UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ENDEAVOR ROBOTICS' AND SACHEM STRATEGIES' SPECIAL MOTIONS TO DISMISS UNDER THE D.C. ANTI-SLAPP ACT

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INTRODUCTION

Defendant Endeavor Robotics ("Endeavor") has conspired with Defendant Sachem Strategies ("Sachem") to spread the malicious fiction that Robo-Team NA, Inc. ("Robo-Team"), a U.S. military contractor, is backed by, connected to, or an agent of, the Chinese government. Defendants' effort to hide behind the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act ("D.C. Anti-SLAPP Act" or "the Act")[1] must fail for several reasons. First and foremost, the D.C. Circuit has definitively held that the D.C. Anti-SLAPP Act cannot be applied in diversity actions in federal court. In *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015), the D.C. Circuit ruled that this Court must apply the standards for granting pre-trial judgment set forth in Rules 12 and 56 of the Federal Rules of Civil Procedure, instead of the directly conflicting and procedurally improper test of "'likely to succeed on the merits"' set forth in the D.C. Anti-SLAPP Act's special motion to dismiss provision. Contrary to Defendants' assertions, the *Abbas* holding is binding on this Court. *Id.* (citation omitted).

Second, the D.C. Anti-SLAPP Act expressly excludes the commercial speech at issue in this case. Defendants' false and defamatory statements, including that "Robo-Team has strong connections with China, a military rival who might gain access to the technology Robo-Team

[1] Defendant Sachem Strategies filed its own special motion to dismiss and notice of joinder, in which "Sachem joins in, adopts, and incorporates herein by reference the legal positions, arguments, and authorities set forth in Endeavor Robotics ("Endeavor's") Special Motion to Dismiss and Memorandum in Support of its Special Motion to Dismiss (ECF No. 19)." Sachem Strategies, LLC's Special Motion to Dismiss and Notice of Joinder in Special Motion to Dismiss Under the D.C. Anti-SLAPP Act at 2 (hereinafter, "Sachem Special Mot. to Dismiss") (ECF No. 20). Both Endeavor's and Sachem's special motions to dismiss are addressed in this Consolidated Opposition.

develops for the U.S. Army[,]"[2] are commercially motivated, targeting Endeavor's main competitor for U.S. military robotics contracts. Such defamatory commercial speech, "directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance" is expressly excluded from the protection of the D.C. Anti-SLAPP Act. D.C. Code § 16-5501(3); *id.* at § 16-5505. Endeavor's false statements were aimed at promoting its own commercial business interests by destroying its main competitor. Defendants cannot shield their commercially motivated speech under the D.C. Anti-SLAPP Act.

Finally, even if this Court decided to disregard *Abbas* to apply the D.C. Anti-SLAPP Act and its "likely to succeed" test, and found that Defendants made a *prima facie* showing under the Act, Robo-Team would still prevail. Robo-Team is likely to succeed on the merits of each of its claims. There is not a shred of evidence to support Defendants' knowingly false statements of fact, the gist of which is that Robo-Team is backed by, connected to, or an agent of, the Chinese government. There is also no evidence that Robo-Team exposed International Traffic in Arms Regulation ("ITAR")-restricted technology to any unauthorized person or entity. On the contrary, the only admissible evidence before this Court is that Robo-Team is not backed by, connected to, or an agent of, the Chinese government, the investors named in Defendants' motions are Singaporean, and Robo-Team has not violated ITAR. Declaration of Shahar Abuhazira (hereinafter "Abuhazira Decl."), Ex. 1 ¶¶ 2-4. Accordingly, Defendants' special motions to dismiss should be denied in their entirety.

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[2] *See, e.g.*, Sachem Strategies' Memorandum in Support of its Motion to Dismiss at 7 (hereinafter "Sachem Mot. to Dismiss") (ECF No. 13-1).

ARGUMENT

I. THE D.C. ANTI-SLAPP ACT CANNOT BE APPLIED IN THIS CASE.

In *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015), the D.C. Circuit addressed the precise issue presented here: whether the special motion to dismiss prescribed by D.C.'s Anti-SLAPP Act may be applied in a federal diversity action. The answer was, and still is, no. Federal Rules of Civil Procedure 12 and 56 preempt the Act because they establish the exclusive standards by which a federal court may grant pre-trial judgment, and the standards prescribed by the Act directly conflict with those exclusive federal standards. Furthermore, even if the Act were applicable in a federal diversity action, Defendants' cannot make the *prima facie* showing required under the Act, because their defamatory campaign was designed to protect and promote Endeavor's commercial interests and is therefore explicitly excluded from the Act's protection.

A. THE D.C. ANTI-SLAPP ACT CANNOT BE APPLIED IN FEDERAL DIVERSITY ACTIONS.

A federal court exercising diversity jurisdiction "should not apply a state law or rule if (1) a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas*, 783 F.3d at 1333 (citing *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) (majority opinion)). In *Shady Grove*, the Supreme Court considered whether a New York law prohibiting class actions in cases seeking certain types of damages could be applied in federal diversity cases. The answer was no. Because Federal Rule of Civil Procedure 23 "attempt[ed] to answer the same question" as the New York law, and Rule 23 did not violate the Rules Enabling Act, Rule 23 governed. 559 U.S. at 399.

