ORAL ARGUMENT NOT YET SCHEDULED

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

13-7171

YASSER ABBAS,

Plaintiff-Appellant,

—v.—

FOREIGN POLICY GROUP, LLC and JONATHAN SCHANZER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PLAINTIFF-APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) and this Court's October 25, 2013 order, Appellant Yasser Abbas submits the following certificate as to parties, rulings, and related cases:

A. Parties and Amici:

Yasser Abbas, Appellant

Foreign Policy Group, LLC, Appellee

Jonathan Schanzer, Appellee

District of Columbia, Amicus

B. Rulings Under Review:

Appellant Yasser Abbas is appealing the Decision and Order of the Hon. Emmet G. Sullivan, U.S.D.J. dated September 27, 2013, which granted Appellees' Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act.

C. Related Cases:

The case on review has not previously been before this Court, any other Court of Appeals, or any other Court within the District of Columbia. Counsel is not aware of any related cases pending in this Court, any other Court of Appeals, or any other Court within the District of Columbia.

Dated: New York, New York
November 22, 2013

Respectfully Submitted,

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REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests the Court to schedule oral argument in this matter. Among other issues, the questions involved in this appeal include determining whether the D.C. anti-SLAPP Act applies to a federal court sitting in diversity. This is a significant question not yet decided by this Court.

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GLOSSARY

"The anti-SLAPP Act" and "the Act" mean the District of Columbia anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*

"The Committee Report" refers to the Council of the District of Columbia, Committee on Public Safety and the Judiciary Report, Bill 18-893, dated Nov. 18, 2010.

"FP" stands for Foreign Policy Group, LLC, formerly a division of the Washington Post Company.

"*Foreign Policy*" stands for the on-line and print publication by FP.

"Rule 12" refers to Federal Rule of Civil Procedure 12.

"Rule 56" refers to Federal Rule of Civil Procedure 56.

"The Schanzer article" and "the article" mean the June 5, 2012 article written by defendant Jonathan Schanzer and published in *Foreign Policy* entitled, "The Brothers Abbas," with the subtitle, "Are the sons of the Palestinian President growing rich off their father's system?"

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INTRODUCTION

Does the anti-SLAPP Act apply in a federal court sitting in diversity? The district court said it does and granted Defendants' anti-SLAPP motion. We respectfully urge this Court to reverse because the anti-SLAPP Act mandates the *procedure* for dismissing certain cases with prejudice before trial and, in doing so, preempts Federal Rules 12 and 56.

The D.C. Council passed the anti-SLAPP Act in response to what it recognized as a growing "litigation phenomenon": "Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making." (JA-389) (The Committee Report at 2). In an effort to protect "the kind of grassroots activism that should be hailed in our democracy," the Act purports to enable a defendant to "more expeditiously and more equitably" dispense with meritless suits. *Id*. at 1, 3. (JA-388, 390).

While the stated intent of the Act is to protect "the kind of grassroots activism that should be hailed in our democracy," the reach of the statute goes way beyond protecting those petitioning the government to also shield "[a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." Section

2.(1)(b). Rather than drafting a special motion to dismiss procedure of such a vast scope, the D.C. Council could have granted "grassroots activists" a qualified or absolute substantive immunity that could be invoked via a Rule 12 or 56 motion. However, the Council did not do that, instead mandating a dismissal procedure that directly conflicts with the operation of the federal rules.

FP, which was a division of the Washington Post Company when the Schanzer article was published, and Jonathan Schanzer, who has written a book on Palestinian politics and who testifies before Congress concerning alleged corruption in the West Bank, hardly qualify as "normal, middle-class and blue-collar Americans" who are "on their first venture into the world of government decision making." Neither Defendant was engaged in any kind of "grassroots activism" when they defamed Plaintiff with the unsubstantiated libelous innuendo published in *Foreign Policy* that he is growing rich off of his father's alleged corruption.

Jonathan Schanzer provided testimony before Congress in which he suggested that Congress investigate the way in which President Mahmoud Abbas's sons, Yasser and Tarek, have accumulated wealth since their father took office in 2005. This action does not involve that testimony. And Congress took no action because of it.

In the Schanzer article, Defendants went a significant step further than suggesting that Congress pursue an investigation. Mr. Schanzer posits that Mr. Abbas's father is corrupt, rich and powerful. He observes how rich his son is. He then poses the question, which contains the answer, that his son must be growing rich off of nepotism.

Mr. Schanzer is on a mission to criticize the Palestinian leadership which has extended to President Mahmoud Abbas's family. This is not only provocative and unfounded, but it also has personal consequences. That Plaintiff's reputation is harmed is the least of it. Such remarks place him and his family in danger.

The First Amendment was not intended to shield the media from lawsuits when its remarks can have such dangerous consequences. While individuals like Plaintiff should be amenable to every form of fair inquiry, no considerations of public policy require that they should be helplessly exposed to false accusations of stealing from U.S. taxpayers and the Palestinian people. This is the heart of why Plaintiff felt he had to bring this lawsuit.

Contrary to Defendants' claim, Plaintiff is not trying to "intimidate into silence" the Defendants. In fact, Defendants' arguments turn the anti-SLAPP Act on its head by trying to intimidate Plaintiff from defending his personal and business reputation by the threat of legal fees being awarded against him under the Act.

Pursuant to the anti-SLAPP Act, the district court dismissed Plaintiff's claim, before Defendants answered the Complaint and before any discovery, based on over 200 pages of material outside of the pleadings (primarily news articles) submitted by Defendants. Based largely on the news articles, the district court concluded that Mr. Abbas is a limited purpose public figure who had not been defamed and that he had failed to demonstrate that his claim was "likely to succeed on the merits."

The district court gave short shrift to the threshold question as to whether the Act applies in a federal court sitting in diversity, relying on a First Circuit decision which, in turn, relies on a Ninth Circuit decision. Members of the Ninth Circuit, including its Chief Judge, currently disagree on the issue. In any event, those maintaining that anti-SLAPP Acts apply in federal court base their argument in large part on a claim that such Acts have substantive consequences or substantive aims making them substantive rather than procedural so they do not conflict with Rules 12 and 56.

However, as Justice Scalia explained in *Shady Grove*, "[i]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010). "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules

for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." *Id.* at 406 (*quoting Hanna v. Plumer*, 380 U.S. 460, 472 (1965)). Rules 12 and 56 are much more than "rationally capable of classification as procedure"; they are quintessentially rules of procedure.

Finally, some argue that anti-SLAPP statutes should apply in federal court to avoid forum shopping with the implied premise being that federal procedure and the federal judiciary are not up to the task of weeding out weak claims early. Plaintiff submits that just the opposite is true. In addition, Mr. Abbas clearly was not forum shopping in this case. Had he been forum shopping he would have commenced suit in England, which is a far more favorable venue for libel claimants than the United States and particularly was so when this action was commenced, instead of Defendants' home field, the District of Columbia. Mr. Abbas was simply looking for his day in court to clear his name.

JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1332(a)(2) because the Plaintiff is a citizen of Canada and Defendants are citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs.

The district court entered a Memorandum Opinion and Order dismissing the action with prejudice on September 27, 2013. Plaintiff filed a timely notice of

appeal on October 23, 2013 pursuant to 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES

1. Whether the anti-SLAPP Act's special motion to dismiss procedure conflicts with, answers the same question as, or directly collides with, Federal Rules 12 or 56 so as to make the Act inapplicable in a federal court sitting in diversity.

2. Whether Rules 12 and 56 were adopted in violation of the Rules Enabling Act.

3. Whether, even if the anti-SLAPP Act applies in this Court, the action should not be dismissed because:

(a) Plaintiff is likely to prevail on the merits since, when read in context, the defamatory questions posed by the Schanzer article can reasonably be read as assertions of false facts, and,

(b) Even if the defamatory questions are deemed to be opinions, they are actionable because they contain provably false connotations.

4. Whether the district court incorrectly ruled that Plaintiff is a limited purpose public figure or, alternatively, whether Plaintiff should not be required to establish a likelihood of proving by clear and convincing evidence the inherently

fact-intensive question of actual malice by Defendants without any discovery from Defendants.

RELEVANT STATUTES

The District of Columbia anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, is contained in an Addendum to this brief.

STATEMENT OF FACTS

The Parties

Plaintiff, Yasser Abbas, is a businessman who operates businesses throughout the Middle East and the Gulf region. (JA-009) (para. 4). Yasser Abbas and his brother, Tarek Abbas, are the sons of Mahmoud Abbas, the Palestinian President. (JA-009) (para. 9).

