SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL, et al., Plaintiffs, v. **ROBERT WEILER, JR., et al.,** Defendants.	**Civil Action No. 2015 CA 009512 B** **Calendar 7** **Judge Jeanette J. Clark** **Next Court Date: April 29, 2016** **Event: Initial Conference**

DEFENDANT LARRY CIRIGNANO'S
REPLY MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF SPECIAL MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendant LARRY CIRIGNANO ("Cirignano"), pursuant to SCR Civil 12-I(e), submits this memorandum of points and authorities in support of his Special Motion to Dismiss Plaintiffs' Complaint (Cirignano's "Special Motion") under D.C. Code § 16-5502 (the "Anti-SLAPP Act"), and in reply to Plaintiffs' Consolidated Brief in Opposition to the Special Motions to Dismiss of Defendants Robert Weiler, Jr., Ruby Nicdao, Larry Cirignano, & Jonathan Darnel (Plaintiffs' "Special Opposition Brief").

PRELIMINARY STATEMENT

As shown in the Memorandum of Points and Authorities in support of Cirignano's Special Motion (Cirignano's "Special Memorandum"), Plaintiffs attempt to avoid their burden of proof with respect to each individual Defendant, especially Cirignano, by deploying a single, unverified, conclusory allegation that all defendants "entered into a conspiracy." (Cirignano Cirignano Special Mem. at 2, n.3; Compl., ¶ 86.) Now confronted with the sworn Declaration of Larry Cirignano (the "Cirignano Declaration") (Cirignano Special Mem., Ex. 1), which defeats Plaintiffs' unverified conspiracy allegation and otherwise destroys any notion of a conspiracy involving Cirignano,

Plaintiffs in their Special Opposition Brief try to hide their inability to show a likelihood of success on the merits *against Cirignano* by treating all Defendants as a single entity. Though Defendants have in common many meritorious points in support of dismissal of Plaintiffs' claims under the Anti-SLAPP Act, this Reply addresses Plaintiffs' abject failures to avoid Anti-SLAPP dismissal *as to Cirignano* individually.

ARGUMENT

I. THE CIRIGNANO SPECIAL MOTION WAS TIMELY FILED.

In attempting to rescue their improvident lawsuit from the Anti-SLAPP Act, Plaintiffs inexplicably lead off with their most obviously specious argument: that Cirignano filed his Special Motion to Dismiss out of time. Specifically, Plaintiffs complain, Cirignano filed his Motion on the forty-sixth day after service of Plaintiffs' Complaint, and therefore missed the Anti-SLAPP Act's forty-five day filing deadline **by one day**. Plaintiffs' pitching this argument—**first**—casts a pall of nonseriousness on Plaintiffs' entire Special Opposition Brief.

A special motion to dismiss under the Anti-SLAPP Act must be filed "within 45 days after service of the claim." D.C. Code § 16-5502(a). The Act is silent, however, regarding the computation of the forty-five-day time period when the last day of the period falls on a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed. Rule 6(a), however, supplies the answer:

> In computing any period of time prescribed or allowed by these rules, by order of Court, **or by any applicable statute**,[1] the day of

[1] The obvious meaning of "applicable statute" for purposes of Rule 6(a) is a statute that prescribes a period of time for performing an act within a civil action, which § 16-5502(a) clearly does. *See* SCR Civil 1 ("These Rules govern the procedure in all suits of a civil nature in the Civil Division of the Superior Court of the District of Columbia . . . ."); *cf. Tippett v. Daly*, 10 A.3d 1123, 1126 (D.C. 2010) (holding Rule 6 inapplicable to landlord tenant statute prescribing time period for out-of-court act and providing its own method of computation).

> the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day or any part of a day in which the office of the clerk is closed, in which event the period runs until the end of the next day which is not one of the aforementioned days.

SCR Civil 6(a) (emphasis added). Thus, the plain language of Rule 6 provides that a statutory time period for filing a paper in court cannot end on "a Saturday, a Sunday, or a legal holiday, or . . . a day in which the office of the clerk is closed, in which event the period runs until the end of the next day which is not one of the aforementioned days." *Id.*

Plaintiffs are correct that Cirignano filed his Special Motion to Dismiss under the Anti-SLAPP Act on the forty-sixth day after he was served with Plaintiffs' Complaint. (Pls. Special Opp. Br. at 5-6.) Plaintiffs fail to inform the Court, however, that the forty-fifth day after service, January 31, 2016, was a Sunday. Under a plain reading of Rule 6(a), Cirignano's time period for

