UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBO-TEAM NA, INC., Plaintiff, v. ENDEAVOR ROBOTICS and SACHEM STRATEGIES, Defendants.	Case No. 1:17-cv-01263-ABJ

ENDEAVOR ROBOTICS' REPLY IN SUPPORT OF
SPECIAL MOTION TO DISMISS

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. THE DISTRICT'S ANTI-SLAPP ACT PROPERLY PROTECTS ENDEAVOR AGAINST ROBO-TEAM'S STRATEGIC SUIT IN THIS COURT. 3

II. ENDEAVOR HAS MADE A PRIMA FACIE SHOWING ITS LOBBYING IS FIRST AMENDMENT ACTIVITY ENTITLED TO ANTI-SLAPP PROTECTION 7

III. ROBO-TEAM HAS FAILED TO MEET ITS BURDEN TO SHOW ANY OF ITS CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS. 10

A. Robo-Team Is Not Likely To Succeed On Its Defamation Claim. 11

B. Robo-Team Is Not Likely To Succeed On Any Of Its Other Claims. 16

IV. ROBO-TEAM SHOULD NOT BE PERMITTED TO CONDUCT DISCOVERY 17

CONCLUSION 18

TABLE OF AUTHORITIES

(*Authorities chiefly relied upon are designated with an asterisk)

Cases **Page(s)**

3M Co. v. Boulter,
842 F. Supp. 2d 85 (D.D.C. 2012) 6

Abbas v. Foreign Policy Grp., LLC,
783 F.3d 1328 (D.C. Cir. 2015) 4, 6

Abex Corp. v. Md. Cas. Co.,
790 F.2d 119 (D.C. Cir. 1986) 4

Adelson v. Harris,
774 F.3d 803 (2d Cir. 2014) 5

Am. Petroleum Inst. v. TechnoMedia Int'l,Inc.,
699 F. Supp. 2d 258 (D.D.C. 2010) 11

Art Metal-U.S.A., Inc. v. United States,
753 F.2d 1151 (D.C. Cir. 1985) 11

Boley v. Atl. Monthly Grp.,
950 F. Supp. 2d 249 (D.D.C. 2013) 14

Burke v. Air Serv Int'l, Inc.,
685 F.3d 1102 (D.C. Cir. 2012) 7

Carpenter v. King,
792 F. Supp. 2d 29 (D.D.C. 2011) 17

Chi v. Loyola Univ. Med. Ctr.,
787 F. Supp. 2d 797 (N.D. Ill. 2011) 6

Columbia First Bank v. Ferguson,
665 A.2d 650 (D.C. 1995) 13

**Competitive Enterprise Inst. v. Mann*,
150 A.3d 1213 (D.C. 2016) ..... *passim*

Connick v. Myers,
461 U.S. 138 (1983) 8

**Easaw v. Newport*,
No. CV 17-00028 (BAH), 2017 WL 2062851 (D.D.C. May 12, 2017) 4

Farah v. Esquire Magazine, Inc.,
863 F. Supp. 2d 29 (D.D.C. 2012) 4

Forras v. Rauf,
39 F. Supp. 3d 45 (D.D.C. 2014) 4, 14

Freeman v. Bechtel Constr. Co.,
87 F.3d 1029 (8th Cir. 1996) 17

Gasperini v. Ctr. For Humanities, Inc.,
518 U.S. 415 (1996) 5

Godin v. Schencks,
629 F.3d 79 (1st Cir. 2010) 5, 7

Gov't Relations Inc. v. Howe,
Civ. No. 05-1081, 2007 WL 201264 (D.D.C. Jan. 24 2007) 16

L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles,
191 Cal. Rptr. 3d 579 (Cal. Ct. App. 2015) 10

Lane v. Random House, Inc.,
985 F. Supp. 141 (D.D.C. 1995) 13

Mann v. Quality Old Time Serv., Inc.,
15 Cal. Rptr. 3d 215 (Cal. Ct. App. 2004) 10

Margolis v. Gosselin,
No. 95-03837-A, 1996 WL 293481 (Mass. Super. Ct. May 22, 1996) 8

Martin Marietta Corp. v. The Evening Star Newspaper Co.,
417 F. Supp. 947 (D.D.C. 1976) 11

Mastro v. Potomac Elec. Power Co.,
447 F.3d 843 (D.C. Cir. 2006) 13

Mendoza v. ADP Screening & Selection Servs., Inc.,
107 Cal. Rptr. 3d 294 (Cal. Ct. App. 2010) 9

Naegele v. Albers,
110 F. Supp. 3d 126 (D.D.C. 2015) 16

Northon v. Rule,
637 F.3d 937 (9th Cir. 2011) 5

Palmer v. Hoffman,
318 U.S. 109 (1943) 5

Parsi v. Daioleslam,
595 F. Supp. 2d 99 (D.D.C. 2009) 15

Scanwell Labs., Inc. v. Thomas,
521 F.2d 941 (D.C. Cir. 1975) 16

Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 5

Sherrod v. Breitbart,
843 F. Supp. 2d 83 (D.D.C. 2012) 5

Snyder v. Phelps,
562 U.S. 443 (2011) 8

Steinmetz v. Coyle & Caron, Inc.,
No. 15-CV-13594-DJC, 2016 WL 4074135 (D. Mass. July 29, 2016) 5