Defendant FP publishes *Foreign Policy*, a magazine of global politics, economics, and ideas. (JA-009) (para. 5). On its website, FP proclaims that it is "ranked most credible among Influentials vs. the Competition." (JA-009) (para. 6). *Foreign Policy* Arabic is published bimonthly in partnership with Gulf Strategic Studies Center in Qatar. *Foreign Policy* Arabic contains translated material from FP's flagship edition and is distributed throughout the Middle East. (JA-009) (para. 7).

Defendant Jonathan Schanzer is a Vice-President for Research at the Foundation for Defense of Democracies. (JA-009) (para. 8).

The Schanzer article

On June 5, 2012, Jonathan Schanzer wrote an article in *Foreign Policy* entitled, "The Brothers Abbas," with the subtitle, "Are the sons of the Palestinian President growing rich off their father's system?" (JA-009) (para. 10). Neither Jonathan Schanzer nor FP made any effort to contact Plaintiff prior to publication of the Schanzer article. (JA-010) (para. 11). Mr. Schanzer only used sources that supported his point of view, including only the first of two articles concerning Plaintiff published by Al-Aswak.net economic magazine. (JA-010) (para. 12).

The Schanzer article then poses a further question, stating: "new details are emerging of how close family members of Palestinian leader Mahmoud Abbas, a major U.S. partner in the Middle East, have grown wealthy. Have they enriched themselves at the expense of regular Palestinians -- and even U.S. taxpayers?" (JA-010) (para. 13).

With reference to "their father's system," the article relies in large part on an allegation by Mohammed Rachid, a man with ample motivation to lie given his own prosecution for corruption and conviction within weeks of when the article was written, and his subsequent 15-year sentence for embezzlement, that President Abbas has hidden away "$100 million in ill-gotten gains." (JA-010) (para. 14).

After suggesting that there is evidence that the President has hidden away "$100 million in ill-gotten gains," Mr. Schanzer links plaintiff to this lie by his

implication in the article that: "The conspicuous wealth of Abbas's own sons, Yasser and Tarek, has become a source of quiet controversy in Palestinian society since at least 2009, when Reuters first published a series of articles tying the sons to several business deals, including a few that had U.S. taxpayer support." (JA-010) (para. 15).

To support his implication that Mr. Abbas is guilty of having stolen from the Palestinians and U.S. tax payers, Mr. Schanzer suggested that Yasser and Tarek were in hiding: "Since the Arab Spring began in late 2010 and early 2011, the Abbas brothers have largely dropped out of sight in the West Bank. Where have they gone? According to an article written by Rachid on the staunchly anti-Abbas website InLight Press, the family owns lavish properties worth more than $20 million in Gaza, Jordan, Qatar, Ramallah, Tunisia, and the UAE." (JA-013) (para. 35). "Of course, the Abbas brothers' absence doesn't mean that Palestinians will forget. On a research trip to Ramallah last year, several Palestinians told me that the Abbas family dynasty is common knowledge. However, discussion of the issue rarely rises above a whisper -- thanks to growing fear of retribution by PA security officers, who have apprehended journalists and citizens for openly challenging President Abbas's authority." (JA-014) (para. 37).

Plaintiff's request for a retraction and a proposal to "put matters right"

On July 23, 2012, the London law firm, Bates Wells & Braithwaite ("BWB"), wrote FP a letter on behalf of Plaintiff, stating that the "allegation [in the Schanzer article] that our client has made vast sums of money at the expense of ordinary Palestinians, and US taxpayers, through exploiting his father's position as President is highly defamatory and damaging to his personal and business reputations." (JA-370). The letter advised FP that "[p]ublication of this article has had, and is having a seriously damaging effect on the reputation of Mr. Abbas. As a result of the continued publication of these allegations, various online blogs and articles are now commenting on and repeating these allegations, including translated into Arabic (eg on aljazeera.net, maannews.com, alwatanvoice.com)." *Id.* The letter also identified 13 factual inaccuracies contained in the article. *Id.*

Finally, the letter concluded: "Our client appreciates the value of free speech. He has no particular wish to end up in litigation with the publishers of Foreign Policy or with Mr. Schanzer (to whom we are copying this letter) . . . However, he will take steps to protect his reputation, and we trust that you share his/our view that there is no value in uncorrected falsehoods. With that in mind we should be grateful if you would please remove the allegations complained of from your website and let us know within the next 14 days what steps you propose to take to put matters right, including by way of retraction." (JA-373).

On August 6, 2012, James A. McLaughlin, Associate Counsel for Washington Post Media, responded to BWB's letter, stating that, after reviewing the letter with Mr. Schanzer, "we believe there are several points that may warrant follow-up editorial action, such as through a published clarification (if warranted by substantiated facts) and/or on-the-record comments from your client for inclusion in an updated article. Beyond that, Foreign Policy would welcome a proposed letter to the editor or other submission in which Mr. Abbas (or you, on his behalf) would have the opportunity to respond to the piece as a whole." (JA-378).

Mr. McLaughlin's letter then proceeded to address the 13 factual inaccuracies alleged in BWB's letter, admitting some might not be entirely accurate and disputing the inaccuracy, the implication, or the defamatory significance of others. (JA-378 – 384). The letter concluded: "More fundamentally, we believe that your client's objections, in substance, amount to a disagreement with the questions posed by Dr. Schanzer from a responsible marshaling of the publicly available evidence. Accordingly, we believe that they are best addressed along the lines suggested in this response." *Id.* (JA-384).

On August 21, 2012, BWB responded to Mr. McLaughlin's letter, thanking him for the response but stating: "We note that Mr. Schanzer's article remains on your website and that the offer of possible '*follow-up editorial action*' appears to

fall well short of the retraction which we had in mind as a sensible first step towards putting matters right." (JA-386) (Jones Dec. ex. 36).

The Defamation Action

On September 20, 2012, Mr. Abbas filed the complaint in this action against FP and Mr. Schanzer, alleging libel per se – injury to personal reputation (Count I), libel per se – injury to professional reputation (Count II), libel – actual malice by Defendant Schanzer (Count III), libel – reckless disregard/malice by Defendant FP (Count IV), and libel – by implication (Count V). (JA-016 – 021).

On November 5, 2012, Defendants responded to the complaint by filing a motion to dismiss pursuant to FRCP 12(b)(6) and a "special motion to dismiss" pursuant to the anti-SLAPP Act. The anti-SLAPP motion was supported by over 200 pages of exhibits, most of which was comprised of 28 articles. Plaintiff filed his opposition to the motions on December 10, 2012, and Defendants filed their replies in support of the motions on December 31, 2012.

The District of Columbia moved for leave to file an *amicus curiae* brief, which the district court granted, and the District filed a brief on December 22, 2012, arguing that the anti-SLAPP Act is applicable in a federal court sitting in diversity.

The District Court Decision

On September 27, 2013, Judge Sullivan issued a decision and order, granting Defendants' anti-SLAPP motion, dismissing Plaintiff's complaint with prejudice, and denying Defendants' motion to dismiss pursuant to Rule 12(b)(6) as moot. (JA-543). With respect to Mr. Abbas's background, the decision cites the Complaint for his business interests and then cites many of the articles relied on by Defendants to support their claims that Mr. Abbas is a public figure who has not been defamed by the Schanzer article. (JA-545, 560-563).

The district court concluded that the language of the anti-SLAPP statute applied to the Schanzer article, and following the analysis of the United States Court of Appeals for the First Circuit in *Godin v. Schencks,* 629 F.3d 79 (1st Cir. 2010), concluded that the statute applied in a federal court sitting in diversity. (JA-555). In doing so, the court recited *Godin's* conclusions that Federal Rules of Civil Procedure 12(b)(6) and 56 did not control the issue under the anti-SLAPP statute, applying the statute would discourage forum shopping, and because the statute is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right,' it cannot be displaced by Rule 12(b)(6) or Rule 56." (JA-556 - 557) (quotation marks and citations omitted).

The court found that "Mr. Schanzer's statements are protected under the anti-SLAPP Act." (JA-558). As to Plaintiff's likelihood of prevailing on his

defamation claim, the court found that the two allegedly libelous questions at issue ((1) "Are the sons of the Palestinian president growing rich off their father's system?"; and (2) Have they enriched themselves at the expense of regular Palestinians—and even U.S. taxpayers?") are rhetorical and are not questions of fact. (JA-567).

Adopting Defendants' argument, the district court explained: "Though the conclusions Mr. Abbas draws are possible answers to the questions posed by Mr. Schanzer, the questions invite the reader to form her own judgments regarding the relationship between Mr. Abbas's family ties and his admittedly great wealth. The reader could arrive at a number of different conclusions . . . That Mr. Abbas would prefer the readers to not answer the questions in the affirmative is not sufficient to support his defamation claim." (JA-570 – 571) (Decision at 27-28) (citations omitted).

