were false in the face of official reports showing Boley was found to have committed war crimes and human rights abuses.[7] *See Bell v. Associated Press*, 584 F. Supp. 128, 129, 132 (D.D.C. 1984); *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 292, 294 (4th Cir. 2008) (holding a radio commentator did not act with actual malice as a matter of law where she relied on official reports, articles, and officials to report allegations of rape, torture, and murder at Abu Ghraib prison, stating "[t]he actual malice standard thus offers broad protection for the media commentator who is critical of public officials or public figures responsible for war-related activities")); (*see also* cases cited Mem. at 21). Boley's opposition to these reports amounts to nothing more than conspiracy theories, charges of bias by the immigration judge, and untimely and misplaced attacks (Opp. at 4, 6, 7-8, 10).

Accordingly, Boley has not – and cannot – plead a plausible defamation claim. His claim must be dismissed under Rule 12(b)(6).

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[7] The materials attached to the Ratner Declaration are proper evidence for the purpose of the anti-SLAPP analysis, and are also appropriate for judicial notice pursuant to Federal Rule of Evidence 201(b). (*See* cases cited Mem. at 2 n.1.) *See Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 278-80 & n.2 (S.D.N.Y. 1999) (Chin, J.) (taking judicial notice of the "history and politics" of the Liberian civil war, including the State Department Report at issue, stating that, in the mid-1990s, "the United States Government issued a report condemning the widespread human rights violations in Liberia, noting in particular the massacre of civilians"), *aff'd*, 201 F.3d 134 (2d Cir. 2000).

III. Boley's Claim Is Barred by the District of Columbia's One-Year Statute of Limitations for Defamation

A. Application of the "Discovery Rule" in Cases Such as This Has Been Rejected Under Controlling District of Columbia Law and Is Contradicted by Boley's Own Exhibits

Boley argues in his Opposition that the statute of limitations on his defamation claim should begin to run when he purportedly "heard" and "saw" the Article and Post (Opp. at 15-18), but these dates are irrelevant under controlling District of Columbia law. It is well-established that the "discovery rule" does not apply where, as here, an allegedly defamatory publication is disseminated by a mass media defendant, because any injury is readily apparent from a defamatory statement disseminated by the mass media. (*See* Mem. at 10 n.5) (citing *Henderson v. MTV*, No. 05-1937 (EGS), 2006 WL 1193872, at *1 (D.D.C. May 3, 2006); *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 299 & n.5 (D.C. 2001)).[8]

Moreover, undermining Boley's assertion that he "was unaware of the publication until April 2012 and therefore was unable to take action in response" (Opp. at 15), Boley attaches to his Opposition letters to two U.S. Attorneys (ECF No. 12-1, at 69-70) revealing that he was aware of the publications by August 31, 2011– more than 16 months before he filed this action. Tellingly, to support his point, he offers only the unsworn assertion in his Opposition. His sworn declaration is silent.

The statute of limitations on Boley's defamation claim began to run upon publication, which, as Boley's Complaint and Opposition concede, occurred on January 27, 2010 for the

[8] *Stith v. Chadbourne & Parke, LLP*, 160 F. Supp. 2d 1, 8 (D.D.C. 2001), upon which Boley relies for his assertion that the "discovery" rule applies, is inapposite because it involves publication by a non-media defendant, specifically a former employer's statement to the EEOC. In addition, *Stith* was decided before *Mullin*, which rejects the "discovery rule" in mass media cases.

Article, and February 11, 2010 for the Post – almost three years before Boley filed this action on January 22, 2013. (Compl. ¶¶ 20-21); (Opp. at 4, 15); (*see* Mem. at 9-11).[9] Boley's defamation claim against Defendants is plainly time-barred and should be dismissed on this independent basis alone.

B. Boley Is Not Entitled to Tolling Because He Cannot Demonstrate That He Was "Imprisoned" or That His Civil Detention Caused "Real Disabilities" That Prevented Him From Litigating This Action

Boley concedes that "no DC Court has extended 12-302(a)(3) to an immigration detainee" (Opp. at 14) and cites not a single case supporting his view that the Court should take the unprecedented step of expanding the statute's application here.[10] "[T]he term 'imprisonment' should be given its ordinary meaning," which is "'the act of putting or confining a man in prison.'" *Fernandors v. District of Columbia*, 382 F. Supp. 2d 63, 69 (D.D.C. 2005) (citing *Rose*, 23 F.2d at 994)) and a "prison," is "[a] state or federal facility of confinement for *convicted criminals*[,]" not civil immigration detainees such as Boley. (*See* cases cited Mem. at 11 n.7 & Black's Law Dictionary, at 1232 (8th ed.) (emphasis added)).

