IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

CENTER FOR ADVANCED DEFENSE STUDIES	:	
	:	**Case No. 2014 CA 002273 B**
Plaintiff,	:	**Judge Thomas J. Motley**
	:	**Next Court Date: 8/26/14 11:00 AM**
v.	:	**Event: Motion Hearing**
KAALBYE SHIPPING INTERNATIONAL, ET AL.	:	
Defendants.	:	

PLAINTIFF'S REPLY
TO
DEFENDANT'S OPPOSITIONS
TO
PLAINTIFF'S RULE 12(B)(6) MOTION TO DISMISS
AND
PLAINTIFF'S SPECIAL MOTION TO DISMISS

August 11, 2014

WARD & WARD, PLLC

BY: */s/ Daniel S. Ward*
Thomas J. Ward (D.C. Bar No. 155838)
Daniel S. Ward (D.C. Bar No. 474339)
Taimur Rabbani (D.C. Bar Pending)
2020 N Street, N.W.
Washington, D.C. 20036
Phone: (202) 331-8160
Email: tom@wardlawdc.com
Email: dan@wardlawdc.com
Email: trabbani@wardlawdc.com

Counsel for Plaintiff
Center for Advanced Defense Studies

I. INTRODUCTION

The Odessa Network, ("The Report") using a data analytics platform widely used by the United States Government,[1] reaches a number of accurate, undisputed inferences. It infers, and KAALBYE cannot dispute, that KAALBYE facilitates Russian arms transfers to active war zones, and that KAALBYE does so because of its direct connections with high levels of the Russian and former Ukrainian governments. KAALBYE asks the Court to find "malicious" the use of this reliable technology to make such undisputed inferences.

KAALBYE's contradictory positions belie the infirmity of its arguments. Previously, KAALBYE attacked C4ADS for using commercial, subscription AIS data, rather than obtaining satellite data, which KAALBYE called "the most accurate available data." Counterclaims ("CC"), ¶¶ 165, 167-68, 173. Conversely, KAALBYE now asserts satellite data "is not yet reliable" and that "subscription-based AIS data providers are more accurate, more complete, and more commercially motivated to derive improved coverage and accurate data for global tracking of vessels." KAALBYE Opposition Brief ("Oppo."), Whyte Declaration, ¶¶ 8, 11. KAALBYE championed *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947 (D.D.C. 1976) as "persuasive authority" that corporations must show malice in libel cases involving topics of public interest. KAALBYE Motion to Dismiss Memo ("KAALBYE MTD"), p. 26, n.10. C4ADS agreed. KAALBYE now attacks C4ADS for using the same case for the same proposition. Oppo., p. 5.

KAALBYE will say whatever is expedient as part of its effort to obfuscate truth about parties that enable (and profit from) the flow of arms. KAALBYE cannot show that it is likely to succeed on the merits. It complains of allegations and inferences made by the Washington Post – not C4ADS. KAALBYE's counterclaims should be dismissed with prejudice.

[1] Including, but not limited to, the CIA, FBI, DOJ, DOD, and the NSA.

II. ARGUMENT

A. KAALBYE'S Procedural Arguments are Meritless

To get around the obvious infirmities in its allegations, KAALBYE makes two procedural arguments. First, KAALBYE asks this Court to ignore its deficient counterclaims under Rule 12(g). Second, KAALBYE asks this Court to only require of it a "prima facie" showing to survive the Special Motion to Dismiss. These arguments both fail.