Stovell v. James,
810 F. Supp. 2d 237 (D.D.C. 2011) 13

Taylor v. FDIC,
132 F.3d 753 (D.C. Cir. 1997) 8

Trudeau v. ConsumerAffairs.com, Inc.,
No. 10 C 7193, 2011 WL 3898041 (N.D. Ill. Sept. 6, 2011) 7

U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.,
190 F.3d 963 (9th Cir. 1999) 5, 7

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 7

Washington v. Smith,
893 F. Supp. 60 (D.D.C. 1995) 15

Webster v. Sun Co.,
731 F.2d 1 & 14 (D.C. Cir. 1984) 12

White v. Fraternal Order of Police,
909 F.2d 512 (D.C. Cir. 1990) 14

Statutes

D.C. Code § 16-5501 ..... 8, 9, 17

D.C. Code § 16-5502 ..... 10, 11, 14, 17

D.C. Code § 16-5505 9

Other Authorities

Federal Rule of Civil Procedure 56 6

Endeavor Robotics ("Endeavor") submits this Reply to Robo-Team NA, Inc.'s ("Robo-Team's") Opposition (ECF No. 22) to Endeavor's Special Motion to Dismiss Under the District of Columbia's ("District's" or "D.C.'s") Anti-SLAPP Act ("Special Mot.") (ECF No. 19-1).

INTRODUCTION

Robo-Team's true aims in this litigation become clearer with each filing attempting to prop up its claims. Robo-Team does not want its competitor, Endeavor, to participate in the abiding and serious policy discussion among the public, defense establishment, and policymakers over the grave threat posed by ongoing efforts by Chinese owned and/or controlled entities improperly to acquire sensitive U.S. military technologies, including robotics systems. Robo-Team also does not want Endeavor to propose legislative solutions to this serious and widely-recognized problem that apparently impact Robo-Team's narrow commercial interests.

But Robo-Team cannot use transparently strategic and far-fetched federal litigation to stop Endeavor's textbook lobbying efforts. The District's Anti-SLAPP Act – like those enacted in States around the country – exists and operates to curb this very kind of abuse of process to punish and chill constitutionally-protected First Amendment activity. The Act applies with full force here. The D.C. Court of Appeals – which has the final word on interpreting District law – has recently confirmed the Act provides *substantive* rights under *Erie*, in addition to procedural protections that mirror the Federal Rules of Civil Procedure. Robo-Team's arguments that the Act does not apply in diversity cases rely on outmoded federal authority and would produce forum shopping and unfairness in contravention of *Erie*'s animating objectives.

Not only does the Act apply here, but Endeavor is entitled to its protections. Endeavor has made a *prima facie* showing that its lobbying activity and communications targeted by Robo-Team in this litigation address issues of public interest – the national security threat posed by Chinese efforts to acquire our defense technologies. Robo-Team is mistaken that its suit only

targets so-called "commercial" speech outside the Act's protections. Even a cursory review of the Sachem Memo reveals it is a classic lobbying piece addressing a matter of abiding public concern: It identifies a serious policy problem – protecting our Nation's security and economy from Chinese infiltration – and seeks a legislative solution. None of the challenged communications – made to public officials – promote any good or service or make any comparative advertising claim. Just because legislative efforts to address the serious problem of Chinese efforts to undermine our national defense apparently impact Robo-Team's business interests does not mean Endeavor's core First Amendment activity deserves any less protection. Endeavor's lobbying and communications fall within the heartland of the Act's protections.

To overcome Endeavor's *prima facie* showing, Robo-Team must come forward with evidence to demonstrate it has a likelihood of success on its claims, including that the challenged communications are false and "defamatory." Robo-Team has not done so, because it cannot. Robo-Team's claims are all *unlikely* to succeed on the merits and it has not met its evidentiary burden to prove otherwise now.

Robo-Team's defamation claim is unlikely to succeed because the communications it challenges are protected by multiple privileges, are true (they recite no more than widely-reported and accurate information about the company), and Robo-Team has suffered no actual harms of any kind. Robo-Team has presented no evidence to demonstrate otherwise. One would think the CEO of its North American branch could explain how the challenged communications are false and how they harmed the company. But his terse declaration does not, beyond noting the company did not violate ITAR, despite a public video that apparently shows otherwise. Nor can Robo-Team rely on *Endeavor's filings* to support newly-minted allegations found nowhere it its complaint. Only Robo-Team has said is "backed by," "connected to," or an "agent" of the

Chinese government. Robo-Team's other claims fail as a matter of law for obvious reasons as well, and it has made no effort to prove them up.