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No court has held the 45-day requirement of § 16-5502(a) to be absolute, so as to foreclose the obvious operation of Rule 6, or tolling principles. In fact, Plaintiffs and courts have said the opposite. *See, e.g.,* Pls. Special Opp. Br. at 4 ("Courts have the **discretion** to deny a late filing without reaching the merits." (emphasis added)); *Newmyer v. Sidwell Friends School*, No. 2011 CA 003727, Order Denying Plaintiff/Counter-Defendant Arthur Newmyer's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act at 2 (D.C. Super. Ct. May 22, 2012) (attached to Pls. Special Opp. Br. at Ex. 4) ("The court agrees that this special motion to dismiss is untimely filed and **can** be denied for that reason alone. . . . Nevertheless . . . the court may very well conclude that the ameliorative purpose of the Act requires **a more flexible interpretation of the forty-five day framework**." (emphasis added)); *Forras v. Rauf*, 39 F. Supp. 3d 45, 51 (D.D.C. 2014) ("Although D.C. Code § 16–5502 provides that a special motion to dismiss should be filed within forty-five days of the service of the claim . . . considering the circumstances under which the action was brought, the time to file the special motion to dismiss is equitably tolled and this motion is considered timely.")

Even if the application of Rule 6(a) was a close question (it is not), its apparent application coupled with Plaintiffs' tacit concession of no prejudice (Pls. Special Opp. Br. at 5, 6) compels acceptance of a forty-sixth day filing when the forty-fifth day was a Sunday.

filing his motion ran until the end of the next day, Monday, February 1, 2016.[2] Thus, Cirignano's filing on February 1 was timely.

II. THE ANTI-SLAPP ACT APPLIES TO THIS CASE.

Cirignano's Motion properly invokes the Anti-SLAPP Act against Plaintiffs' claims according to the plain language of the Act. In determining the applicability of the Act to this case, the Court

> must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning. **The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used.** Moreover, in examining the statutory language, it is axiomatic that the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them.

Peoples Drug Stores, Inc. v. D.C., 470 A.2d 751, 753 (D.C. 1983) (internal quotations and citations omitted) (emphasis added).

As an initial matter, the Act subjects to dismissal "**any claim** arising from an act in furtherance of the right of advocacy on issues of public interest . . . ." D.C. Code § 16-5502(a) (emphasis added). In defining "an act in furtherance of the right of advocacy on issues of public interest," the Act plainly protects all of the following expressive conduct: "Any written or oral statement made . . . . [i]n a place open to the public or a public forum in connection with an issue of public interest; or . . . [a]ny other expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1). "'Issue of public interest' means an issue related to health or safety; . . . community well-being; the District government; . . . or a . . . service in the market place." D.C.

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[2] It is difficult to comprehend Plaintiffs' omission of any reference to the facially controlling Rule 6(a). While it is even more difficult to conceive of an argument against the Rule's application, not having an argument does not excuse the obligation to bring controlling authority to the Court's attention. *See* D.C.R. Prof'l Conduct 3.3(a)(3).

Code § 16-5501(3); *see also Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 9 (D.D.C. 2013).

It is beyond dispute that Plaintiffs' claims against Cirigano arise from his expressive activity, to members of the public in a public forum, opposing abortion—particularly abortions to be performed by a future Planned Parenthood facility located between Plaintiffs' elementary and middle school buildings. (Cirignano Special Mem. at 3, Ex. 1 (Cirignano Decl.), ¶¶ 4, 5.) And it is beyond dispute that the propriety of abortion in general, and in particular the abortions to be conducted on Plaintiffs' campus, is an "issue of public interest" under the Act, as it is "related to health or safety; . . . community well-being; . . . or a . . . service in the market place." D.C. Code § 16-5501(3). Thus, according to the Act's plain language, it applies to Plaintiffs' claims in this case, and Cirignano properly invoked the Act in his Special Motion. As a result, Plaintiffs must demonstrate they are "likely to succeed on the merits" of their claim, D.C. Code § 16-5502(b), which they have utterly failed to do in their Special Opposition Brief.

Though Plaintiffs pay lip service to the priority of plain language over legislative intent when it comes to the Act's forty-five-day filing requirement (Pls. Special Opp. Br. at 5.), when it comes to application of the Act to this case, Plaintiffs immediately forego the Act's unambiguous plain language and devote their argument to its legislative history. (Pls. Special Opp. Br. at 7-10.) The Court should reject Plaintiffs' attempt to avoid the Act's plain language.