First, Rule 12(g) does not preclude a Rule 12(b)(6) motion. The District of Columbia Court of Appeals has rejected KAALBYE's argument. In *Higgs v. Higgs*, 472 A.2d 875 (D.C. 1984), the defendant initially filed a 12(b)(2) motion to dismiss. That defendant subsequently filed a 12(b)(6) motion to dismiss. Like KAALBYE, the *Higgs* plaintiff asserted that the 12(b)(6) motion was barred under Rule 12(g). *Id* at 877. The Court of Appeals disagreed, stating:

> [Plaintiff] asserts that [Defendant's] filing of a motion to dismiss for lack of personal jurisdiction pursuant to Super.Ct.Civ.R. 12(b)(2) barred him from filing the subsequent motion to dismiss for failure to state a claim upon which relief could be granted. This argument is without merit, as Super.Ct.Civ.R. 12(g) and (h)(2) provide that the defense of failure to state a claim upon which relief can be granted is not waived by prior assertion of any of the defenses enumerated in Super.Ct.Civ.R. 12(b).

Id. at 877-78. The Federal Courts concur. As one Circuit Court explained:

> Rule 12(h)(2) specifically excepts failure-to-state-a-claim defenses from the Rule 12(g) consolidation requirement. The policy behind Rule 12(g) is to prevent piecemeal litigation in which a defendant moves to dismiss on one ground, loses, then files a second motion on another ground. Rule 12(h)(1) enforces this consolidation requirement by adding a waiver rule . . . The Rule 12(h)(1) waiver rule applies only to the defenses listed in Rule 12(b)(2)–(5) (lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process). Failure-to-state-a-claim defenses are thus excepted from the Rule 12(g)(2) consolidation requirement and not included in the Rule 12(g)(1) waiver rule.

Ennenga v. Starns, 677 F.3d 766, 772-73 (7th Cir. 2012) (citations omitted).

Even if this Court were to agree with KAALBYE, the Special Motion to Dismiss would

be unaffected: a Special Motion to Dismiss is not a Rule 12 motion. It is not, as KAALBYE wrongly asserts, raised "in an answer . . . under Rule 12 or . . . under Rule 56." Oppo. p. 8. Instead, it is raised by "Special Motion" and must be so raised within 45 days. D.C. Code § 16-5502.[2] Bringing the Special Motion with a separate Rule 12(b)(6) motion is precisely how other litigants have brought (and prevailed on) a Special Motion to Dismiss under the D.C. Anti-SLAPP Act ("the Act"). *See*, *e.g.*, *Abbas v. Foreign Policy Group, LLC*, 975 F. Supp. 2d 1 (D.D.C. 2013). Rule 12(f) requires C4ADS to file a Motion to Strike within 20 days. Super. Ct. Civ. R. 12(f). The Act requires C4ADS to file a Special Motion within 45 days. D.C. Code § 16-5502(a). Were a Special Motion a Rule 12 motion, as KAALBYE seeks, the Act's 45-day provision would be meaningless. Denying the Special Motion on these grounds would be unjust. Cases of this import should be decided on merit, not picayune procedural interpretations. *See Garces v. Bradley*, 299 A.2d 142, 144 (D.C. 1973)

Further, the Court can consider these issues *sua sponte*. *See*, *e.g.*, *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir. 1992). Alternatively, it can join the motions. Such relief would be particularly warranted here, where (1) the motions are undecided, (2) there is no prejudice, (3) rejecting C4ADS's 12(b)(6) motion would undermine the very reason rule 12(g) exists, by needlessly delaying adjudication of a fully briefed 12(b)(6) motion, and (4) to do otherwise would permanently deny C4ADS the Act's protection.

Second, to survive a Special Motion, KAALBYE needs more than a "prima facie" showing. They need to show they are "likely to succeed." D.C. Code 16-5502(b). The Act states:

[2] The only authority KAALBYE cites, to have this Court permanently deny C4ADS its rights on the basis of an earlier-filed motion to strike, comes from a single district court opinion in Illinois. Oppo. at 8. The Illinois act is vastly different from the D.C. Anti-SLAPP act – it does not create a special motion to dismiss, it creates substantive "immunity" that the D.C. statute does not, and it does not have a time limit in which that unique "immunity" defense must be raised. 735 ILCS 110/1-99. The distinction between a "special motion" that must be raised in 45 days and a "defense" that can be raised at any time cannot be ignored.

> 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.