The court also concluded that the questions imply an opinion, not a fact. (JA-571). On this issue, quoting Defendants' argument, the Court wrote that "even [if] the relationship between Mr. Abbas's business success and corruption in the PA were at issue in the Commentary . . . '[g]iven the myriad of factors that may have contributed to Plaintiff's wealth—his education, his experience, his skill, and indeed, his connections and opportunities—it would be impossible to prove that Plaintiff grew wealthy *solely* because of his father' or *solely* by virtue of corruption

in the Palestinian Authority." (JA-574) (emphasis added) (quoting Defendants' MTD at 10).

Defendants' counsel then filed a motion under the anti-SLAPP Act seeking an award of approximately $207,000 in fees and costs for making the 12(b)(6) motion and the anti-SLAPP motion. Plaintiff opposed the motion and, alternatively, requested a stay pending the outcome of this appeal. That motion is currently pending before the district court.

SUMMARY OF ARGUMENT

The district court incorrectly dismissed this action with prejudice based on the anti-SLAPP Act's special motion to dismiss procedure. Under the anti-SLAPP Act, a court may dismiss a plaintiff's claims with prejudice on a preliminary basis based on the pleadings and on matters outside the pleadings merely because the plaintiff has not "demonstrate[d] that the claim is likely to succeed on the merits." The Act mandates a stay of all discovery pending the court's resolution of the potentially dispositive motion to strike.

Under *Shady Grove*, however, if a federal rule answers or covers the question in dispute, the federal rule governs unless it is invalid. 559 U.S. at 398. Federal courts must ignore state rules of procedure because it is Congress that has

plenary authority over the procedures employed in federal court, and this power cannot be encroached upon by the states. *Id*. at 400.

Here, D.C.'s anti-SLAPP Act mandates that a court resolve a "special motion to dismiss" in a different manner than it would otherwise resolve a preliminary motion attacking the merits of a case under Rules 12 or 56. The anti-SLAPP Act changes the standard for surviving summary judgment and getting a case dismissed with prejudice before trial by requiring the plaintiff to show a "likelihood" that he will prevail, rather than merely a triable issue of fact. Here, the anti-SLAPP Act requires Mr. Abbas to establish a likelihood of proving by clear and convincing evidence the inherently fact-intensive question of actual malice by Defendants without any discovery from Defendants.

The Federal Rules do not contemplate that a defendant may get a case dismissed for factual insufficiency while concealing evidence that supports plaintiff's case. The District anti-SLAPP statute allows for precisely that. The Act also authorizes attorneys' fees against a plaintiff who loses a special motion by a standard far different from that applicable under Federal Rule of Civil Procedure 11.

The anti-SLAPP Act is not substantive. It creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a "special motion to strike";

it contains provisions limiting discovery. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation; and its only purpose is the swift termination of certain lawsuits the D.C. Council believed to be unduly burdensome. The Council could have, but did not, specifically granted a defendant contemplated by the Act an immunity that could be invoked pursuant to a Rule 12 or 56 motion, similar to existing qualified or absolute immunities in the defamation context. Instead, the Council mandated a dismissal procedure that directly conflicts with the operation of the federal rules—which means that the procedure does not apply in a federal court sitting in diversity.

Finally, Anti-SLAPP statutes are intended to address suits that "masquerade as ordinary lawsuits but are intended to deter *ordinary people* from exercising their political or legal rights or to punish them for doing so." Plaintiff respectfully submits that they are not intended to address suits, like this one, commenced by individuals who have been wrongfully alleged to be stealing money at the expense of American taxpayers against publishers like the Washington Post Company and authors like Jonathan Schanzer.

* * *

If the Court concludes that the anti-SLAPP Act does apply in federal court, then the order below should be reversed because Plaintiff has demonstrated a likelihood of prevailing on the merits. First, Mr. Schanzer's questions are capable

of defamatory meaning because they could be read as assertions of fact. In considering the parties' arguments on this issue, the Court should draw on its judicial experience and common sense.

The fact that the article can reasonably be read to imply the meaning Mr. Abbas alleges is best shown by the fact that the comments following the article and the links to the article, when they are responding to the article, overwhelmingly understand the article to not just imply but to actually be making the claims that Mr. Abbas alleges. Plaintiff submits that Defendants' characterizations, positing purportedly non-defamatory, alternative meanings, do not pass muster under any reasonable, common sense reading of the Schanzer article.

Second, the two statements at issue, posed as questions, are not statements of opinion protected by the First Amendment because they contain a provably false connotation. Adopting Defendants' argument, the district court concluded that the question is whether Mr. Abbas's business success is *solely* attributable to his father's power and connections and proving that is impossible. Plaintiff respectfully submits that there is no basis in law, equity or logic to place such an insurmountable burden on Defendants with the ironic effect of insulating Defendants from liability for defamation. Rather, the question should be whether there is *any* evidence of an improper or corrupt connection between Mr. Abbas's business success and his father's power and connections. Such a connection

certainly is not impossible to prove if it existed. Such connections are investigated and litigated every day in this country.

Defendants' argument is essentially that Mr. Schanzer is exempt from liability because he cannot prove that Mr. Abbas is wrongfully profiting from his father's system at the expense of the Palestinian people and U.S. taxpayers. If something as inflammatory and damaging as that cannot be proven, then it should not be published. Plaintiff respectfully submits that it is not unreasonable for Mr. Abbas to believe that he should be entitled to open up his records and clear his name.

STANDARD OF REVIEW

While there is no established standard of review for orders striking cases under the anti-SLAPP Act, courts reviewing orders under similar statutes review them *de novo*. *See, e.g., Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1163 (9th Cir. 2011).

ARGUMENT

I. THE D.C. ANTI-SLAPP ACT DOES NOT APPLY IN A FEDERAL COURT SITTING IN DIVERSITY.

A. Relevant Standards

The anti-SLAPP Act mandates that a federal court resolve a "special motion to dismiss" in a different manner than it would otherwise resolve a preliminary motion attacking the merits of a case under Rules 12 or 56. The question is

whether those rules preclude a federal court sitting in diversity from applying the Act.

The Supreme Court established the governing test long ago in *Hanna v. Plumer*, 380 U.S. 460 (1965). "When a situation is covered by one of the Federal Rules," a federal court must apply the Federal Rule, notwithstanding the existence of a conflicting state statute. *Id.* at 471.

Under the *Erie* doctrine, "federal courts are to apply state substantive law and federal procedural law when sitting pursuant to their diversity jurisdiction." *Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107 (D.C. Cir. 2012) (internal quotation marks and citations omitted). To determine whether a law is substantive or procedural for *Erie* purposes, the Supreme Court has articulated a two-step analysis. The first step requires the court to determine whether there is an applicable federal rule or statute that is "sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980).

This case presents the question of whether a state law applies in the face of conflicting Federal Rules of Civil Procedure. The Court must "first determine whether [the federal rule] answers the question in dispute." *Shady Grove*, 559 U.S. at 398 (*citing Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987)).

If there is such a controlling federal rule, then the rule governs, state law notwithstanding, unless it exceeds statutory authorization or Congress's

rulemaking power. *Shady Grove*, 559 U.S. at 398. Thus, the Court must consider whether the federal rule complies with the Rule's Enabling Act requirement that the Federal Rules of Civil Procedure and the Federal Rules of Evidence "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). If the federal rule answers or covers the question in dispute, then the federal rule governs unless it is invalid. *Shady Grove*, 559 U.S. at 398. The Court does not "wade into *Erie's* murky waters unless the federal rule is inapplicable or invalid." *Id*. (*citing Hanna*, 380 U.S. at 469-71).

Only if the federal rule and the state rule at issue "can exist side by side . . . [with] each controlling its own intended sphere of coverage without conflict," may the Court proceed to the second step of the analysis. *Walker*, 446 U.S. at 752. Under the second step, the federal court is to apply the District of Columbia or state law at issue if the failure to enforce the state law would disserve the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468.

B. The anti-SLAPP special motion-to-dismiss procedure conflicts with, answers the same question as, or directly collides with Federal Rules of Civil Procedure 12 and 56.

The question, as articulated in *Shady Grove*, *Burlington Northern* and *Walker*, is whether Section 16-5502's special motion to dismiss procedure

"conflicts with, answers the same question as, or directly collides with Federal Rules 12 or 56." *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 101 (D.D.C. 2012).[1]

When considering a special motion to dismiss, Sections 16-5502(b) and (d) require the court to grant the motion and dismiss the claim with prejudice if the defendant 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 the plaintiff fails to "demonstrate[] that the claim is likely to succeed on the merits." Defendants acknowledge that, under this standard, a court must grant the special motion to dismiss even where the motion is based on matters outside the pleadings, and even though the plaintiff has or can raise a genuine issue of material fact on its claim.