Robo-Team effectively concedes it cannot show it has any likelihood of success on any of its claims – and that its litigation is a public relations stunt and business ploy – by renewing its bid for some unspecified measure of "targeted" discovery. Having come forward with essentially nothing to support its claims, the Court should not let Robo-Team fish in the discovery pond now. Robo-Team cannot litigate in reverse by filing a federal case, and then hope to backfill its bare allegations in discovery. That kind of abusive litigation tactic is exactly what the Act protects defendants against. Robo-Team has not identified a single fact it needs or even intends to "discover," how such discovery bears on its claims, or how it would be prejudiced absent discovery. Robo-Team's desired discovery is pointless and would needlessly burden Endeavor. And it would improperly advance Robo-Team's objective with this suit to punish and harass Endeavor for exercising its First Amendment rights.

The Court should grant the Special Motion and award Endeavor its fees and costs.

ARGUMENT

I. THE DISTRICT'S ANTI-SLAPP ACT PROPERLY PROTECTS ENDEAVOR AGAINST ROBO-TEAM'S STRATEGIC SUIT IN THIS COURT.

Robo-Team's suit is the poster child for the kind of suit the Anti-SLAPP Act is designed promptly to resolve in light of the fundamental interests at stake. Robo-Team cannot dodge the Act's application by relying on outmoded federal authority and mistaken procedural arguments.

As an initial matter, Robo-Team does not even dispute the Anti-SLAPP Act is a *substantive* law carrying *substantive* protections. As the D.C. Court of Appeals has explained, the Act confers "a ***substantive right*** not to stand trial and to avoid the burdens and costs of pre-trial procedures, a right that would be lost if a special motion to dismiss is denied and the case

proceeds to discovery and trial." *Competitive Enterprise Inst. v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016). The Act's legislative history also confirms it is intended to confer substantive rights. *See id.* at 1226 (The Act created "substantive rights with regard to a defendant's ability to fend off a SLAPP." (citing Council of the District of Columbia, Rep. of the D.C. Comm. On Pub. Safety and the Judiciary on Bill 18-893, at 1 (Nov. 19, 2010))).

Instead, Robo-Team argues the Act cannot be applied in light of the D.C. Circuit's decision in *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015). Opp. at 3-7. But *Abbas* has been superseded by the D.C. Court of Appeals' recent decision in *Mann*, which confirms the Anti-SLAPP Act provides substantive rights. Because *Mann* is the most recent and authoritative state court interpretation of the Act, and it clearly and unmistakably renders the *Abbas* decision outmoded and inaccurate, this Court should follow *Mann*. For "when a decision by the D.C. COA clearly and unmistakably renders inaccurate a prior decision by the D.C. Circuit interpreting D.C. law, this Court should apply the D.C. COA's more recent expression of the law." *Easaw v. Newport*, No. CV 17-00028 (BAH), 2017 WL 2062851, at *10 (D.D.C. May 12, 2017). The reason is clear: "[I]n a diversity case, this Court must apply the current substantive law of the District of Columbia, . . . which the D.C. Circuit is no more qualified than this Court to ascertain." *Id.*; *see Abex Corp. v. Md. Cas. Co.*, 790 F.2d 119, 125–26, n.30 (D.C. Cir. 1986) (deferring to another circuit's interpretation of state law, but noting court "will not blind [itself] to state court decisions handed down *after* the circuit court opinion in question").

Accordingly, this Court should recognize the Act is substantive law directly applicable in diversity cases under the *Erie* doctrine – something this Court had already done even without the guidance of *Mann*. *See, e.g., Forras v. Rauf*, 39 F. Supp. 3d 45, 52 (D.D.C. 2014) (applying Act because it "empowers defendants with the substantive right to fend of SLAPP lawsuits."); *Farah*

v. Esquire Magazine, Inc., 863 F. Supp. 2d 29, 36 n. 10 (D.D.C. 2012) ("It was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences.").[1] Doing so aligns with numerous other federal courts that have held similar anti-SLAPP statutes provide substantive rights for *Erie* purposes. *See, e.g., Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) (holding Maine's anti-SLAPP act "created a supplemental and substantive rule to provide added protections . . . to defendants who are named as parties because of constitutional petitioning activities."); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) ("California has articulated the important, substantive state interests furthered by the Anti–SLAPP statute."); *Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014) (applying Nevada's anti-SLAPP statute); *Steinmetz v. Coyle & Caron, Inc.*, No. 15-CV-13594-DJC, 2016 WL 4074135, at *3 (D. Mass. July 29, 2016) (applying Massachusetts' anti-SLAPP statute because it "is substantive rather than procedural"); *Chi v. Loyola Univ. Med. Ctr.*, 787 F. Supp. 2d 797, 808 (N.D. Ill. 2011) (applying Illinois' anti-SLAPP statute).[2]

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[1] Allocation of the burden of proof is *substantive* and governed by *state* law. *See Palmer v. Hoffman*, 318 U.S. 109, 117 (1943). The D.C. Anti-SLAPP Act's provision of attorney's fees and costs is also a *substantive* remedy. *See, e.g., Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 n. 4 (D.D.C. 2012) ("[W]here a statute provides provisions for attorneys' fees and costs for the prevailing party – as the D.C. Anti-SLAPP provides – other courts have held such statutory provisions are substantive in nature.") (citing cases); *Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011) (awarding attorneys' fees under Oregon statute because "[t]he entitlement to fees and costs enhances the anti-SLAPP law's protection of the state's 'important, substantive' interests").