Plaintiffs essentially argue that the Act does not apply to their claims because Plaintiffs are neutral on the subject matter of Cirignano's expression, and because Plaintiffs' motives for wanting to silence Cirignano are pure, having to do with protecting children. (Pls. Special Opp. Br. at 9-10.) But no provision of the Act exempts otherwise covered claims based on the viewpoint or motives of the claimant. To be sure, if Plaintiffs have valid claims to enjoin Cirignano's

expression, the Act gives Plaintiffs the opportunity to demonstrate they are likely to succeed on the merits of those claims. D.C. Code § 16-5502(b). The Act does not, however, give Plaintiffs the opportunity to create exceptions to the Act's reach in derogation of its plain language.[3]

Plaintiffs also argue, remarkably, that Cirignano's expression does not involve an issue of public interest under the Act. (Pls. Special Opp. Br. at 11-15.) But once again, Plaintiffs must go around the Act's plain language to make their point. Indeed, rather than argue that Cirignano's expression fails to meet the Act's definition of "issue of public interest" (which, of course, Plaintiffs cannot), Plaintiffs argue that Cirignano's expression does not meet the definition of "public concern" for purposes of First Amendment protection. (Pls. Special Opp. Br. at 11-15.) Not only is Plaintiffs' argument unconvincing, it is also wholly inapposite to the applicability of the Act.

In sum, none of Plaintiffs' arguments against the applicability of the Act to this case have merit. Accordingly, Plaintiffs must meet the Act's requirement to demonstrate they are likely to succeed on the merits of their claims.

III. PLAINTIFFS CANNOT DEMONSTRATE THEY ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS AGAINST CIRIGNANO.

A. Plaintiffs cannot establish Cirignano entered into a conspiracy with any other Defendant.

Having neither alleged nor adduced evidence of any actionable conduct by Cirignano individually (Cirignano Special Mem. at 2-5), Plaintiffs' claims against Cirignano depend on Plaintiffs' being able to establish that Cirignano entered into a conspiracy with other Defendants.

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[3] In a case cited by Plaintiffs and attached to their Opposition Brief (Pls. Special Opp. Br. at 5 n.9, Ex. 3), this Court rejected out of hand a similar attempt by a plaintiff. *See Mann v. National Review*, No. 2012 CA 008263, Order at 6-9, n.8 (D.C. Super. Ct. July 19, 2013) ("Plaintiff's real argument appears to be that the Motion should be denied.").

As shown in the Preliminary Statement of this Reply, however, Plaintiffs' conspiracy theory continues to rely on a single, unverified, conclusory allegation that all defendants "entered into a conspiracy." (Cirignano Special Mem. at 2, n.3; Compl., ¶ 86.) Plaintiffs have not refuted the sworn Cirignano Declaration (Cirignano Special Mem., Ex. 1) supporting his Special Motion, which Declaration defeats Plaintiffs' unverified conspiracy allegation and otherwise destroys any notion of a conspiracy involving Cirignano. Moreover, Plaintiffs have failed to demonstrate how they will even attempt to refute Cirignano's sworn testimony to meet their burden under the Anti-SLAPP Act. Plaintiffs cannot succeed on the merits of any claim against Cirignano based on conspiracy.

Plaintiffs' burden to demonstrate likely success in establishing a conspiracy involving Cirignano is higher than Plaintiffs feign in their Special Opposition Brief. While Plaintiffs recognize their likelihood of success burden requires the adduction of competent evidence over and above a verified pleading (Pls. Special Opp. Br. at 16), Plaintiffs downplay their merits burden as only requiring "minimal merit" and a "legally sufficient claim," citing *Payne v. District of Columbia*, No. 2012 CA 6163B, Order Granting Defendants' Special Motion to Dismiss Pursuant to D.C. Code § 16-5502(a) or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) (D.C. Super. Ct. May 28, 2013). (Pls. Special Opp. Br. at 15-16, Ex. 5.) However, in another order cited by Plaintiffs, *Center for Advanced Defense Studies v. Kaalbye Shipping International*, No. 2014 CA 002273 B, Order Granting Plaintiff/Counter-Defendant's Special Motion to Dismiss (D.C. Super. Ct. Apr. 7, 2015) (Pls. Special Opp. Br. at 16 n.19, Ex. 6), this Court rejected the low-bar merits standard from California adopted by *Payne* as contrary to both the plain language and legislative intent of the D.C. Anti-SLAPP Act. *See Kaalbye*, Order at 5-9. According to the more recent and eminently better-reasoned *Kaalbye* Order, the Anti-SLAPP Act's "likely to

succeed on the merits" standard must be viewed as essentially equivalent to the preliminary injunction standard requiring "substantial likelihood" of success on the merits. *Id.* at 6-7.