Under the Federal Rules of Civil Procedure, Rule 12 provides the sole means of challenging the legal sufficiency of a claim before discovery commences. To survive a Rule 12(b)(6) motion to dismiss, which is the closest Rule 12 analog to an anti-SLAPP motion to dismiss, the plaintiff must allege facts stating a claim that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[1] After the anti-SLAPP Act was held by the district court in *3M Company* to be inapplicable, the District of Columbia filed a motion to dismiss its appeal and vacate the portion of the court's opinion that was the subject of the appeal. The district court denied the motion after concluding that the application of the Act "in federal court raises serious policy questions, and the Court does not agree that it serves the public interest to erase an opinion from the books that may contribute to the necessary and healthy debate of those questions." *3M Co. v. Boulter*, 290 F.R.D. 5, 11 (D.D.C. 2013).

This standard does not impose a "likelihood of success" requirement at the pleading stage. *See id.* at 556. "[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment *that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder*." *Id.* at 556-63 n.8 (2007) (noting that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable") (emphasis added).

Thus, any attempt to impose a "likelihood of success" requirement obviously conflicts with Rule 12. By forcing the plaintiff to establish that success is not merely plausible but likely, the anti-SLAPP Act bars claims at the pleading stage when Rule 12 would allow them to proceed.

The Act also conflicts with Rules 12(d) and 56. The Advisory Committee Notes to the 1946 Amendment explain that Rule 12(d) links Rule 12 with Rule 56 to provide the exclusive means for federal courts to use to rule upon a pretrial motion to adjudicate a case on the merits based on matters outside the complaint, "whether the motion is labeled a 'motion to dismiss,' a 'motion for judgment on the pleadings,' a 'motion for summary judgment,' a 'speaking motion,' or anything else." *3M Co.*, 842 F. Supp. 2d at 97-98.

Motions to dismiss under the anti-SLAPP Act almost invariably require consideration of matters outside the pleadings (in this case defendants relied on

hundreds of pages of hearsay material from the internet),[2] and when that is the case, Rule 12(d) states that "the motion *must* be treated as one for summary judgment under Rule 56." (Emphasis added). Under Rule 56, a party is entitled to summary judgment only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To defeat summary judgment, the non-movant only needs to "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quotation marks omitted).

Thus, the anti-SLAPP Act directly conflicts with Rule 56 by requiring the plaintiff to prove that he is likely to prevail if the case proceeds to trial, which is obviously a significantly different showing from identifying material factual disputes that a jury could reasonably resolve in plaintiff's favor.

The anti-SLAPP Act's special motion to dismiss procedure also violates a plaintiff's right to a trial by jury guaranteed by the Seventh Amendment to the United States Constitution, which provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const.

[2] Articles offered in evidence as proof of the facts recited therein are out-of-court declarations generally held to be inadmissible under the hearsay rule. *See, e.g., Jacobsen v. Deutsche Bank, A.G.*, 206 F. Supp. 2d 590 (S.D.N.Y. 2002).

amend. VII. The Federal Rules of Civil Procedure state that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a).

Thus, the anti-SLAPP Act must be "consistent with the letter and spirit of the constitution" and, specifically, the Seventh Amendment. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (June 28, 2012) (quotation marks and citation omitted). However, the Act requires a court to make determinations of disputed issues of material fact, weigh evidence and determine whether a plaintiff's claims are "likely to succeed on the merits." D.C. Code § 16-5502. If, after weighing the evidence, the Court determines a plaintiff cannot meet this burden, the Court must grant the motion to dismiss.

Under Rule 12(b)(6), a court's consideration of the facts is limited to the allegations in the complaint and a plaintiff can replead if the complaint is dismissed. Under Rule 56, a court's consideration of the facts is based on the evidence adduced following discovery and the court is to determine whether there are any disputed issues of fact for trial. The court is not to resolve disputed issues of fact.

Here, by contrast, while some of Plaintiff's defamation claim involves a question of law, other parts involve questions of fact—issues such as whether the

Schanzer article's questions are supported by facts provided in the hyperlinked source material, whether Mr. Schanzer's alleged opinions are based on verifiable facts, whether the libelous questions at issue imply a provably false fact, whether Plaintiff is a limited purpose public figure, and, if so, whether Plaintiff can prove, by clear and convincing evidence, that Defendants are guilty of actual malice, and, if Plaintiff is not a limited purpose public figure, whether Defendants were negligent.

This detailed and extensive fact-finding, and determination of disputed issues of fact, without the involvement of the jury, is in direct conflict with the language and spirit of the Seventh Amendment. "The Supreme Court has made it quite clear that Rule 56 sets the outer boundary for dismissing claims on the merits based upon a pretrial evaluation of the evidence; to go further infringes upon the Seventh Amendment right to a jury trial." *3M Co. v. Boulter*, No. 11-cv-1527, 2012 WL 5245458, *1 (D.D.C. October 24, 2012).

Finally, the anti-SLAPP Act also mandates a stay of all discovery pending the court's resolution of a motion to strike. [16-5502(3)(c)]. This discovery-limiting aspect of the statute collides with the discovery-allowing aspects of Rule 56 and further highlights the conflict between the statute and Rule 56. Under the federal rules, a defendant cannot get a case dismissed for factual insufficiency

while concealing evidence that supports plaintiff's case. The District anti-SLAPP Act allows for precisely that.

The application of the anti-SLAPP procedure in a defamation case like this one, where the defendant claims (erroneously in Plaintiff's view) that the plaintiff is a public figure, is unfair in the extreme in a manner that the federal rules would plainly not permit. Based on the anti-SLAPP Act, Mr. Abbas is required to establish a likelihood of proving by clear and convincing evidence the inherently fact-intensive question of actual malice by Defendants without any discovery from Defendants. It frankly is shocking to those, like Mr. Abbas, who heretofore have believed that the United States federal court system is the paragon of due process and fairness.

In this connection, none of the principal cases relied on by Defendants and cited by the district court in finding that Mr. Abbas had not carried his burden of establishing a likelihood of prevailing on the merits involved a motion to dismiss a Plaintiff's Complaint at the pleading stage. Two of the cases were summary judgment cases and one was a 12(b)(6) motion following discovery. *See* (JA-568 - 570) (Decision at 25-27).

In sum, the anti-SLAPP Act permitted Defendants to obtain the dismissal of Plaintiff's claim on the merits based on the district court's determination of disputed issues of fact, without any discovery, based on hundreds of pages of

hearsay news articles submitted by Defendants. In doing so, the special motion to dismiss under the Act fundamentally changes the procedure and standards otherwise set forth in Rules 12 and 56 for challenging the merits of a plaintiff's claim and directly conflicts with Rule 12(d) and Rule 56. *See Shady Grove*, 559 U.S. at 420 n.4.

C. The Special Motion to Dismiss Procedure Strips a Federal Court of Discretion Otherwise Granted in the Federal Rules of Civil Procedure.

This Court should reverse and remand because the anti-SLAPP Act wholly strips the district court of the discretion it otherwise has to determine whether a claim should be dismissed with or without prejudice. Section 16-5502(d) mandates that a dismissal under the Act must be a dismissal with prejudice.

As the court observed in *3M Company*, *supra*: "[w]hether the defendant's challenge under the Anti-SLAPP Act is akin to a Rule 12(b)(2) motion for lack of personal jurisdiction, a Rule 12(b)(6) motion for failure to state a claim, a Rule 12(d) converted motion for summary judgment, or a speaking motion seeking dismissal due to weaknesses in the plaintiff's evidence, the dismissal must be with prejudice. This is a direct conflict with the Federal Rules, which do *not* mandate dismissal with prejudice in every circumstance, and which in fact vest a district court with discretion to determine whether a dismissal under Rule 12(b) would operate as an adjudication on the merits." 842 F. Supp. 2d at 104 (emphasis added by court).

In *Burlington Northern*, *supra*, on which the majority opinion in *Shady Grove* relied, the Supreme Court considered whether, in diversity actions, a federal court must apply an Alabama state statute that imposed a fixed penalty on appellants who obtained stays of judgment pending unsuccessful appeals. The purpose of the Alabama "mandatory affirmance penalty," much like the purpose of the D.C. Anti-SLAPP Act, was to penalize frivolous appeals and appeals interposed for delay and to provide "additional damages" to appellees "for having to suffer the ordeal of defending the judgments on appeal." *Burlington Northern*, 480 U.S. at 4. The Supreme Court held that the Alabama state statute could not apply in a federal diversity case because it conflicted with Fed. R. App. P. 38.