[2] Robo-Team argues the Anti-SLAPP Act is only a procedural rule that must give way because it collides with the Federal Rules. Opp. at 7 n.6. But a Federal Rule "cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring); *see also Gasperini v. Ctr. For Humanities, Inc.*, 518 U.S. 415, 426-39 (1996) (in applying state law in diversity action, holding while state law was procedural, its objective was substantive). At its core, the Anti-SLAPP Act provides substantive remedies for defendants sued for exercising First Amendment rights.

Robo-Team is also incorrect that the Anti-SLAPP Act's safeguards are unavailable in diversity actions because they are procedural and conflict with the Federal Rules. Opp. at 3-6. Again, Robo-Team's reliance on *Abbas* is misplaced. *Abbas* was decided without guidance from the D.C. Court of Appeals, and, in the absence of a decision from that court, the *Abbas* court assumed the Act did not "mirror" federal procedural standards. 783 F.3d at 1333-35 & n.3.[3]

But closely following *Abbas*, the D.C. Court of Appeals proved that assumption wrong in *Mann*. *Mann* squarely holds the Act's "likely to succeed" standard " 'simply mirror[s] the standards imposed by Federal Rule 56' " because "the question is substantively the same: whether the evidence suffices to permit a jury to find for the plaintiff." 150 A.3d at 1238 n.32 (quoting *Abbas*, 783 F.3d at 1335). Because the Act's purpose is "to avoid the toll that meritless litigation imposes on a defendant who has made a prima facie showing that the claim arises from advocacy on issues of public interest," *id.* at 1235, "likely to succeed on the merits" means "if the court can conclude that the claimant could not prevail *as a matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury," *id.* at 1236.

Anticipating the impact of its decision, the D.C. Court of Appeals recognized it would "no doubt factor into future analysis . . . concerning the applicability of the Anti-SLAPP Act in litigation brought in federal courts." *Id.* Thus, with *Mann*, the D.C. Court of Appeals clearly and unmistakably rendered *Abbas* inaccurate by expressly interpreting the Anti-SLAPP Act's standard to mirror Federal Rule 56. The Act and Federal Rule 56 can thus "exist side by side, . . . each controlling its own intended sphere of coverage without conflict.' " *Burke v. Air Serv*

[3] Before *Abbas*, only a single district court in this Circuit held the Act inapplicable in federal court. *See 3M Co. v. Boulter*, 842 F. Supp. 2d 85, 96 (D.D.C. 2012).

Int'l, Inc., 685 F.3d 1102, 1108 (D.C. Cir. 2012) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).[4]

Robo-Team does not even argue that the outcome for which it advocates – denial of Anti-SLAPP Act protections in diversity actions in this Court – would encourage forum shopping and the unfair administration of justice. Special Mot. at 10-11. It plainly would. And allowing Robo-Team to deploy the federal court to chill First Amendment activity would indeed "disserve the so-called 'twin aims of the *Erie* rule." *Burke*, 685 F.3d at 1108. The Court should apply the District's Anti-SLAPP Act in this case.[5]

II. ENDEAVOR HAS MADE A *PRIMA FACIE* SHOWING ITS LOBBYING IS FIRST AMENDMENT ACTIVITY ENTITLED TO ANTI-SLAPP PROTECTION.

In its opening brief, Endeavor demonstrated its challenged "defamatory" communications are protected by the Act because they raise grave policy concerns over the need to protect our national security and economy from Chinese influence and trade secrets theft. Special Mot. at 11-13. Endeavor's lobbying in fact came amid ongoing investigations by the Congress and Executive Branch on these very policy issues, which directly impact Endeavor – and apparently Robo-Team too. *Id.* at 11-12. While Robo-Team does not dispute there is abiding government attention to Chinese efforts to obtain U.S. defense technologies, it argues the challenged communications are not protected because they were "statements directed primarily toward

[4] Numerous federal courts have held that similarly framed state anti-SLAPP standards are consistent with Rule 56. *See, e.g.*, *Godin*, 629 F.3d at 91; *Newsham*, 190 F.3d at 972; *Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041, at *5 (N.D. Ill. Sept. 6, 2011).

[5] Robo-Team argues that applying the Act in this Court would violate its constitutional jury-trial right. Opp. at 6 n.3. But the Act passes constitutional muster. As the *Mann* court explained, the Act is a "tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protections *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." 150 A.3d. at 1239. The *Mann* court in fact expressly considered and rejected Robo-Team's argument by interpreting the Act's "likely to succeed on the merits" standard "to remove doubt that the Anti-SLAPP statute respects the right to a jury trial." *Id.* at 1236 & n.30.

protecting the speaker's commercial interests." Opp. at 7-8 (quoting D.C. Code § 16-5501(3)). Not so.