Id. (**emphasis added**) The movant (C4ADS, *not* KAALBYE) must make a *prima facie* showing, after which the claim should be dismissed unless the respondent (KAALBYE) "demonstrates that the claim is *likely to succeed on the merits*." KAALBYE improperly conflates "prima facie" and "likely to succeed on the merits." The D.C. Council chose its words carefully. Only one party (C4ADS) must make a "prima facie" showing while the other (KAALBYE) must show likelihood of success. Otherwise, the Act's language is meaningless.

KAALBYE ignores the only District of Columbia Court of Appeals decision to date that addresses the Act – a decision that clearly rejects KAALBYE's desired lower standard. In *Doe v. Burke*, the Court of Appeals granted interlocutory review to a defamation defendant, then granted defendant's Special Motion because plaintiff was not "likely to succeed on the merits." 91 A.3d 1031 (D.C. 2014).[3] The *Burke* Court determined plaintiff was a limited-purpose public figure, then held plaintiff was not likely to succeed in showing that defendant's statements were malicious. *Id* at 1045. In so holding, the *Burke* Court did *not* look for the "prima facie" showing KAALBYE suggests. Rather, it carefully examined facts relevant to defendant's state of mind. *Id*. KAALBYE need make more than a "prima facie" showing. In so doing, this Court can and should consider the items C4ADS has already presented.

[3] *Burke* concerned a "Special Motion to Quash" under the Anti-SLAPP Act. 91A.3d 1031. A Special Motion to Quash differs from a Special Motion to Dismiss because it pertains to subpoenas, but the burdens set forth in the Act are identical for either Special Motion. Both motions require that a party make "a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest," at which point the motion is granted unless the responding party "demonstrates that the underlying claim is likely to succeed on the merits." D.C. Code §§ 16-5502, 16-5503.

B. KAALBYE Is Not Likely To Show Negligence, Let Alone Malice

KAALBYE cannot show that C4ADS acted negligently. Regarding "AIS data," C4ADS subscribed to and obtained information from commercial AIS vendors,[4] *See generally* Report, p. 68, n. xiv. – the type of data vendor KAALBYE itself uses, and the type of data vendor KAALBYE's expert acknowledges is "more accurate," "more complete," and "commercially motivated to derive improved coverage and accurate data." Whyte Decl., ¶ 11**.** Further, C4ADS cannot plausibly be negligent by not relying on KAALBYE's proprietary data, which KAALBYE zealously protects. If reliance on AIS data rather than proprietary data is negligence, it would be impossible to publish reports on arms shipping. Further, a Google search shows numerous reputable reports that rely on AIS data, *not* proprietary data.[5]

With regards to the remaining Counterclaims, C4ADS was not negligent to rely on open-source data when an explicit, primary purpose of the Report is to show the utility of disparate open-source data. Further, if this was negligent, it would eviscerate the ability to use open-source data, the type of data on which one must rely when writing on an industry as opaque as international arms shipment – it would stifle dialogue on this issue of public concern. Report, p. 67. While this may be KAALBYE's objective, it is an inaccurate statement of the standard of care, and obliterates C4ADS' Constitutional right. Further, it is not negligent to use Russian and Ukrainian news articles when writing on Russian or Ukrainian entities – if anything, it would be negligent to ignore such sources, as KAALBYE proposes. It is also not negligent to rely on, e.g., the New York Times, the BBC, the AP, KAALBYE's statements, statements from the U.S.

[4] KAALBYE attempts to conflate, or its expert does not distinguish, "open-source" from "free" – the terms are different. As the Report acknowledges, the open-source AIS data came in part from multiple commercial sources. *See, e.g.,* Report, p. 68, n. xiv

[5] *See*, *e.g.*, Christopher Johnson and Peg Mackey, *Exclusive: Iran ships "off radar" as Tehran conceals oil sales*, Reuters, Apr. 13, 2012, available at http://www.reuters.com/article/2012/04/13/us-iran-oil-tracking-idUSBRE83C0TS20120413.