Even if applicable, a plaintiff must also demonstrate "real disabilities" that prevented him from litigating the action while he was detained. This Boley cannot do. (Mem. at 11 n.7) (citing *Cannon v. District of Columbia*, 569 A.2d 595, 596 (D.C. 1990) (per curiam)). Boley was not

[9] Boley even uses the Opposition to challenge Goldberg's reporting in the 1995 *New York Times* Article (Opp. at 5-6), for which any defamation claim has been time-barred for more than 15 years.

[10] Boley's citation to *Rose v. Washington Times Co.* undermines his position, because he misrepresents the holding; in fact, the Circuit *rejected* that plaintiff's attempt to extend the precursor to D.C. Code § 12-302(a)(3) to arrestees on bail and *affirmed* dismissal of the libel action against the newspaper as time-barred. 23 F.2d 993, 994 (D.C. Cir. 1928).

too disabled to litigate other claims, with access to counsel, while in immigration detention.[11] Nor was he too disabled to have his son write to two U.S. Attorneys, while Boley was detained, seeking a criminal probe of Goldberg and referencing the Article. ECF No. 12-1, at 69-71. Accordingly, the Court should reject Boley's unprecedented request to toll the statute of limitations and find that the action is time-barred.

IV. The D.C. Anti-SLAPP Act Offers Substantive Protections That Apply in This Diversity Action

Boley's sole argument regarding the Anti-SLAPP Act – that it is inapplicable in federal court – is based on one, non-binding district court decision that is contrary to the weight of authority in this district, and every federal appeals court to consider the issue, finding the Act applies in federal court. (Opp. at 22) (citing *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 96 (D.D.C. 2012) (Wilkins, J.), *appeal dismissed as moot*, No. 12-7012 (D.C. Cir. Oct. 19, 2012)).

Courts across the country apply anti-SLAPP statutes in federal diversity actions such as this. *See Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) ("[F]ederal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must."); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-

[11] *See Boley v. United States*, No. 6:09-cv-06348-CJS (W.D.N.Y. filed July 9, 2009) (notice of appearance filed by Boley's attorney, ECF No. 8, Feb. 4, 2010) (Boley's cross motion to amend complaint and response to motion to dismiss, ECF Nos. 11-12, May 12, 2010) (Boley's amended complaint, ECF Nos. 15, June 4, 2010) (Boley's affidavits of service, ECF Nos. 16-23, Aug. 4, 2010) (Boley's summon returns, ECF Nos. 24, 26, Aug. 10 and Oct. 20, 2010, respectively) (Boley's stipulation of voluntary dismissal, ECF No. 28, Oct. 11, 2011); *Boley v. Philips*, No. 6:12-cv-06016-CJS (W.D.N.Y. filed Jan. 1, 2012) (Boley's petition for writ of habeas corpus, ECF No. 1).

69 (5th Cir. 2009) (Louisiana statute); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999) (California statute). [12]

The District of Columbia explicitly intended to create "*substantive rights* with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate designed to punish or prevent the expression of opposing points of view" and a substantive "*immunity* to individuals engaging in protected actions." (Committee Report at 1, 4 (emphasis added); *see also id.* at 6). "It was certainly the intent of the D.C. Council and the effect of the law – dismissal on the merits – to have substantive consequences."[13] *Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 36 n.10 (D.D.C. 2012) (Collyer, J.), *appeal docketed*, No. 12-7055 (D.C. Cir. June 15, 2012) (applying the D.C. Anti-SLAPP Act in a federal diversity action). The Act's burden-shifting mechanism and attorneys' fees and costs provision are substantive. *Godin*, 629 F.3d at 89 n.15, 86 n.10; *Newsham*, 190 F.3d at 971-73. As such, the