1. Robo-Team seems to assume *any* commercial impact or interest strips a speaker's First Amendment activity of the Anti-SLAPP Act's protections. But the Act's plain language distinguishes "statements directed primarily toward protecting the speaker's commercial interests," which may not be covered, from communications directed "toward commenting on or sharing information about a matter of public significance," which are covered. D.C. Code § 16-5501(3). Where communications bear on a matter of public significance – such as Chinese industrial and cyber espionage – the speaker's motivations are irrelevant. *See Margolis v. Gosselin*, No. 95-03837-A, 1996 WL 293481, at *2 (Mass. Super. Ct. May 22, 1996) ("Neither the legislatures nor courts of the states implementing anti-SLAPP statutes . . . require that defendants seeking statutory protection be motivated by selfless public interests).

Here, Endeavor's lobbying focused on the widely-reported issue of Chinese efforts to secure sensitive military robotics technology by investing in and influencing foreign companies. Robo-Team does not dispute this is a matter of public concern. Nor could it: "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."); *Taylor v. FDIC*, 132 F.3d 753, 769 (D.C. Cir. 1997).

As the Supreme Court has explained, "speech of only private concern" would include things like a "report [that] was sent to only five subscribers to [a] reporting service, who were

bound not to disseminate it further," and "videos of an employee engaging in sexually explicit acts . . . [that] did nothing to inform the public about any aspect of the [employing agency's] functioning or operation." *Snyder*, 562 at 543. But here, Robo-Team alleges Endeavor made "false statements far and wide" to "congressional representatives, the U.S. Department of Defense, the U.S. Department of State, contracting officers, private company executives, Robo-Team's current and prospective customers, and the press." Opp. at 10. This is the opposite of "speech of only private concern." Endeavor's challenged activities treat matters of public concern in the heartland of the First Amendment and the Act's protections.[6]

2. Robo-Team further argues Section 16-5505 excludes from protection a person "primarily engaged in the business of selling . . . goods or services" when the communications were "for the purpose of promoting, securing, or completing sales . . . [of] the person's goods or services," and the audience is an "actual or potential buyer or customer." Opp. at 8, 12-13; *see* D.C. Code § 16-5505. But that Section is inapplicable because none of the "defamatory" communications were made primarily for Endeavor's commercial interests or "promoting, securing, or completing sales" of its "goods or services." Neither the Sachem Memo nor any of the Congressional letters once mention Endeavor or any of its specific products, let alone any of Robo-Team's products or services.

3. Robo-Team further analogizes the Anti-SLAPP Act's "commercial speech exclusion" (Sections 16-5501(3) and 16-5505) to a similar provision in California's anti-SLAPP Act. Opp. at 8-9 & n.7. But the analogy fails. The California Act's exclusion centers on comparative advertising claims. *See Mendoza v. ADP Screening & Selection Servs., Inc.*, 107

[6] As in response to Endeavor's Rule 12 Motion, Robo-Team again asserts allegations found nowhere in its complaint, such as that Endeavor defamed it to the State Department, contracting officers, and the press. *Compare* Opp. at 10, *with* Cmplt. ¶¶ 34-35; *see* Reply in Support of its Rule 12 Motion to Dismiss, at 9 n. 8 & 13 n.11 (ECF No. 18) ("Rule 12 Reply").

Cal. Rptr. 3d 294, 301 (Cal. Ct. App. 2010) ("[T]he Legislature appears to have enacted section 425.17, subdivision (c), for the purpose of exempting from the reach of the anti-SLAPP statute cases involving comparative advertising by businesses . . . . No such business advertising context is presented by [Plaintiff's] case against [Defendant].").[7] Robo-Team challenges lobbying on a public policy issue and legislative proposals, not any comparative advertising. Simply because blocking Chinese efforts to acquire our military technology and thereby undermine our national defense may apparently impact Robo-Team's commercial interests does not reduce Endeavor's core First Amendment activity into less protected commercial activity. Endeavor's challenged lobbying is core speech activity protected by the Anti-SLAPP Act.

III. ROBO-TEAM HAS FAILED TO MEET ITS BURDEN TO SHOW ANY OF ITS CLAIMS ARE LIKELY TO SUCCEED ON THE MERITS.

Because Endeavor has made a *prima facie* showing that Robo-Team's claims arise "from an act in furtherance of the right of advocacy on issues of public interest," Robo-Team must "demonstrate[ ] that the claim[s] [are] likely to succeed on the merits." D.C. Code § 16-5502(b). It has not done so, because it cannot. Instead of coming forward with evidence showing it can succeed on any of its claims –which one would think it had gathered before making a federal case of Endeavor's lobbying – Robo-Team quibbles over the "admissibility" of material Endeavor cites as if *Endeavor* bears the burden to *disprove* Robo-Team's bare claims. Opp. at 2

[7] The California commercial speech cases Robo-Team cites are off-point and readily distinguishable. Opp. at 11-12. In *L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles*, the court held defendants' internet advertisements were commercial speech because they only directed consumers to their website instead of plaintiffs' and "made no statements about the taxicab industry, the taxicab licensing process, or local taxicab regulations." 191 Cal. Rptr. 3d 579, 586 (Cal. Ct. App. 2015). But here, while Robo-Team complains it was referenced in Endeavor's lobbying, Endeavor's lobbying addressed a national security policy issue and sought a legislative solution. As such, none of Endeavor's challenged communications advertised any product or service. The other case Robo-Team invokes – *Mann v. Quality Old Time Serv., Inc.*, 15 Cal. Rptr. 3d 215 (Cal. Ct. App. 2004) – has no bearing here because it addressed speech primarily about the plaintiff, not an issue of public interest. *See id.* at 219.