In *Burlington Northern*, the Court concluded that the Alabama rule conflicted with the federal rule even though the federal court might at times find grounds to impose the same penalties specified in the Alabama statute. As Judge Wilkins explained in *3M Company*:

> "[t]he direct conflict was borne out of the fact that the state law deprives the federal court of discretion on a categorical basis. For this precise reason, the D.C. Anti-SLAPP statute conflicts with Federal Rules 12 and 56. Even though a special motion to dismiss under Section 16-5502 might sometimes raise arguments that are identical to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, a Rule 12(b)(6) motion to dismiss for failure to state a claim, or a Rule 12(d)/56 motion for summary judgment, the statute ultimately mandates dismissal with prejudice if the plaintiff fails to demonstrate a likelihood of success on the merits, even

> where a plaintiff has raised a genuine issue of material fact and even where dismissal without prejudice is appropriate. Just as in *Burlington Northern*, the Anti-SLAPP Act in this way 'precludes any exercise of discretion within its scope of operation.'" 842 F.Supp.2d at 106 (*quoting Burlington Northern*, 480 U.S. at 7-8).

Thus, Plaintiff respectfully requests this Court to adopt the conclusion in *3M Company*, relying on the unanimous opinions in *Burlington Northern* and *Walker*, as well as the majority opinion in *Shady Grove* and other Supreme Court cases, that: "the text and structure of Rules 12 and 56 were intended to create a system of federal civil procedure requiring notice pleading by plaintiffs, whereby a federal court may dismiss a case when the plaintiff fails to plead sufficiently detailed and plausible facts to state a valid claim, but a federal court may not dismiss a case without a trial based upon its view of the merits of the case after considering matters outside of the pleadings, except in those instances where summary judgment under Rule 56 is appropriate. These are bedrock principles of the Federal Rules of Civil Procedure. These principles were expressly articulated by this Circuit in *National War Labor Board* and *Farrall*, by the 1946 amendments that added what is now Rule 12(d), by the contemporaneous Advisory Committee Notes explaining the 1946 amendments, and by this Circuit in *Callaway* [*v. Hamilton Nat. Bank of Washington*, 195 F.2d 556 (D.C. Cir. 1952)] construing the 1946 amendments. To the extent that other federal courts have failed to undertake this analysis or have reached a different interpretation of Rules 12 and 56 when

upholding Anti-SLAPP laws from other states, this Court respectfully disagrees with those opinions and must follow the binding precedent of this Circuit." *3M Co.*, 842 F. Supp. 2d at 106-07.

There is nothing to support Defendants' implication in the district court that it is necessary to apply the anti-SLAPP Act in federal court because federal procedure and the federal judiciary are not up to the task of weeding out weak claims early. Just the opposite is true.

D. Rules 12 and 56 were not adopted in violation of the Rules Enabling Act.

Since Rules 12 and 56 unambiguously answer the dispute at issue in this case, those rules will govern unless they were adopted in violation of the Rules Enabling Act, 28 U.S.C. § 2072. *See Shady Grove*, 559 U.S. at 406-07.[3] Rules 12 and 56 do not run afoul of the Rules Enabling Act or the Constitution because "[g]iven the procedural characteristics of Rule 12(d) and Rule 56, they fall squarely within the proper scope of the Rules Enabling Act. (citations omitted). Indeed, the Supreme Court has observed that pleading standards and summary

[3] Challenges to the Federal rules can succeed "only if the Advisory Committee, [the Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Bus. Guides, Inc. v. Chromatic Commc'ns. Enters., Inc.*, 498 U.S. 533, 552 (1991) (*quoting Hanna*, 380 U.S. at 471). The Supreme Court has rejected every Rules Enabling Act challenge to a Federal Rule that has come before it. *Shady Grove*, 559 U.S. at 406-07 (plurality).

judgment rules are classic examples of appropriate rules." *3M Co.*, 842 F. Supp. 2d at 110 (*citing Shady Grove*, 559 U.S. at 404-05).

Defendants' approach invalidates Rules 12 and 56 to the extent they conflict with the alleged substantive policies and aims of the anti-SLAPP Act. As Justice Scalia noted in *Shady Grove* in rejecting a similar argument, "[t]he test is not whether the rule affects a litigants substantive rights; most procedural rules do." 559 U.S. at 406-07 (noting that "[p]leading standards for example, often embody policy preferences about the types of claims that should succeed—as do rules governing summary judgment, pretrial discovery, and the admissibility of certain evidence") "[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." *Id.* at 410.

The key point for this appeal is that "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure." *Shady Grove,* 559 U.S. at 406 (*quoting Hanna,* 380 U.S. at 472). Rules 12 and 56 are much more than "rationally capable of classification as procedure"; they are quintessentially rules of procedure.

Finally, "the D.C. Anti-SLAPP Act is codified with procedural matters in the D.C. Code, and the Act applies to all claims, not just to claims brought under

District law, seriously undermining any contention that the Act 'serves the function of defining [state] rights or remedies.'" *3M Co.*, 842 F. Supp. 2d at 110-11 (*citing Shady Grove*, 559 U.S. at 431-32 (Stevens, J., concurring)). Summing up and rejecting the arguments by the Defendants and the District of Columbia, the court in *3M Company* concluded, in words that apply directly here: "[t]he Act is a summary dismissal procedure that the Defendants and the District seek to clothe in the costume of the substantive right of immunity—but this is largely a masquerade. Based on the procedural characteristics of the Act, and the presumptive validity of the Federal Rules of Civil Procedure, this Court is satisfied that Rules 12 and 56 do not abridge, enlarge or modify any substantive right in violation of the Rules Enabling Act." *3M Co.*, 842 F. Supp. 2d at 111.

E. Opinions From Other Circuits

The Ninth Circuit has addressed the threshold issue on this appeal most frequently. There, in April, 2013, two members of a 3-member panel of the Court of Appeals published separate frank opinions rejecting the Ninth Circuit's *Newsham v. Lockheed* decision on which the district court in this case principally relied, stating that the decision "was a big mistake" and "should be reconsidered." *Makaeff v. Trump University, LLC*, 715 F.3d 254, 275 (9th Cir. 2013). In a concurring opinion in *Makaeff*, Chief Judge Alex Kozinski strongly advocated against applying anti-SLAPPs in federal court:

> *Newsham* was a big mistake. Two other circuits have foolishly followed it. I've read their opinions and find them no more persuasive than *Newsham* itself. It's time we led the way back out of the wilderness. Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof. As a three judge panel, *Metabolife* could only do so much, and we are generally bound to follow *Newsham*. But if this or another case were taken en banc, we could take a fresh look at the question. I believe we should. *Makaeff*, 715 F.3d at 275 (*citing Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010) and *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009)).[4]

In rejecting the applicability of Anti-SLAPPs, Chief Judge Kozinski discussed how a conflicts analysis is only appropriate if the state rule is, in fact, substantive:

> It's not [substantive]. The anti-SLAPP statute creates no substantive rights; it merely provides a procedural mechanism for vindicating existing rights. The language of the statute is procedural: Its mainspring is a "special motion to strike"; it contains provisions limiting discovery; it provides for sanctions for parties who bring a non-meritorious suit or motion; the court's ruling on the potential success of plaintiff's claim is not "admissible in evidence at any later stage of the case"; and an order granting or denying the special motion is immediately appealable. The statute deals only with the conduct of the lawsuit; it creates no rights independent of existing litigation; and its only purpose is the swift termination of

[4] In *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832 (9th Cir. 2001), the Court refused to apply the discovery-limiting aspects of the California anti-SLAPP statute after concluding that they collided with the discovery-allowing aspects of Rule 56.

> certain lawsuits the legislators believed to be unduly burdensome.
>
> Federal courts must ignore state rules of procedure because it is Congress that has plenary authority over the procedures employed in federal court, and this power cannot be trenched upon by the states. To me, this is the beginning and the end of the analysis. Having determined that the state rule is quintessentially procedural, I would conclude it has no application in federal court. 715 F.3d at 273-74 (*citing Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and 28 U.S.C. § 702).

