

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

CENTER FOR ADVANCED)	
DEFENSE STUDIES,)	
)	
Plaintiff/Counter-Defendant,)	
)	Case No. 14-0002273
v.)	Judge Thomas J. Motley
)	Next Court Date: 12/19/14 9:15 a.m.
KAALBYE SHIPPING INTERNATIONAL,)	Event: Motion Hearing
)	
Defendant/Counter-Plaintiff, et al.)	
)	
)	
)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES
REGARDING ACTUAL MALICE OF C4ADS

Defendant/Counter-Plaintiff Kaalbye Shipping International Ltd. (“Kaalbye”), by and through undersigned counsel and pursuant to District of Columbia Superior Court Rule 12(b)(6) and DC Code § 5501 *et seq.* (the “DC SLAPP Law”) hereby submits this reply memorandum in support of its contention that Plaintiff/Counter-Defendant Center for Advanced Defense Studies (“C4ADS”) defamed Kaalbye with actual malice.

The C4ADS Opposition (“Opp. Br.”) is misleading on key issues and shows why its motions to dismiss should be denied. Mr. Mesko’s self-serving disclaimers cannot alter the facts, and the Report portrayed itself as a research effort – not guesswork. The information about C4ADS’s research methods proves that C4ADS willfully avoided several types of data, readily available from the providers it used, that disprove its statements about Kaalbye and its erroneous premise that “AIS discrepancies” and “signatures” are consistent with arms shipments facilitated by disabled AIS transponders. C4ADS does not deny that multiple sources of information – satellite tracking, comprehensive AIS transponder data, vessel itineraries, deck logs, and

shipping records prove that none of Kaalbye's vessels traveled to Syria in the first six months of 2013 – when “Russia allegedly surged heavy weapons shipments to Syria.”¹ C4ADS does not deny it misled its readers about quarterly International Maritime Organization (“IMO”) reports of AIS “discrepancies,” that those reports uniformly show no IMO member reported any Kaalbye vessel with unexplained AIS gaps or problems. C4ADS also engages in obvious subterfuge by misleading the court about a source that it knew contradicted its report and its knowledge that years-old news sources it cited on were not reliable.²

**C4ADS's Statements About Kaalbye Maliciously
Misled the Public About the Underlying Facts**

C4ADS has finally revealed the sources of its AIS data research, and that information conclusively shows that its research intentionally avoided data that disproved its results-oriented statements about Kaalbye. Indeed, the greatest “known limitation” in the data was C4ADS's knowing decision to avoid several components of AIS data, particularly the most complete and accurate AIS *and satellite* data at its disposal. C4ADS collected limited data, avoided more detailed analysis afforded by its subscription sources, and never bothered to give Kaalbye the opportunity to address its findings. Prior to any litigation in this case, Kaalbye met with C4ADS and allowed it to review AIS data, Inmarsat satellite data, itineraries, and other information that showed its statements about Kaalbye were false. No correction was forthcoming, whereas a reputable journalist from the Washington Post reviewed the data, conducted additional research, and issued a correction. C4ADS's opposition does not explain why it quickly pulled the original version of its Report within ten days of publication, then republished it with a number of pages

¹ Ex. 1 to Am. Compl., C4ADS Report, p. 68.

² C4ADS's repeated self-serving statement that Kaalbye has high level ties to the Russian government is irrelevant. Kaalbye denies this unsupported opinion.

omitted from it. Evidence surrounding prior revisions would likely show C4ADS already knew its Report had false and defamatory content.³

Failure to collect Suez and Gibraltar Data: C4ADS intentionally avoided data that disproved its false statements by limiting its data collection to “port calls” but avoiding two obvious and crucial data points – the Straits of Gibraltar and the Suez Canal. In stating that AIS transponder “discrepancies” could be consistent vessels disappearing from AIS coverage in the Mediterranean to deliver arms to Syria or elsewhere, C4ADS clearly knew that gaps in AIS coverage are consistent with travel over the open ocean. Avoiding Gibraltar and Suez AIS data showed conscious disregard for the truth, that many vessels commonly make perfectly innocent voyages that have nothing to do with arms deliveries or AIS transponder tampering. C4ADS knew the Mediterranean Sea is a confined area, and the only way a vessel can depart is via Gibraltar and the Suez – heavily travelled shipping lanes that C4ADS cannot deny have excellent AIS coverage. Yet C4ADS, who are clearly sophisticated and educated, failed to collect data that would show vessels departing the Mediterranean for points East (via the Suez) or West (via Gibraltar) to evaluate whether vessels traveled on that course rather than “disappearing” to deliver arms to Syria.