& 18-21. But Robo-Team has it exactly backwards. Endeavor need only make a "prima facie showing" under Section 16-5502(b), which it has done. D.C. Code § 16-5502(b); *Mann*, 150 A.2d at 1237 ("The Act . . . places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection."); Special Mot. at 11-13; *supra* Part II. It is up to Robo-Team to demonstrate its claims are likely to succeed. It has failed to carry that burden.

A. Robo-Team Is Not Likely To Succeed On Its Defamation Claim.

Robo-Team's central defamation claim is meritless because all of the so-called "defamatory" communications are not only protected by multiple longstanding privileges, they are manifestly *true*. Robo-Team's arguments do not save its claim, and it has come forward with no evidence to show it has any chance of success on it – which it does not.

1. Robo-Team does not dispute it has failed to present any evidence of damages. But that is an essential element of a defamation claim brought by a corporation: "[A] corporation suing for defamation . . . may only recover actual damages in the form of lost profits." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985); *Am. Petroleum Inst. v. TechnoMedia Int'l,Inc.*, 699 F. Supp. 2d 258, 267 n.7 (D.D.C. 2010) (same); *Martin Marietta Corp. v. The Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) ("The law of libel has long . . . limit[ed] corporate recovery to actual damages in the form of lost profits."). "This traditional doctrine does no more than recognize the obvious fact that a libel action brought on behalf of a corporation does not involve the essential dignity and worth of every human being and, thus, is not at the root of any decent system of ordered liberty." *Id.*

Robo-Team has not presented a shred of evidence it has suffered harm of any kind from Endeavor's "defamatory" communications. Its own CEO – who presumably would know of any damage to the company – does not state in his declaration any of the challenged communications

caused Robo-Team to lose any contract or anyone not to do business with Robo-Team. Opp., Ex. 1. Robo-Team's failure to offer any evidence of damages is fatal to its defamation claim, as well as to its tortious interference and conspiracy claims, which rest on the same challenged activity. Special Mot. at 16; Endeavor Mem. in Supp. of Mot. to Dismiss at 24-25, ECF No. 10-1 ("Rule 12 Mot.").[8]

2. As in its Opposition to Endeavor's Rule 12 Motion, Robo-Team again argues Endeavor's lobbying communications were not privileged. Opp. at 14-16; Rule 12 Reply at 12-15. Robo-Team is mistaken. Robo-Team initially argues the privilege for unsolicited communications to a legislative body does not apply because Endeavor has not identified any underlying legislative proceeding or investigation. Opp. at 14. But the D.C. Circuit "[did] not incorporate such a requirement in [its] definition of the scope of the privilege" because "[t]o grant immunity only to those statements made in connection with an already existing . . . investigation would severely limit the scope of possible input." *Webster v. Sun Co.*, 731 F.2d 1, 6 nn.13 & 14 (D.C. Cir. 1984). And the communications at issue here were allegedly made to members of Congress, who considered the information as part of their ongoing investigation of defense "acquisition and industrial base policy," and "technology transfer and export controls," in any event. Special Mot. at 7. The Sachem Memo mentioned – and was delivered to Congress amid – the Congressional U.S.-China Economic and Security Review Commission, which was then investigating the very issues raised in the communications. Cmplt., Ex. 1, at 1; Special Mot. at 5; Rule 12 Reply at 13 n.10.[9]

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[8] Robo-Team still has not offered a solitary piece of evidence to show the amount in controversy meets the jurisdictional minimum. Rule 12 Mot. at 15-16; Rule 12 Reply at 11. It does not.

[9] Robo-Team argues the privilege does not apply because the communications were "spread far and wide" to people with no interest in or connection to the Legislature. Opp. at 14-15. But Robo-Team gives no hint as to the identities of these people in its complaint. Cmplt. ¶¶ 5, 8 &

Robo-Team further argues Endeavor cannot invoke the privilege for fair comment on matters of public interest because the communications were not opinions, but "statements of fact that can be disproven." Opp. at 15-16. But as discussed below, Robo-Team has not provided evidence to disprove them. And many of the challenged communications are obviously opinions, such as the communication about ITAR violations. Cmplt., Ex. 1 ("*apparent* violation of ITAR regulations"). Moreover, the fair comment privilege still "applies when the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 150 (D.D.C. 1995). Robo-Team only alleges the Sachem Memo was presented to government officials who could plainly draw their own conclusions based on it.[10]

Robo-Team also argues the common interest privilege applies only where a party has a duty to speak. Opp. at 16. But a duty is *sufficient* – not *necessary* – for the privilege to apply. *See Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995); *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 858 (D.C. Cir. 2006) (holding common interest privilege statements applied despite any duty). Nor is this a jury question: "Whether a statement is protected by a privilege *is a question of law for the court.*" *Columbia First Bank*, 665 A.2d at 655 (emphasis added). Robo-Team has not offered anything to show Endeavor warned Members of Congress and the defense establishment about a national security threat in bad faith.