Navy, Congressional testimony, and other credible sources on which C4ADS relied. Additionally, it is not negligent to not rely on articles from 2005 regarding the cruise missile incident, especially given evidence that KAALBYE's role in that shipment became known in 2006. *See* Complaint**,** Ex**.** 25**,** English Translation, p. 5 **(**"In 2004-05 this scandal was discussed . . . the information about the "Kaalbye Shipping" participation appeared only in June 2006."). KAALBYE cannot show negligence, because there is none.

Because KAALBYE cannot show negligence, it also cannot show malice, which is the proper standard *sub judice*. KAALBYE is a public figure or public official. KAALBYE's founder and principal was at all relevant times a well-known government official in Ukraine. KAALBYE is directly connected to the highest levels of the Russian government. KAALBYE has repeatedly been featured in prominent international publications and mentioned in testimony before Congress. KAALBYE is at least a limited-purpose public figure. It is one of the most active facilitator of Russian arms shipments to conflict zones. "Like any public figure," KAALBYE has "exposed [itself] to comment and criticism by virtue of the prominent role [it] has assumed in this controversy." *Burke*, 91 A.3d at 1045. Finally, and as KAALBYE previously informed this Court, "corporations suing for defamation mass mediate defendants on issues of legitimate public concern must allege actual malice." KAALBYE MTD at n. 10, quoting *Martin Marietta Corp.*, 417 F. Supp. At 954. KAALBYE is tied to the highest levels of the Russian and former Ukrainian governments. It transports arms to areas where civilians are annihilated and U.S. security is undermined. It is featured in press articles and congressional testimony. It can reasonably expect to be discussed. The malice standard applies. KAALBYE cannot show malice, because there is none. Counts I-VIII of the Counterclaims should be dismissed with prejudice.

C. KAALBYE Is Not Likely to Show That The Statements are Actionable

The Report plainly sets forth its sources, including subscription AIS data (that KAALBYE itself acknowledges is accurate and reliable), statements from KAALBYE itself, statements from government officials, and other sources on which C4ADS rightly relied. The Report then repeatedly states its findings as, e.g., "inferential," "inductive," an "analysis" of correctly stated data, "circumstantial," a "hypothesis," and "insight" derived from stated data. C4ADS provides its methodology, which makes clear that C4ADS does not claim to have independent data but is relying on accurately stated data. *See* Memo in Support of Motion to Dismiss, pp. 7-8. Such statements, offered not as truth, but as an interpretation or analysis of accurately stated data, are not actionable in defamation. *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 597 (D.C. 2000).[6] C4ADS cannot be liable for making inferences from reliable facts. Counts I-VIII of the Counterclaims should be dismissed, with prejudice.

D. C4ADS Explicitly Disclaims the "False Implications" That KAALBYE Presumes

Counts II – V and Count VII all rest on "false implications" of "illegal" activity – Counterclaims ("CC"), ¶¶ 218, 224, 231, 237, 251. The Report explicitly disclaims those implications. The Report states, e.g., that judging legality is "beyond the Report's purview," *Id*., Ex. B at 62, n. ix, and that the Report "is not intended to imply participation in illegal activity, and a judgment as such is far beyond the purview of this research." Report, p. 4. KAALBYE's only response to this dispositive issue is to call these unequivocal disclaimers "flimsy." This Court should exercise "careful exegesis" in defamation by "implication" claims *Guilford*, 760 A.2d at 596. Counts II – V and VII of the Counterclaims should be dismissed with prejudice.