C4ADS’s discussion of Kaalbye vessel Ocean Fortune in its opposition is a good example of its knowing dishonesty on this issue. Identifying one visit by a Kaalbye vessel to Syria in early 2012 hardly validates C4ADS’s approach. Opp. Br. 9-10. That vessel had no AIS “discrepancy” or “signature” - it had an AIS radio frequency “handshake” with a transponder tower at a Syrian port. Kaalbye made no effort made to conceal the trip, yet C4ADS gave its

³ As the court is well aware, Kaalbye does not concede it must prove actual malice. Kaalbye submits it is a private figure that does not satisfy the *Waldbaum* limited purpose public figure test.

readers no reason to question why one Kaalbye vessel would make a trip to Syria with its AIS transponder operating while several others might cloak their travels.

C4ADS also claims that its research was *accurate* because a Kaalbye vessel, the Ocean Fortune, had a long gap in coverage between January and February 2013, just as the Report claimed. This is openly misleading. The C4ADS Report falsely said the Ocean Fortune had an AIS transponder gap from January 9, when the vessel was in the Aegean Sea, through *March 7*, when it “reappeared,” “reentering through the Suez” on March 7.⁴ In fact, AIS data from the commercial provider Kaalbye uses shows the Ocean Fortune proceeded *directly* from the Aegean to the Suez, where its AIS transponders had nearly 500 radio “handshakes” with other AIS transponders as the vessel traveled south, away from Syria. Cast in this light, the subsequent gaps in AIS coverage are meaningless, because the Ocean Fortune was clearly traveling outside the Mediterranean and would have to return through the Suez or Gibraltar to call on a Syrian port. Fleetmon and VTE Explorer, subscription AIS providers C4ADS used, undoubtedly have Suez and Gibraltar AIS data in their systems.

Failure to draw a map: AIS data is not limited to port calls, which C4ADS will confirm. Fleetmon and VTE Explorer have functions that are highly visible on their websites that allow a user to input a vessel’s unique identifier number, define a range of dates, and draw a map of the vessel’s AIS transponder transmission history. As Kaalbye’s expert has observed, such maps will have inherent gaps due to the short radio frequency used for AIS transmissions and many other known limitations of the AIS system. However, for researchers attempting to draw conclusions about the handful of vessels Kaalbye operated at the time, inputting the identifier number and drawing a map using either of these subscription services would have been child’s play. It also would have provided a more accurate picture of where the vessels traveled. C4ADS

⁴ Ex. 1 to Am. Compl., C4ADS Report, p. 68.

will not deny the services have this capability. C4ADS has given no reason for its failure to take a few minutes to look at or collect this data, as the Washington Post ultimately did.

Kaalbye, on the other hand, will definitively prove that mapping the course of each vessel during spring 2013, using commercial/subscription AIS data, shows that none of Kaalbye's vessels traveled to Syria.⁵ Exhibit 2 (maps of Kaalbye vessel movements January/June 2013). Moreover, there is an exceedingly strong likelihood that Fleetmon would show the same thing. Yet C4ADS never told the public that more thorough data was available, or that C4ADS failed to collect it. The AIS system is hardly something an average reader would know or understand, so a reader would understandably rely on C4ADS's representations that its collection of thousands of data points and a "near-complete" log of travel between various ports was a sound and reliable way to proceed. Instead, C4ADS's superficial research yielded false and profoundly misleading statements about Kaalbye's vessels, whereas accurate data shows there were no unexplained gaps in AIS transmissions – just routine long-distance ocean travel.

Failure to use satellite data: C4ADS has persistently claimed that satellite-based tracking, while undeniably more accurate than AIS for tracking vessels, is a sort of 'secret sauce' that is closely held and impossible to obtain. Which is nonsense, illustrated by C4ADS's inapt cite to an article about a lost jumbo jet that has nothing to do with ocean cargo shipping. Opp. Br. Ex. 1. As Kaalbye explained in its opening brief (Kaalbye Br. at 9-10) and will testify, the flag administrations for each of its vessels (Liberia's flag administration is managed from offices in Vienna, Virginia) receive Inmarsat satellite data and may release data in response to public

⁵ Co-author Mesko's claim he is not aware of companies that use Shipping Explorer, the commercial AIS provider with which Kaalbye contracts, cites no support and ignores public information. Shipping Explorer is used by divisions of Maersk, one of the largest ocean cargo companies in the world, as well as vessel operators, port managers, logistics companies, and maritime consultants. Exhibit 1, <http://www.shippingexplorer.net/en/forum/thread/140-recommendations-for-shipingexplorer>

queries. C4ADS does not dispute this in its opposition and does not claim it attempted to get accurate satellite data about Kaalbye vessels.