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[12] *See, e.g.*, *Godin*, 629 F.3d at 92 (applying the Maine statute and effectively overturning *Saint Consulting Grp., Inc. v. Litz*, No. 10-10990-RGS, 2010 WL 2836792 (D. Mass. July 19, 2010) and *Turkowitz v. Town of Provincetown*, No. 10-10634-NMG, 2010 WL 5583119 (D. Mass. Dec. 1, 2010); *DC Comics v. Pacific Pictures Corp.*, 706 F.3d 1009, 1013 n.5 (9th Cir. 2013) (reaffirming that the California anti-SLAPP statute applies in federal court despite the *3M* decision); *Gardner v. Martino*, 563 F.3d 981, 990-91 (9th Cir. 2009) (Oregon statute). *See also, e.g.*, *Haywood v. St. Michael's Coll.*, No. 2:12-cv-164, 2012 WL 6552361, at *13 (D. Vt. Dec. 14, 2012) (Vermont statute); *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041, at *5 (N.D. Ill. Sept. 6, 2011) (Illinois statute); *Tennenbaum v. Arizona City Sanitary Dist.*, No. CV-10-2137-PHX-GMS, 2011 WL 3235828 (D. Ariz. July 29, 2011) (Arizona statute); *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111-14 (W.D. Wash. 2010), *recon. denied*, 2010 U.S. Dist. LEXIS 105025 (W.D. Wash. Sept. 28, 2010) (Washington statute); *Balestra-Leigh v. Balestra*, No. 3:09-CV-551-ECR-RAM, 2010 WL 4280424 (D. Nev. Oct. 19, 2010) (Nevada statute), *aff'd on other grounds*, 471 F. App'x 636 (9th Cir. 2012); *Russell v. Krowne*, No. DKC 2008-2468, 2010 WL 2765268 (D. Md. July 12, 2010) (Maryland statute); *Containment Techs. Grp., Inc. v. American Soc'y of Health Sys. Pharmacists*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 2750093, at *4 (S.D. Ind. Mar. 26, 2009) (Indiana statute); *Buckley v. DIRECTV, Inc.*, 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (Georgia statute).

[13] *Accord Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (2012) (Leon, J.), *appeal docketed*, No. 11-7088 (D.C. Cir. Aug. 29, 2011).

Act comes within the *Erie* doctrine as a state substantive law applicable in diversity cases in federal court.

And contrary to Boley's contention, there is no conflict between the Federal Rules and the Anti-SLAPP Act. (Opp. at 22.) The test for whether a federal rule of civil procedure precludes application of a state law in a diversity action is first, whether the "'scope'" of the Federal Rule is "'sufficiently broad to control the issue before the Court.'" *Burke v. Air Serv Int'l*, 685 F.3d 1102, 1107-08 (D.C. Cir. 2012) (quoting *Walker v. Armco Steel Corp*., 446 U.S. 740, 749-50 (1980)). The Federal Rule is not "sufficiently broad" when the Federal Rule and District law "'can exist side by side, ... each controlling its own intended sphere of coverage without conflict.'" *Id.* at 1108 (quoting *Walker*, 446 U.S. at 752).

The Federal Rules and Anti-SLAPP Act "can exist side by side" "each controlling its own intended sphere of coverage without conflict" and applying the Act in federal court does not "directly interfere with the operation of Rule 8, 12, or 56." *Newsham*, 190 F.3d at 972-73. As the Ninth and First Circuits found, "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field'" for "pretrial procedures aimed at weeding out meritless claims." *Id*. at 972; *Godin*, 629 F.3d at 91. Without undermining federal interests, the "Anti-SLAPP statute, moreover, is crafted to serve an interest not directly addressed by the Federal Rules: the protection of 'the constitutional right[] of freedom of speech[.]'" *Id.* at 973 (citation omitted); *accord Godin*, 629 F.3d at 89 n.16, 91. Thus, the Act's substantive protections provide "a mechanism for a defendant to move to dismiss a claim on an entirely different basis": that the claims in question rest on the defendant's protected core political speech and "that the plaintiff cannot meet the special rules [the District] has created to protect such [] activity against lawsuits." *Godin*, 629 F.3d at 89.

As in *Burke*, the Anti-SLAPP Act also does not conflict with the Federal Rules because it can be applied simultaneously with Rules 12 and 56. *See Farah*, 863 F. Supp. 2d at 39 (dismissing libel and related claims under both the Act and Fed. R. Civ. P. 12(b)(6)); *Burke*, 685 F.3d at 1108 (holding D.C. law requiring expert testimony can be applied "simultaneously" with the Federal Rule, and thus "'can exist side by side'"); *see also Godin*, 629 F.3d at 90 & n.17 ("Some [SLAPP] motions, like Rule 12(b)(6) motions, will be resolved on the pleadings," while others "will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does.").[14]