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39. The Court should disregard Robo-Team's rank speculation. *See Stovell v. James*, 810 F. Supp. 2d 237, 248 (D.D.C. 2011) (defamation plaintiff must plead "the time, place, content, speaker, and listener of the alleged defamatory matter").

[10] In opposition to Endeavor's Rule 12 Motion, Robo-Team did not dispute that Endeavor's communications are protected by the privilege for communications to those "who may act in the public interest" and the *Noerr-Pennington* doctrine. Rule 12 Reply at 13-14 & n.13. But now it argues those protections do not apply based on empty allegations of "fraud" nowhere found in its complaint. Opp. at 15 n. 11.

Because Endeavor's lobbying communications are protected under multiple privileges, Robo-Team's defamation claim is unlikely to succeed. *See White v. Fraternal Order of* Police, 909 F.2d 512, 527 (D.C. Cir. 1990) ("Normally the issue of privilege antecedes the question whether a communication is capable of defamatory meaning."); *Forras*, 39 F. Supp. at 55 (holding defamation claim unlikely to succeed under D.C. Anti-SLAPP Act because statements were privileged); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 259 (D.D.C. 2013) (same).

3. Robo-Team has also failed to carry its burden of coming forward with evidence showing the challenged communications are false – which they are not. *See* D.C. Code § 16-5502(b). While Robo-Team argues Endeavor made "statements of fact that can be disproven," Opp. at 16, it has not come forward with anything actually to disprove any of them. The *only* thing Robo-Team offers in support of its claims is a terse declaration from the CEO of its North American branch, which raises more questions than it answers. *Id.*, Ex. 1. Beyond that, Robo-Team purports to rely mostly on *Endeavor*'s filings to support its claims. *See id.* at 13 &17-22.

This is not surprising because Robo-Team does not really even dispute that the bulk of the challenged statements (Cmplt. ¶¶ 23, 28, Exhs. 1-3) are *true*. Special Mot. at 16; Rule 12 Mot. at 20-22. Robo-Team does not dispute:

- It is a wholly-owned subsidiary of an Israeli company with a limited U.S. presence. *Compare* Cmplt. ¶¶ 24, 28 & Ex. 1, *with* Special Mot. at 3 & nn.3-4.
- It raised $50 million in foreign investment from the FengHe Group. *Compare* Cmplt. ¶¶ 24, 28 & Ex. 1, *with* Special Mot. at 3 n. 5.
- The FengHe Group is based in China and Singapore. *Compare* Cmplt. ¶¶ 24, 28 & Ex. 1, *with* Special Mot. 4.
- The FengHe Group's investment represented 25% of Robo-Team's valuation, which conferred significant control over the company's corporate structure. *Compare* Cmplt. ¶¶ 24, 28 & Ex. 1, *with* Special Mot. at 3 n.5, 15-16
- That the FengHe Group was founded by John Wu and Matt Hu; that Mr. Hu personally holds a 5% share in Robo-Team; and that Mr. Hu holds an observer

> seat on Robo-Team's board of directors, with access to all board materials. *Compare* Cmplt. ¶¶ 24, 28 & Ex. 1, *with* Special Mot. at 4.

Robo-Team also does not dispute it hosted a coalition of Chinese nationals at locations in Israel, only that the video of this meeting showed "*apparent* violation of ITAR regulations." Opp. at 17 (emphasis added). But that alleged statement "relates to a matter of public concern and it is clear that the declarant is expressing a subjective view [or] an interpretation" of facts. *Washington v. Smith*, 893 F. Supp. 60, 62 (D.D.C. 1995); Rule 12 Mot. at 18-19. Moreover, while Robo-Team asserts Mr. Wu and Mr. Hu are citizens of Singapore, it does not deny they are or used to be citizens of China. Opp. at 21 & Ex. 1, ¶ 4. Indeed, the ***FengHe Group's own website*** describes Mr. Wu as a "***China*** engineer-turned-venture-capitalist" and Mr. Hu as a "pioneering institutional asset manager ***in China***" and as having "held key management positions in several leading investments and asset firms in ***Greater China***." Special Mot. at 4 & nn. 7-8; & 16; http://www.fenghegroup.com/china-engineer-turned-venture-capitalist-sees-opportunities-in-ageing-workforce-and-new-tech/; http://www.fenghegroup.com/leadership/.[11] Robo-Team has come forward with nothing to show any of these statements are false.