Judge Kozinski then discussed how *Newsham* has created enormous disruption when federal courts apply the California Anti-SLAPP statute: "[t]he Federal Rules aren't just a series of disconnected procedural devices. Rather, the Rules provide an integrated program of pre-trial, trial and post-trial procedures designed to ensure the just, speedy, and inexpensive determination of every action and proceeding. The [] anti-SLAPP statute cuts an ugly gash through this orderly process . . . What we're left with . . . is a hybrid procedure where neither the Federal Rules nor the state anti-SLAPP statute operate as designed." *Makaeff*, 715 F.3d at 274-745 (citations omitted); *see also Makaeff*, at 275-76 (Paez, J., concurring) ("I, too, believe that *Newsham* is wrong and should be reconsidered. I agree that California's anti-SLAPP statute is quintessentially procedural, and its application in federal court has created a hybrid mess that now resembles neither the Federal Rules nor the original state statute.").

One November 27, 2013, a subsequent petition for panel rehearing or rehearing en banc in *Makaeff* was denied, resulting in two sharply divided (4-4) signed written opinions, when the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration pursuant to Fed. R. App. P. 35(f). *Makaeff v. Trump Univ., LLC*, 715 F.3d 254 (9th Cir.), *reh'g en banc denied*, 736 F. 3d 1180 (9th Cir. Nov. 27, 2013).

The Judges signing the opinion denying the petition concluded that the California anti-SLAPP statute created a "separate and additional theory upon which certain kinds of suits may be disposed of before trial [that] supplements rather than conflicts with the Federal Rules." *Makaeff*, 736 F. 3d at 1182 (Wardlaw, J., and Callahan, J.). The denying Judges also concluded that "at worst, a motion to strike functions as a mechanism for considering summary judgment at the pleading stage as is permitted under Rule 12(d)." *Id.* at 1183.

In their view, the anti-SLAPP statute and the federal rules "can exist side by side . . . each controlling its own intended sphere of coverage without conflict," *Makaeff*, 736 F.3d at 1181 (citation omitted), because if the defendant prevails, the SLAPP claim is dismissed and the defendant may be entitled to attorneys' fees. If the defendant loses, he "'remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment.'" *Id*. (*quoting Newsham*, 190 F.3d at 972).

In other words, according to the Judges opposing en banc review, the anti-SLAPP statute does not conflict with the pretrial dismissal procedure under the federal rules because Rules 12 and 56 give *defendants* two additional, fall-back opportunities to dismiss a plaintiff's action before trial. This view of existing side-by-side, we respectfully submit, is unreasonable on its face and cannot be what the Supreme Court intended in *Walker*. *See 3M Co.*, 842 F. Supp. 2d at 109 (rejecting that argument and concluding instead that "[b]ased on this Circuit's analysis of the history and intent of Federal Rule 12(d) as explained in *Callaway*, the law in this Circuit is that 'occupying the field' of weeding out meritless claims is precisely what Rules 12 and 56 were meant to do") (emphasis in original).

The Judges favoring en banc review read California's anti-SLAPP statute as "impermissibly supplement[ing] the Federal Rules' criteria for pretrial dismissal of an action." *Makaeff*, 736 F.3d at 1188 (Watford, J., dissenting) (Kozinski, C.J., Paez, J. and Bea, J., concurring in dissent). They concluded that the statute's attempt to impose a probability-of-success "requirement at the pleading stage would obviously conflict with Rule 12," which permits "'a well-pleaded complaint [to] proceed even if it strikes a savvy judge that actual proof of those facts is *improbable*.'" *Id.* at 1189 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. at 556) (emphasis by court). They also concluded that the statute "eviscerates Rule 56 by requiring the plaintiff to prove that she will probably prevail if the case proceeds to

trial—a showing considerably more stringent than identifying material factual disputes that a jury could reasonably resolve in the plaintiff's favor." *Id*.

Finally, they observed that the Court's decision in *Metabolife*, *supra*, further highlighted the conflict between the anti-SLAPP statute and Rule 56, where the Court held that the discovery-limiting aspects of the statute collided with the discovery-allowing aspects of Rule 56, and, therefore, the Court refused to apply the statute's discovery provisions in federal court. *Makaeff*, 736 F.3d at 1189-90. By allowing the motion-to-strike regime to stand, the Judges, echoing Chief Judge Kozinski's opinion in *Makaeff*, wrote that the resulting amalgamation of anti-SLAPP and Rule 56 procedures has "crippled" the anti-SLAPP statute, resulting in a "hybrid procedure where neither the Federal Rules nor the anti-SLAPP statute operate as designed." *Id.* (*citing Makaeff*, 715 F.3d at 275) (Kozinski, C.J., concurring).

Defendants here, just like the Defendants and the District of Columbia in *3M Company*, also rely heavily on the First Circuit Court of Appeals decision in *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010), where the First Circuit held that Maine's anti-SLAPP statute applied in federal diversity cases because Federal Rules 12 and 56 were "not so broad as to cover the issues within the scope of' Maine's statute." *Id*. at 88. The First Circuit found it significant that, although the federal rules and

the Maine statute may overlap, they address "different (but related) subject-matters," and, thus, the Court concluded there was no conflict. *Id.*

Rejecting the First Circuit's analysis, in which even that Court admitted that Rules 12 and 56 govern "all categories of cases," Judge Wilkins wrote:

> This Court respectfully does not see how Rules 12 and 56 fail to answer the same question as the Anti-SLAPP Act because, as even the First Circuit acknowledged, Rules 12(b)(6) and 56 "are general federal procedures governing all categories of cases." (citation omitted). Based on this Circuit's construction of Rules 12 and 56 as set forth above, those rules govern "all categories of cases" and provide the exclusive means by which a motion may challenge the sufficiency of a claim. This is the *precise* reason why Rules 12 and 56 answer the question in dispute.
>
> Importantly, the First Circuit conceded that, under the Maine statute, a court would be required on a preliminary basis to evaluate material factual disputes that it would not otherwise evaluate on a Rule 56 motion. *3M Co.*, 842 F. Supp. 2d at 107 (emphasis in original).

The First Circuit also held that the Maine statute must apply in federal court because it creates substantive rights, such as substantive legal defenses for a defendant, shifting burdens to a plaintiff, and because it substantively alters the type of harm that is actionable by requiring "actual injury." *Godin*, 629 F.3d at 89-90. Defendants made a similar argument here in the district court. However, as the First Circuit observed, it is "not the province of either Rule 12 or Rule 56 to supply substantive defenses or the elements of plaintiffs' proof to causes of action, state or

federal." *Godin*, 629 F.3d at 89. In *3M Company*, the District and the Defendants argued that the anti-SLAPP Act has created substantive rights, such as an immunity from suit, that the federal rules cannot displace. *3M Co.*, 842 F. Supp. 2d at 108.

In rejecting this argument, Judge Wilkins concluded that "[t]his Court need not conclusively decide whether the D.C. Anti-SLAPP Act creates any substantive rights. Because this Court finds that Rules 12 and 56 answer the question in dispute, the Court need not 'wade into *Erie's* murky waters' to consider that issue. *See Shady Grove*, 559 U.S. at 397-98. Nonetheless, even assuming a substantive right is created, the Anti-SLAPP Act cannot apply in this Court because the D.C. Council has clearly mandated the *procedure* for enforcing any such substantive right that preempts Federal Rules 12 and 56. Indeed, as the preamble to the D.C. Anti-SLAPP Act states, the Act's purpose is: 'To provide a special motion for the *quick and efficient dismissal of strategic lawsuits against public participation* . . ..'" *See 3M Co.*, 842 F. Supp. 2d at 108 (*quoting* 58 D.C. Reg. 741 (Jan. 28, 2011)) (emphasis by court).

As Judge Wilkins noted, "[t]he D.C. Council could have, but chose not to, simply grant a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure that directly conflicts with the operation of the

federal rules as required by the binding precedent of this Circuit. For these reasons, this Court respectfully declines to follow the First Circuit's reasoning in *Godin* that the state law is primarily substantive." *3M Co.*, 842 F. Supp. 2d at 108.

II. EVEN IF THE D.C. ANTI-SLAPP ACT APPLIED IN THIS COURT, PLAINTIFF IS LIKELY TO PREVAIL ON THE MERITS.

In their motions to dismiss, Defendants contended, in effect, that Mr. Abbas serially threatens defamation against anyone who publicly places him in an unflattering light, and they offered to address the numerous factual errors in Mr. Schanzer's article and to even give him an opportunity to write a response denying Mr. Schanzer's allegations. These claims appear to have significantly influenced the district court against Mr. Abbas.

Defendants' offer to allow Mr. Abbas to publish a denial of the allegation that he is growing rich off of nepotism is not an answer. What effect would that have? Of course, he denies the allegation. The allegation remains on the books in cyberspace for all time.