Additionally, Fleetmon visibly offers satellite AIS data and has done so since 2012 – before the Report was published.⁶ In its opposition, C4ADS offered no valid explanation for why it could not have queried the flag administration for specific Kaalbye vessels to review satellite data (see Kaalbye opening brief at 10), claiming in a conclusory way that using satellite data to support its Report would have been impossible. Now that C4ADS has revealed its subscription provider, which clearly offers satellite AIS capability, it is abundantly clear that C4ADS did not use or rely on the most accurate available data from the provider it used.

Indeed, C4ADS admits that “prominent news-gathering entities such as Reuters use Satellite AIS tracking.” Opp. Br. at 10. C4ADS snidely noted that the use of satellite AIS data might “offend the sensibilities” of Mr. Whyte, the expert Kaalbye retained, for any who might rely on such data. Opp. Br. at 11. This is nonsense. While the satellite AIS network is still being built, Whyte Decl. ¶8, Mr. Whyte has clearly stated that satellite-based tracking is more accurate than using AIS to track vessels. Id. ¶23. What should offend the sensibilities of this court is that C4ADS misled its readers into thinking its technical research was accurate and complete, when it is becoming increasingly clear that its research and statements were not accurate or reliable. C4ADS knew that more accurate and complete AIS data and satellite-based data was available, consciously disregarded that data despite its availability from the provider C4ADS admittedly used, then concealed these shortcomings from the public. And, in the process, implied it was possible that a company not known to disable its AIS safety transponders might have done so in this case, contrary to IMO regulations and Kaalbye’s own policies.

⁶ http://www.fleetmon.com/products/satellite_tracking; <http://blog.fleetmon.com/page/2/?s=satellite> (noting satellite AIS has been available on Fleetmon.com since mid-2012).

Misleading use of IMO AIS reports: While C4ADS says it used IMO reports of AIS “discrepancies” in its data-gathering, and misled the public into thinking the IMO reports supported its conclusions, that is demonstrably false. IMO has published quarterly reports of AIS gaps and malfunctions for a number of years. The IMO reports typically identify dozens of vessels whose flag administrations have reported with AIS problems. However, as C4ADS cannot deny, it collected these reports and must have observed, as Mr. Whyte did, that none of those reports have ever listed a Kaalbye vessel. Specifically, the report covering January through March 2013 does not list any Kaalbye vessel.⁷ It was knowingly misleading to conceal that the IMO, the United Nations organization that created the AIS transponder system and authors the regulations governing international ocean travel, issued reports that never show a Kaalbye vessel with any AIS “discrepancy.” C4ADS simply said it collected this data and included it in its “dataset.”

The impact of these multiple shortcomings on the issue of actual malice should be obvious. C4ADS held itself out as expert in this area, heavily promoted its technical expertise, then misled the public about the quality of its data in stating that Kaalbye vessels disappeared from AIS coverage. C4ADS then said the most likely explanation for this “highly suspicious” conduct was disabling AIS transponders – a system C4ADS knows IMO created to improve vessel safety and security.⁸ C4ADS offered some alternative explanations but dismissed those alternatives as inconsistent with ‘average travel times’ or the fact that areas of limited AIS coverage are ‘few.’ Contrary to a few cherry-picked words from the Report, C4ADS’s statements were presented as the product of months of factual research, and their statements about Kaalbye necessarily relied on underlying facts whose accuracy is highly questionable -

⁷ Exhibit 3, April 12, 2013 IMO AIS Discrepancy Report

⁸Exhibit 4, <http://www.imo.org/OurWork/Safety/Navigation/Pages/AIS.aspx>

which C4ADS did not fully, accurately, or honestly share with its readers. As a result, readers were told Kaalbye could have disabled its AIS transponders and that this explanation was more likely and supported by the facts than any benign alternative.⁹

C4ADS Cannot Deny That Its Sources for Kaalbye Allegedly Transporting Missiles for Corrupt Officials are Unreliable

C4ADS's opposition on this issue is highly misleading. To be clear, Kaalbye has never transported X-55 or KH-55 cruise missiles to Iran, China, or any other country and obviously has no information about a situation in which it had no involvement. C4ADS does not deny that annual reports from an international organization that monitors freedom of the press (IREX) noted, for the time periods applicable to articles upon which C4ADS relied, that Russian and Ukrainian media were known to be unreliable. Kaalbye opening brief at 17-20. Though C4ADS notes that some of its sources have also been relied upon by other media organizations, those major news organizations cited articles written in 2013 or 2014. It does not change the inherent unreliability of the old and unsupported stories C4ADS relied on. Also, C4ADS's opposition fails to explain or account for the stark contrast between reliable stories about the sales and transportation of missiles to China and Iran in 2000/2001 by NBC and BBC (which said nothing about Kaalbye) and the unreliable local media that published unsourced, sensationalistic stories.