Instead of submitting evidence to support its claims, Robo-Team invents an entirely new allegation. It now alleges Endeavor defamed it by saying Robo-Team is "backed by," "connected to," or an "agent" of the Chinese government. Opp. at 2, 11, 17, 19-21. But all Robo-Team alleges in its complaint is that Endeavor purportedly communicated that Robo-Team has Chinese investors, and that the Chinese government has used investment as a way to acquire U.S. defense technologies. Special Mot. at 3-6, 15-16.[12] Robo-Team does not because it cannot

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[11] Robo-Team downplays the South China Morning Post article. Opp. at 20. But it ignores that article was posted on the FengHe Group's own website. Special Mot. at 16.

[12] Robo-Team's reliance on *Parsi v. Daioleslam*, 595 F. Supp. 2d 99 (D.D.C. 2009), is misplaced. While Parsi challenged specific statements he was "one of the Iranian regime's

point to any statement from Endeavor that Robo-Team is "backed by," "connected to," or an "agent" of the Chinese government. Only Robo-Team itself makes that allegation.

Endeavor's alleged statements are true, and Robo-Team has not come forward with any evidence to show they are false. Its defamation claim therefore cannot succeed on the merits.

B. Robo-Team Is Not Likely To Succeed On Any Of Its Other Claims.

Robo-Team also has not come forward with evidence, as it must, to support its claims for tortious interference, conspiracy, and unfair competition. Opp. at 21-22. Importantly, Robo-Team does not address its failure to prove up (or even allege) damages beyond purely speculative and hypothetical harms. Robo-Team, and even the CEO of its North American branch, still cannot point to a single lost business expectancy or the basis for any expectancy, or identify any contract the company has not been awarded, or any specific damages whatsoever. Robo-Team cannot proceed with any tortious interference claim. *See Gov't Relations Inc. v. Howe*, Civ. No. 05-1081, 2007 WL 201264, at *9 (D.D.C. Jan. 24 2007) (dismissing tortious interference claim that "merely speculate[d]" about damages and loss of clients and reputation).

This failure likewise dooms Robo-Team's conspiracy claim, which is not even "actionable in and of itself." *Naegele v. Albers*, 110 F. Supp. 3d 126, 156 (D.D.C. 2015) (Berman Jackson, J.). Robo-Team's unfair competition claim is also unlikely to succeed given it has not demonstrated any underlying tort or offered any evidence that Endeavor acted "solely for the purpose of destroying" Robo-Team rather than in furtherance of legislative change. *Scanwell Labs., Inc. v. Thomas*, 521 F.2d 941, 949 (D.C. Cir. 1975).

Lobby arms in the US" and "was the regime's trusted man within the new network," *id.* at 103, there is nothing in the Sachem Memo that says anything about Robo-Team being "backed by" or an "agent of" the Chinese government. Cmplt., Ex. 1.

Robo-Team has failed to meet its burden to "demonstrate" any of its claims are "likely to succeed on the merits." D.C. Code § 16-5502(b); *see id.* § 16-5501(2). The Court should dismiss Robo-Team's complaint with prejudice and award Endeavor its costs and fees. *See id.* §§ 16-5502(d) & 16-5504(a).

IV. ROBO-TEAM SHOULD NOT BE PERMITTED TO CONDUCT DISCOVERY.

Robo-Team once again requests some unspecified – but allegedly "targeted" – discovery. Opp. at 22. But Robo-Team's renewed bid for discovery only confirms that its claims are baseless and "that [its] allegations were made without supporting facts in the hope that [it] would be permitted to embark upon a classic fishing expedition." *Freeman v. Bechtel Constr. Co.*, 87 F.3d 1029, 1032 (8th Cir. 1996). Robo-Team cannot file a case, then hope to backfill its allegations through discovery. That kind of abusive litigation tactic is precisely what the Anti-SLAPP Act protects against by requiring Robo-Team to come forward out of the gate with the evidence to support its claims. As such, Robo-Team cannot defeat this Special Motion, or Endeavor's Rule 12 Motion for that matter, by claiming it does not have any evidence to support its claims. *See Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011) (Berman Jackson, J.) ("The burden of proving falsity rests squarely on the plaintiff, [who] must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue.").

But even if it were permitted to litigate in reverse, it is abundantly clear no amount of supposedly "targeted" discovery would enable Robo-Team to prove up its claims. *See* D.C. Code § 16-5502(c)(2). Robo-Team has not pointed to a single fact it needs or intends to "discover" to support its claims. The reality is discovery would be pointless and needlessly

burden Endeavor. It would only allow Robo-Team to continue to punish Endeavor for exercising its protected First Amendment rights. The Court should deny its request.[13]

CONCLUSION

The Court should grant Endeavor's Special Motion, dismiss the complaint with prejudice, and award Endeavor its fees and costs.

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Respectfully Submitted,

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[13] If the court permits any discovery, which it should not, it should be "conditioned upon [Robo-Team] paying any expenses incurred by [Endeavor] in responding to such discovery." D.C. Code § 16-5502(c)(2).