Similarly, publishing a denial of each of the many factual errors is no answer either. The answer is calling out the author on his reckless and unsubstantiated claims in a judicial forum, offering to open up your financial records to prove that you are not a thief, wrongfully "profiting at the expense of the Palestinian people and U.S. taxpayers," and then putting the author to his proof. This is not something that a businessman does lightly. Litigating and investigating claims of

corruption and improper influence both in court and in legislative bodies have been a common occurrence in this country since Harry Truman made himself famous doing just that over 70 years ago.

Defendants also argued at length that each of the alleged factual inaccuracies was not defamatory. But that is no answer. Standing alone, they were not defamatory. The factual inaccuracies were simply supportive of the defamation claim. Defendants seized on Plaintiff's focus on the allegation of growing rich at the expense of Palestinians and U.S. taxpayers as the gravamen of Plaintiff's claim to assert that Plaintiff had abandoned much of his claim. This, too, seems to have significantly influenced the district court against Mr. Abbas.

That the factual inaccuracies were not the heart of the defamation claim obviously was not to say that they were not significant. Mr. Schanzer's numerous factual errors are relevant to Mr. Abbas's defamation claim insofar as Mr. Schanzer makes the factual claims to support his nepotism claim and also insofar as they relate to the negligent and reckless aspects of the defamation claim.

The basis for the claim is the posing of the question, by Jonathan Schanzer, of whether Plaintiff is "profiting at the expense of the Palestinian people and U.S. taxpayers"—and this is not a small matter. *Foreign Policy* is printed in Arabic and available throughout the Middle East. In that region, Mr. Schanzer's words will not be taken as a question. They will not be debated. They will be taken as true.

A. A libelous charge is just as effectively harmful, and therefore actionable per se, whether the harmful effect results from words that directly and unequivocally make a charge or whether it results from words that do so indirectly and by inference.

In a libel case, it is the role of the court to determine whether the challenged statement is "capable of bearing a particular meaning" and whether "that meaning is defamatory." *Restatement (Second) Of Torts §* 614(i), at 311 (1977); *see also McBride v. Merrell Dow and Pharm., Inc.*, 717 F.2d 1460, 1463 (D.C. Cir. 1983). In making this determination, a court is to consider both the words themselves and the entire context in which the statement occurs. *See Ollman v. Evans*, 750 F.2d 970, 982-83 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

Under District of Columbia law, a statement is defamatory "if it tends to injure [a] plaintiff in his trade, profession or community standing, or lower him in the estimation of the community." *Olinger v. Am. Say. & Loan Ass'n*, 409 F.2d 142, 144 (D.C. Cir. 1969). The publication must be considered "as a whole, and in the sense in which it would be understood by the readers to whom it was addressed." *Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) (en banc). *See White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.D.C. 1990) ("The usual test applied to determine the meaning of a defamatory utterance is whether it was reasonably understood by the recipient of the communication to have been intended in the defamatory sense.") (*quoting* F. Harper, et al., *The Law of Torts* § 5.4 (1986)) (emphasis omitted).

If statements appear to be "at least capable of a defamatory meaning, whether they [are] defamatory and false are questions of fact to be resolved by the jury." *Moss*, 580 A.2d at 1023 (*citing Olinger*, 409 F.2d at 144). The jury's proper function, in turn, is to determine whether a statement, held by the court to be capable of a defamatory meaning, was in fact attributed such a meaning by its readers. *Restatement (Second) Of Torts* § 614 (2).

A statement can be defamatory either because of what is expressly stated or because of an implied meaning. Defamation by implication "stems not from what is literally stated, but from what is implied." *White*, 909 F.2d at 518.

A plaintiff can assert a defamation per se claim even when the alleged defamation is by implication. "A slanderous charge is actionable per se, whether the words directly or indirectly, by intimation or innuendo, contain slander." *Wolff v. Middlebrooks*, 256 Ga. App. 268, 568 S.E.2d 88, 90 (2002) (citation omitted). "The slanderous charge is just as effectively harmful, and therefore actionable per se ... whether the harmful effect results from words which directly and unequivocally make a charge or whether it results from words which do so indirectly or by inference." *Id.* "It is the harmful effect of defamatory language as it is understood which renders it actionable per se, and not its directness or unequivocal nature." *Id.*; *see also Harcrow v. Struhar*, 236 Ga.App. 403, 511

S.E.2d 545, 546 (1999) ("Whether stated directly or by implication or innuendo, it is libelous per se to falsely state that a person is guilty of a crime.").

Here, the libelous charge is not any less harmful because the author deftly made his serious accusations with the journalistic device of putting them in a rhetorical question rather than a declaration. Doing so should not insulate an author from the damage caused. Indeed, posing such a serious allegation as a mere question encourages the reader into believing it even more.

B. Read in context, the accusatory questions posed by the Schanzer article can reasonably be read as assertions of false facts.

Defendants contended below that the questions "Are the sons of the Palestinian president growing rich off their father's system?" and "Have [the Brothers Abbas] enriched themselves at the expense of regular Palestinians and even U.S. taxpayers?" "cannot be read as assertions of facts, much less false facts . . . rather, they are an invitation to ask. . .." This is sophistry.

Adopting Defendants' argument, the district court concluded: "the two questions posed in the Commentary cannot reasonably be read to imply the meaning that Mr. Abbas alleges – that he 'is wrongfully and possibly criminally getting rich off of his 'father's system' or that he is enriching himself 'at the expense of regular Palestinians and even U.S. taxpayers' – nor can they be read to imply the assertion of objective facts. [cit. omitted] Though the conclusions Mr. Abbas draws are possible answers to the questions posed by Mr. Schanzer, the

questions invite the reader to form her own judgments regarding the relationship between Mr. Abbas's family ties and his admittedly great wealth. The reader could arrive at a number of different conclusions . . . That Mr. Abbas would prefer the readers to not answer the questions in the affirmative is not sufficient to support his defamation claim." (JA-570 – 571) (Decision at 27-28) (citations omitted).

With all due respect, the court was viewing the issue as if the world around it did not exist. Posing such questions about a businessman, a politician or even a judge is too serious to ignore.

The fact that the article can be reasonably read to imply the meaning Mr. Schanzer alleges is best shown by the fact that the comments following the article and the links to the article, when they are responding to the article, overwhelmingly understand the article to not just imply but to be actually making the claims that Mr. Schanzer alleges (*see* *http://www.foreignpolicy.com/articles/2012/06/05/the_brothers_abbas*). Some agree, some disagree, but all understand the article in the same manner.

C. Even if the defamatory questions are deemed to be opinions, they are actionable under *Milkovich* because they "contain provably false factual connotations."

The Schanzer article reads as a news story purportedly shedding new light on an old story involving allegations of corruption in the Palestinian Authority. It is by no means a "mere *opinion*" piece as Defendants contended below in

defending against Plaintiff's defamation claim. The article's reference to 'new emerging details' signals that this is news reporting, not *mere opinion*, as does the citation throughout the article to unidentified Palestinian sources which are undisclosed.

As Defendants acknowledge, even if the libelous questions are deemed to be the author's opinions, they are actionable if they "contain a provably false factual connotation." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990). They do, in fact, contain provably false factual connotations. As noted above, whether Plaintiff is "growing rich off [his] father's system"—that is, whether he is growing rich from alleged corruption in the Palestinian Authority is certainly a provable fact by investigating Plaintiff's relevant financial records to see what business he does, how he got it, and with whom he does it.

Second, the two statements at issue, posed as questions, are not statements of opinion protected by the First Amendment because they do contain a provably false connotation. (JA-571 – 575) (*See* Decision at 28-32). The Court's decision states that the questions Mr. Schanzer "purportedly answers is whether Mr. Abbas and his brother are growing rich off their father's political power and connections, not whether they are growing rich as a result of generalized corruption in the Palestinian Authority." (JA-574) (Decision at 31) (citations omitted).

Adopting Defendants' argument, the district court concluded that "even [if] the relationship between Mr. Abbas's business success and corruption in the PA were at issue in the Commentary . . . '[g]iven the myriad of factors that may have contributed to Plaintiff's wealth—his education, his experience, his skill, and indeed, his connections and opportunities—it would be impossible to prove that Plaintiff grew wealthy *solely* because of his father' or *solely* by virtue of corruption in the Palestinian Authority." (*Id.*) (emphasis added) (quoting Defendants' MTD at 10).

The question is not whether Mr. Abbas's business success is *solely* attributable to his father's power and connections. The question is whether there is *any* evidence of an improper or corrupt connection between Mr. Abbas's business success and his father's power and connections.

Defendants' argument is essentially that Mr. Schanzer is exempt from liability because he can imply corruption but cannot be required to prove that Mr. Abbas is wrongfully profiting from his father's system at the expense of the Palestinian people and U.S. taxpayers. If something as inflammatory and damaging as that cannot be proven, then it should not be published. By bringing this lawsuit, Mr. Abbas will be required to open up his records to clear his name. That is not something that anyone does lightly. Defendant Schanzer, in particular,

who writes extensively about Palestinian corruption, should welcome the opportunity to get access to those records.