Boley's reliance on a single case to argue that the Anti-SLAPP Act's substantive protections should not apply, is misplaced. (Opp. at 22) (citing *3M*, 842 F. Supp. 2d 85). Just weeks ago, Judge Wilkins conceded that the *3M* decision Boley cites "is not binding precedent on any other judge or any other court" and "the only power it has is whatever persuasive effect its reasoning may merit." *3M Co. v. Boulter*, -- F. Supp. 2d ----, 2013 WL 1181472, at *7 (D.D.C. Mar. 22, 2013) (order denying motion to vacate decision). The *Farah* court expressly declined to follow *3M*, finding the circuit cases cited above to be better-reasoned. *Farah*, 863 F. Supp. 2d at 36 n.10. Indeed, the *3M* decision, which escaped this Court's review based on a

[14] Under the second part of the test, "the twin purposes of the *Erie* rule – discouragement of forum-shopping and avoidance of inequitable administration of the law – favor application of [the] Anti-SLAPP statute in federal cases." *Newsham*, 190 F.3d at 973 (internal quotation marks omitted); *accord Godin*, 629 F.3d at 91-92. The forum-shopping effect of the *3M* decision was made palpable when two cases then pending in D.C. Superior Court were voluntarily dismissed and the identical suits refiled in D.C. federal district court explicitly to take advantage of the *3M* decision. *Dean v. NBCUniversal*, No. 1:12-cv-00283-RJL, ECF No. 5-1 (D.D.C. filed Feb. 21, 2012) (plaintiffs' attached notice of voluntary dismissal in D.C. Superior Court states: "The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Davis*, No. 11-cv-1527 (RLW) (D.D.C.)"); *Forras v. Rauf*, No. 1:12-cv-282, ECF No. 2-3 (D.D.C. filed Feb. 21, 2012) (same).

settlement while the appeal was pending, is contrary to every other circuit decision on the issue. *3M*, 842 F. Supp. 2d at 107-10. And its reasoning pre-dates *Burke's* clarification of the *Erie* test and manufactures a conflict where none exists, finding, contrary to First and Ninth Circuit decisions, that Rules 12 and 56 occupy the field for summary disposition procedures. *Id*. at 106-07. This Court should follow the weight of authority and apply the Act.

Boley's claims clearly fall within the scope of D.C.'s Anti-SLAPP Act. Indeed, few cases are more transparently designed for the singular purpose of chilling speech than this, penalizing a journalist for his reporting, and few matters fall more squarely into the arena of public concern. Accordingly, the burden must shift to Plaintiff to demonstrate that he is likely to succeed on the merits of his claim. For the reasons discussed in the motion and above, and based on the official findings contained in the exhibits, Boley cannot make this showing. His claim should, therefore, be dismissed under the Anti-SLAPP Act and costs and attorneys' fees awarded.[15]

CONCLUSION

For all of the reasons set forth above and in Defendants' memorandum of law, Defendants The Atlantic Monthly Group, Inc. and Jeffrey Goldberg respectfully request that the Court dismiss Plaintiff's Complaint in its entirety with prejudice and award Defendants their attorney's fees and costs, pursuant to the D.C. Anti-SLAPP Act.

[15] Defendants' request for an oral hearing is not a "legal maneuver" (Opp. at 23); it is a legal right that Atlantic, as any defendant, has in this Court, and, respectfully, should be granted. LCvR 7(f).

Dated: April 12, 2013

Respectfully submitted,

/s/ Constance M. Pendleton
Laura R. Handman (DC Bar No. 444386)
Constance M. Pendleton (DC Bar No. 456919)
Micah J. Ratner (DC Bar No. 996955)
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue N.W., Suite 800
Washington, DC 20006-3401
(202) 973-4200
(202) 973-4499 (fax)
laurahandman@dwt.com
conniependleton@dwt.com
micahratner@dwt.com

Attorneys for Defendants The Atlantic Monthly Group, Inc. and Jeffrey Goldberg

Of Counsel:

Bruce Gottlieb (DC Bar No. 487596)
Aretae Wyler (DC Bar No. 994489)
The Atlantic Monthly Group, Inc.
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 266-7374
(202) 266-6001 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2013, I caused the foregoing Defendant The Atlantic Monthly Group, Inc. and Jeffrey Goldberg's Reply Memorandum of Points and Authorities in Support of Motion to Dismiss and Special Motion to Dismiss Plaintiff's Complaint to be served via the court's CM/ECF system upon the Clerk of the Court and via First Class mail, postage prepaid, upon the following persons:

George S. Boley
c/o George S. Boley, Jr.
54 Bruen Ave., Unit 4
Irvington, NJ 07111
Pro Se Plaintiff

/s/ Constance M. Pendleton
Constance M. Pendleton