Given this high burden, Plaintiffs Special Opposition Brief utterly fails to demonstrate any likelihood of success on Plaintiffs' conspiracy theory against Cirignano. Plaintiffs do correctly cite the elements of actionable conspiracy:

> In the District of Columbia, "[t]o establish a prima facie case of civil conspiracy, [a plaintiff] ha[s] to prove (1) an agreement between two or more persons (2) to participate in an unlawful act, and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement pursuant to, and in furtherance of, the common scheme. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 446 (D.C. 2013) (citations and internal quotations omitted). "'[L]iability for civil conspiracy depends on performance of some underlying tortious act'; '[civil] conspiracy is not independently actionable; rather it is a means for establishing vicarious liability for the underlying tort.'" *Id.* (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

(Pls. Special Opp. Br. at 29.) Despite this good start, however, Plaintiffs then revert to the unverified and speculative allegations of their Complaint, on their way to the ultimate and insufficient conclusion that "it is highly plausible that there was an agreement." (Pls. Special Opp. Br. at 30.) Plaintiffs have not even attempted to refute Cirignano's sworn Declaration that he had *no agreement* with any other Defendant, let alone adduce evidence that Cirignano made "an agreement . . . to participate in an unlawful act" to satisfy the minimal elements of a conspiracy claim.[4] Accordingly, Plaintiffs cannot demonstrate any likelihood of success on the merits of their claims against Cirignano.

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[4] Apparently conceding their failure to demonstrate any likelihood of success on the merits in their Special Opposition Brief, Plaintiffs purport to proffer eleven categories of evidence they would adduce at a hearing to meet their burden. None of the proffered categories, however, would contribute a single fact in opposition to Cirignano's sworn declaration testimony that he had no agreement with any other Defendant. Therefore, Plaintiffs' proffer is wholly insufficient to justify any delay in dismissing Plaintiffs' claims against Cirignano.

B. Plaintiffs are not entitled to speculative discovery to avoid dismissal of their claims.

Having failed to demonstrate any likelihood of success on the merits of their claims against Cirignano, Plaintiffs seek to invoke the Anti-SLAPP Act's limited discovery provision to rescue their claims. (Pls. Special Opp. Br. at 33-35.) *See* D.C. Code. § 16-5502(c)(2). Once again, however, Plaintiffs fail to make the required showing under the Act's plain language.

The limited discovery provision of the Act provides, in pertinent part: "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." D.C. Code § 16-5502. Plaintiffs' request for purportedly "targeted" discovery comprises thirteen broad categories of information which are indistinguishable from full merits discovery. Moreover, Plaintiffs fail to show the Court how the requested discovery is "likely" to enable Plaintiffs to defeat Cirignano's Special Motion—Plaintiffs do not reveal what they reasonably could expect to find.

In *3M Company v. Boulter*, No. 11-cv-1527 (RLW), Order (D.D.C. Nov. 15, 2011), the federal district court set forth the requirements for a plaintiff to obtain targeted discovery under the Anti-SLAPP Act:

> Plaintiff must set forth **with particularity and specificity** precisely what targeted topics and/or categories of discovery it needs to defeat the Special Motion, as well **as what that discovery will likely show**. If Plaintiff contends that it will be prejudiced by the inability to take discovery, it must set forth with particularity why it would suffer such prejudice . . . .

Boulter, Order at 1-2 (emphasis added) (attached hereto as Exhibit 1).

Plaintiffs' request for broad, speculative discovery is not accompanied by any explanation as to how the requested discovery is likely to enable Plaintiffs to defeat Cirignano's Special

Motion. The implied possibility that Plaintiffs **may** obtain helpful information is insufficient.[5] Thus, Plaintiffs' request for targeted discovery under the Anti-SLAPP Act should be denied as to Plaintiffs' claims against Cirignano.

CONCLUSION

For all of the foregoing reasons, as well as those stated in Cirignano's Special Memorandum, Cirignano's Special Motion to Dismiss Plaintiffs' Complaint should be granted.

[5] Obtaining discovery under the Act is intended to be difficult, to protect defendants engaged in expression from burdensome lawsuits:

> The D.C. Council's purpose, to grant broad protection to advocacy on issues of public interest, is apparent in the Act's legislative history. For example, the American Civil Liberties Union ("ACLU"), in its written testimony before the Council, made the following remarks, commenting on the importance of limiting discovery in Anti-SLAPP proceedings:
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> > A case may exist in which a plaintiff could prevail on such a . . . claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPS.
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> As the ACLU"s testimony illustrates, the Act's discovery rules are designed to err on the side of protecting freedom of speech, at the expense of some meritorious claims.

Kaalbye, Order at 7-8 (citations omitted) (Pls. Special Opp. Br. at Ex. 6).

DATED this March 24, 2016

Respectfully submitted:

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