Finally, Defendants argued in the district court that the libelous questions are not actionable because the facts contained in the article provide a basis for a reader to draw a wide range of contrary conclusions, running the gamut from Plaintiff being a self-made man to his exploiting his father's system for personal gain and anything in between. This argument typifies the fatal flaw in Defendants' motion on the merits, which is that the motion mischaracterizes the language used in the Schanzer article, the context of the language, and the extent to which the language is verifiable. *See Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc).

In considering the parties' arguments, the Court should "draw on its judicial experience and common sense." *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Defendants' characterizations do not pass muster under any reasonable, common sense reading of the Schanzer article.

D. The Complaint alleges that Defendants acted with the requisite fault.

Plaintiff disputes Defendants' claim that he is a limited purpose public figure, who must establish that Defendants acted with actual malice in publishing the Schanzer article. To prevail on this claim, Defendants must establish that: (1) there is a pre-existing public controversy, (2) Plaintiff has played a non-trivial role in the controversy, and (3) the alleged defamatory statements are germane to

Plaintiff's participation in the controversy. *See, e.g., Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980).

Plaintiff acknowledges that there is a public controversy concerning allegations of corruption within the Palestinian Authority. The question is whether Defendants can bootstrap the specific allegations of corruption contained in the Schanzer article concerning Plaintiff to the existing broader general public controversy concerning the Palestinian Authority so as to make that part of the public controversy. The article attempts to make a similar bootstrapping argument to support the rhetorical accusation that Plaintiff is profiting from PA corruption with no factual support other than the vague claims of the author's unidentified sources.

This is not a situation like the cases relied on by Defendants in the district court where the alleged limited purpose public figure is the actual maker of the public controversy or inserts himself into a public controversy or uses his influence to advocate and practice controversial policies. Rather, this is a situation where others, most notably Mr. Schanzer and his purported sources, are widening a public controversy to slander a public figure's family and a member of the family is simply defending himself against the slander. Mr. Schanzer's article and his comments before Congress demonstrate that Mr. Schanzer is the one making the public controversy in this case.

In a case like this, a party does not become a limited purpose public figure by virtue of defending himself from the slanderous claims by the controversy maker such that he must prove actual malice to state an actionable libel claim. *See Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979) (concluding that "[c]learly those charged with defamation cannot by their own conduct, create their own defense by making the claimant a public figure" and rejecting defamation defendant's claim that a general "concern about public expenditures" constituted a sufficient controversy to make the claimant a public figure because otherwise everyone who received or benefited from myriad public grants could be classified as a public figure).

In addition, the fact that Plaintiff has done much work for the Palestinian people, including ensuring the repatriation to the Palestinian National Fund of $45 million held by Orascom Telecom and ensuring the resumption of U.S. and Canadian aid to the UN Relief and Works Agency for Palestinian Refugees, has not, contrary to Defendants' claim in the district court, "necessarily implicated him in the controversy surrounding the Palestinian Authority." The controversy surrounding the PA involves allegations that the money in the PA's coffers is being pilfered. Plaintiff's involvement with the PA is just the opposite—that is, adding to the coffers, not pilfering them.

In sum, Plaintiff is not a limited purpose public figure in this case. A contrary finding would turn the limited-purpose-public-figure rule on its head because the purported pre-existing public controversy at issue is a controversy largely made by the alleged libeling party, the Plaintiff's involvement in the controversy is limited to defending himself from the defamatory allegations, and the alleged defamatory statements that are germane to the controversy are part and parcel of the controversy created by the libeling party.

E. While Plaintiff does not have to establish actual malice, the allegations of the complaint, once proven, will permit such a finding in this case.

Plaintiff disputes that he must show actual malice because, as discussed above, he is not a limited purpose public figure in this case. Nonetheless, Plaintiff submits that the allegations of the complaint, once proven, will support a finding of actual malice. The same evidence establishes Defendants' negligence.

To establish actual malice, the question is whether Defendants entertained serious doubts as to the truth of the libel contained in the Schanzer article such that their publication of the article evinces a reckless disregard for the truth or falsity of the article's contents. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). As Defendants acknowledge, actual malice should "not be confused with the concept of malice as an evil intent or motive arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

At this pleading stage, the evidence that Defendants entertained serious doubts as to the truth of the libel contained in the Schanzer article is that neither the article itself, nor any of the sources upon which Mr. Schanzer relied for his libelous innuendo, even remotely support the libel. To the contrary, as Defendants acknowledge in a different context in the district court, the sources cited by Mr. Schanzer support Plaintiff's denial that there is any evidence of wrongdoing connected with the contract work obtained by Plaintiff. The allegations in the complaint set forth the groundwork for the discovery that will show malice under the standards required by the court.

The allegations in the complaint adequately plead facts, and may be proven, as to Defendants, and Defendant Schanzer in particular. The motive was to use the mere fact that Plaintiff has successful businesses to support the libelous accusations of corruption within the government of his father, President Abbas. Asking the reader to consider whether a son is growing rich off his father's government and enriching himself at the expense of an impoverished people who rely on aid from other countries and U.S. taxpayers will certainly "tend[] to injure plaintiff in his trade, profession or community standing or lower him in the estimation of [his] community." *See Olinger*, *supra*, 409 F.2d at 144. That is the legal standard.

At this point, all that Plaintiff asks is that Defendants' motion to dismiss be denied and that he be allowed to clear his good name by presenting himself for deposition and opening up his books for inspection. Plaintiff also seeks discovery of Defendants so that he can show the malice that Defendants argue cannot be proven.[5]

The scurrilous allegation that Plaintiff is growing rich off of his father's alleged corruption is a very serious charge and is very damaging to Plaintiff's reputation in the Middle East where reputation means everything. *See Rosenblatt v. Baer*, 383 U.S. 75, 86, 92-93 (1966) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. . . . The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.") (Justice Stewart, concurring opinion).

But even worse is the possibility that the Schanzer article's unsubstantiated, reckless accusations could be life threatening for Plaintiff and his family in a

[5] The support for Defendants' libelous innuendo is nothing more than Mr. Schanzer's 'whispered' discussions with several Palestinians, which itself, for all the article reveals, is nothing more than unsubstantiated libelous innuendo.

region where there is great poverty and an angered member of the community might be incited to violence. Defendant Schanzer, who professes intimate familiarity with the Palestinians and their culture, certainly is aware of the possible consequences of his reckless reporting.

What the Court never heard because of the anti-SLAPP dismissal of Mr. Abbas's case is the evidence placing Mr. Schanzer's article in the context of Mr. Schanzer's body of work and explaining his motivations and his reasons for tarring Mr. Abbas and his brother along with their father. Some of this evidence is included in Mr. Schanzer's published work, and, any unpublished evidence is in Mr. Schanzer's control.

Mr. Schanzer is on a mission concerning the current Palestinian leadership. *See, e.g.*, "State of Failure: Yasser Arafat, Mahmoud Abbas, And the Unmaking of the Palestinian State." http://www.amazon.com/State-Failure-Mahmoud-Unmaking-Palestinian/dp/1137278242/. (Published October 29, 2013). That mission has now extended to President Mahmoud Abbas's family, which is not only provocative and unfounded, but also has the effect of putting a target on President Abbas's family, specifically his son, plaintiff Yasser Abbas and Yasser's children.

The anti-SLAPP act should not apply under the Federal Rules. But, if the Court finds otherwise, it was not intended to protect sophisticated people in the

political arena like Defendants. The statute should not be allowed to be used to silence people like Plaintiff.

CONCLUSION

For the foregoing reasons, the Court should reverse the order below and issue an order denying Defendants' Special Motion to Dismiss the Complaint pursuant to the D.C. anti-SLAPP Act and remanding the matter to the district court for further proceedings.

Dated: New York, New York
April 30, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 13,142 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: New York, New York
April 30, 2014

/s/ Louis G. Adolfsen
LOUIS G. ADOLFSEN

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: New York, New York
April 30, 2014

/s/ Louis G. Adolfsen
LOUIS G. ADOLFSEN

STATUTORY ADDENDUM

D.C. Statutes, Title 16, Chapter 55
Strategic Lawsuits Against Public Participation
(D.C. Code § 16-5501, 5502, 5504)

DC ST § 16-5501
§ 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.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

DC ST § 16-5502

§ 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.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c) (1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

DC ST § 16-5504

§ 16-5504. Fees and costs.

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney 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.