C4ADS also misled the court by saying a contrary source, a report by an Australian defense think tank, had been "superseded" and does not say the missiles in question were transported by aircraft, not ocean cargo vessels. Opp. Br. at 19. The article Kaalbye cited, a lengthy discussion solely of the KH-55 or X-55 missile that has detailed discussion about the alleged sales to Iran and China, has not been superseded; it was updated in early 2014 and

⁹ C4ADS also knows or should know that its afterthought attack on Kaalbye's safety record is groundless (Opp. Br. at 15-16). Kaalbye shared numerous safety certifications with C4ADS prior to this litigation, the issues C4ADS notes were minor and quickly remedied, and the Socol 3 failed in the Aegean due to a manufacturing flaw, not a safety issue.

continues to contain the same language about the missiles being transported by aircraft. The document cited in the C4ADS opposition is a different report altogether, a summary that was also updated in early 2014. The report C4ADS cites summarizes discussions of a dozen or more rockets or missiles and literally contains one sentence that mentions in passing the sale and transfer of missiles to Iran. Opp. Br. Ex. 31, p. 43. This nifty piece of misdirection shows the lengths to which C4ADS will go to avoid the obvious shortcomings in this aspect of the Report.¹⁰ Most importantly, C4ADS does not deny it knew of the Air Power Australia report, knew it contradicted their Report, and concealed the facts from its readers. Indeed, C4ADS does not deny that the matter was subsequently investigated; a number of individuals were charged with crimes as a result; but no individual from Kaalbye was reportedly charged. Seleginskaya Decl. ¶8, Ex. 1.¹¹ Clearly, this would have been a very different report had C4ADS done balanced reporting that acknowledged known alternative explanations and potential issues regarding the accuracy of its media sources – in that the comments about the missiles were not supported by data or any other verifiable facts.

C4ADS Defamed Kaalbye in its Statements about the MV Anastasia

C4ADS's opposition misses the point regarding the Anastasia being allowed to leave the Las Palmas port carrying arms. No fine of any amount could have facilitated the vessel's departure if the Anastasia had truly been carrying concealed weapons. C4ADS never explains how its research capabilities, said to include the ability to encompass court records, were never used to find out more information about this incident. Further, Kaalbye has certificates, publicly

¹⁰ C4ADS also criticizes the Australian think tank report because it cites Russian and Ukrainian news sources. While the report mentions that "media" were covering the story, it does not contain a single cite to a specific Russian or Ukrainian news source. In fact, the Report's primary source of information is an open letter from the deputy chairman of Ukraine's parliamentary committee on organized crime and corruption, from which the author derived highly specific details from the investigation of the illegal missile sales. Seleginskaya Decl., Ex. 2, pp. 2-3. Needless to say, that document did not mention Kaalbye or any Kaalbye principal or employee.

¹¹ <http://www.globalsecurity.org/wmd/world/iran/x-55.htm>.

available from Georgia's ship registry, that show exactly when the Anastasia was flagged with the Republic of Georgia¹². C4ADS did not use "the information available to us" as Mr. Mesko claims – a simple inquiry to Georgia's ship registry was clearly within the capability of these claimed experts. C4ADS does not deny that the cargo at issue had all the necessary paperwork to transport dangerous cargo when the vessel was detained – all of which is detailed in court records that software available to C4ADS supposedly has the capability to search. That the vessel was fined reflects the violation of Las Palmas port rules by failing to provide an accurate oral report of the cargo – but it also does not change the truth, that the cargo was fully documented on paper, which is why the vessel was allowed to leave. Ultimately, C4ADS was happy to emphasize the accuracy afforded by its powerful software but ignored public information that contradicted outdated news stories and that would have yielded more accurate reporting of the facts.

The Guards That do not Protect Kaalbye

C4ADS cites no source supporting its claim Kaalbye occupies the majority of the Maritime Business Center in Odessa. It does not deny (a) the stairs only access a bank and other non-Kaalbye businesses, (b) the presence of regular security guards at the door, or (c) public access to elevators the public uses to access the upper floors of the building. Apparently, Ms. Mesko was unwilling to obtain information from the regular guards or any of the businesses on the ground floor that are open to the public, and he didn't try to use the elevators. Eschewing obvious paths to the facts and the truth is reckless and constitutes actual malice.

¹² Seleginskaya Decl. Ex. 3. C4ADS claims Kaalbye has not identified the "known and obvious sources" of information about the registration of the Anastasia with the Republic of Georgia. Opp. Br. at 24. The exhibits to Ms. Seleginskaya's declaration are from Georgia's shipping registry. C4ADS, with its claimed expertise, should be able to make this determination from the seals and text of the "Georgian Maritime Administration." These are available to the public.

Respectfully submitted,

Dated: December 15, 2014

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