Likewise, the Report's *many* disclaimers regarding AIS data, alternate explanations for

[6] This is easily distinguished from the defamatory statements made by other Defendants, because those statements explicitly misstate the contents of the Report and the contents of the Washington Post correction. *See*, *generally*, Opposition to KAALBYE Motion to Dismiss. Here, by contrast, C4ADS accurately describes data it accumulated.

data gaps, C4ADS's characterization of data as "circumstantial" (not "proven") and of the voyages as "suspicious" (not "known") all nullify the "unmistakable" false implication on which KAALBYE rests Count I. Oppo., p. 12. Further, nowhere does the Report state that KAALBYE tampered with safety beacons. The Report states, accurately, that there are discrepancies in the data on 60,000+ port calls and 10,000+ ships analyzed, but there are a number of reasons such discrepancies could exist. The Report does not "unmistakably convey" that KAALBYE tampered with equipment. Oppo., p. 12. Defamation by "implication" requires more. *Guilford,* 760 A.2d at 596. Count I should be dismissed with prejudice.

E. KAALBYE Is Not Likely to Show that The Report is Not Substantially True

KAALBYE's cherry-picks statements regarding its safety practices as the "sting" or "gist" of the Report. Those statements are not the "gist" of the Report. KAALBYE acts as a proxy for the Russian government. It has high-level connections to the Russian and former Ukrainian governments. It transports weapons to conflict zones. This is the gist of the Report as it pertains to KAALBYE – as evidenced in the Report's Executive Summary and Conclusion. These statements are uncontested. Because KAALBYE concedes that the "gist" or "sting" of the Report as it pertains to KAALBYE as at least substantially true, Counts I-VIII should be dismissed with prejudice.

F. KAALBYE Is Not Likely to Show that a Picture of Armed Guards Defamed It

KAALBYE is not likely to succeed in showing that it is defamatory to state that an entity has armed guards at its place of business. Many legitimate enterprises employ guards. The ten story building known as the "Maritime Business Center" consists primarily of KAALBYE's offices – Report, p. 39. Even if incorrect, the reporting of these guards as "Kaalbye Guards" is at least substantially true, not malicious, and causes KAALBYE no harm. Count VI should be

dismissed with prejudice.

G. KAALBYE's Is Not Likely to Show that the Report Damaged It

KAALBYE had a pre-existing reputation, as, e.g., (1) an entity that made a "non-precise oral declaration" of its cargo while transporting arms to Angola during the war there, Oppo., p. 14, (2) an entity that transported arms to Syria in the midst of the atrocities there, (3) an entity whose principal admitted its connection to the *Faina*, and (4) an entity linked by press articles and government officials to the transfer of cruise missiles to Iran. C4ADS could not have plausibly harmed KAALBYE's pre-existing reputation. Counts I-VIII should be dismissed with prejudice.

WARD & WARD, PLLC

August 11, 2014

BY: */s/ Daniel S. Ward*
Thomas J. Ward (D.C. Bar No. 155838)
Daniel S. Ward (D.C. Bar No. 474339)
Taimur Rabbani (D.C. Bar Pending)
2020 N Street, N.W.
Washington, D.C. 20036
Phone: (202) 331-8160
Email: tom@wardlawdc.com
Email: dan@wardlawdc.com
Email: trabbani@wardlawdc.com

Counsel for Plaintiff
Center for Advanced Defense Studies

CERTIFICATE OF SERVICE

I do hereby certify that on this 11th day of August 2014, I served a copy of the foregoing by filing electronically with the Courts electronic filing system, CaseFileXpress, upon the following counsel of record:

Andrew M. Friedman
SQUIRE PATTON BOGGS (US) LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000
(202) 457-6315 Fax
Andrew.friedman@squirepb.com

Counsel for Defendant Kaalbye Shipping International

Benjamin J. Lambiotte
GARVEY SCHUBERT BARBER
1000 Potomac Street, NW, 5TH Floor
Washington, DC 20007-3501
(202) 965-7880
(202) 965-1729 Fax
blambiotte@gsblaw.com

Andrew J. Goodman
GARVEY SCHUBERT BARBER
100 Wall Street, 20th Floor
New York, New York 10005-3708
(212) 965-4534
(212) 334-1278
agoodman@gsblaw.com

Counsel for Defendants Global Strategic Communications Group and Peter Hannaford

/s/ Daniel S. Ward

Daniel S. Ward