Similarly, and directly binding here, the D.C. Circuit applied the same analysis and arrived at the same conclusion regarding Rules 12 and 56 and the directly conflicting provisions of D.C.'s Anti-SLAPP Act. *Abbas*, 783 F.3d at 1334. The Anti-SLAPP Act provides that:

> 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.

§ 16-5502(b). Dismissal under the Act "shall be with prejudice." § 16-5502(d). These procedural mechanisms do not apply in a federal diversity case. *Abbas*, 783 F.3d at 1334. Rules 12 and 56 establish an exclusive and "'integrated program' for determining whether to grant pre-trial judgment." *Id.* at 1334 (citing *Makaeff v. Trump University, LLC*, 715 F.3d 254, 274 (9th Cir. 2013) (Kozinski, J., concurring)). They are "'general federal procedures governing *all categories of cases*.'" *3M Co. v. Boulter*, 842 F. Supp. 2d 85, 107-08 (D.D.C. 2012) (emphasis added) (citation omitted). Moreover, because the D.C. Anti-SLAPP Act sets up "an additional hurdle a plaintiff must jump over to get to trial[,]" it also conflicts with Federal Rules of Civil Procedure 12 and 56. The Act therefore cannot be applied in a federal diversity action. *Abbas*, 783 F.3d at 1334.

Numerous federal courts have reached the same conclusion regarding other states' analogous Anti-SLAPP laws, often citing *Abbas*. *See, e.g.*, *Davide M. Carbone v. Cable News Network, Inc.*, No. 1:16-cv-1720-ODE, at 9 (N.D. Ga. Feb. 15, 2017) (citing *Abbas*); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, No. 15-CV-0547-MV-LAM, 2016 WL 8254920, at *4 (D.N.M. Feb. 17, 2016) (citing *Abbas*); *Unity Healthcare, Inc. v. Cty. of Hennepin*, 308 F.R.D. 537, 539 (D. Minn. 2015) (citing *Abbas*), *appeal filed* (July 2015); *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996) ("To the extent that the anti-SLAPP statute imposes additional

procedures in certain kinds of litigation in state court, it does not trump Fed. R. Civ. P. 12(b)(6).").

1. Rule 12's Standard is Different.

Under Rule 12(b)(6), "a plaintiff can overcome a motion to dismiss by simply alleging facts sufficient to state a claim that is plausible on its face." *Abbas*, 783 F.3d at 1334 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A well-pleaded complaint 'may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable.'" *Abbas*, 783 F.3d at 1334 (quoting *Twombly*, 550 U.S. at 556). The "plausibility" standard established by *Twombly* "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556. The Rule 12 standard is plainly distinct from the Act's "likely to succeed" standard. *Abbas*, 783 F.3d at 1334.

2. Rule 56's Standard is Different.

The standard for dismissal under Rule 56 also contrasts starkly with the Anti-SLAPP Act. Under Rule 56, summary judgment will be granted if "the *movant* shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Not only is the "genuine dispute of fact" standard distinct from the "likely to succeed" standard, but under Rule 56, the burden is on the movant. *Id.* Therefore, the D.C. Anti-SLAPP Act directly conflicts with Rule 56 in two ways: it imposes a significantly higher burden and also shifts that burden to the plaintiff. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1237-38 (D.C. 2016) (noting that the D.C. Anti-SLAPP Act's burden-shifting mechanism is a "reversal of the allocation of burdens" under the D.C. analogs of Federal Rules 12 and 56). Moreover, the Anti-SLAPP Act would require this court to evaluate material factual

disputes before trial, which Rules 12 and 56 expressly prohibit.[3] *3M Co.*, 842 F. Supp. 2d at 108 (citing *Callaway v. Hamilton Nat'l Bank of Wash.*, 195 F.2d 556 (D.C. Cir. 1952)).

"Put simply, the D.C. Anti-SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56."[4] *Abbas*, 783 F.3d at 1335. Because Rules 12 and 56 do not violate the Rules Enabling Act, "[a] federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision." *Id.* at 1337.

3. The Act's Inapplicability is a Matter of Federal Law.

Endeavor cannot circumvent the dispositive, binding, and well-reasoned holding in *Abbas*. Yet it attempts to twist a D.C. Council Committee Report, as well as *dicta* in a footnote in an inapposite decision from the D.C. Court of Appeals, into an abrogation of binding D.C. Circuit precedent. Defendants claim that this Court is "bound to follow *Mann*" because in a diversity case, "this Court must apply the current substantive law of the District." Endeavor Mem. in Supp. of Special Mot. to Dismiss at 10 (hereinafter "Endeavor Special Mot. to Dismiss)

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[3] Because the Anti-SLAPP Act calls for the trial court to decide issues of material fact, weigh evidence, and decide plaintiff's likelihood of success on the merits, it also violates the plaintiff's right to a jury trial under the Seventh Amendment of the U.S. Constitution. *See 3M Co. v. Boulter*, No. 11-cv-1527 (RLW), 2012 WL 5245458, at *1 (D.D.C. Oct. 24, 2012) (denying a motion to dismiss under the D.C. Anti-SLAPP Act and noting that "[t]he Supreme Court has made it quite clear that Rule 56 sets the outer boundary for dismissing claims on the merits based upon a pretrial evaluation of the evidence; to go further infringes upon the Seventh Amendment right to a jury trial."); *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015) (en banc) (declaring that Washington state's Anti–SLAPP special motion to dismiss violates the state's constitutional guarantee to a jury trial); *Opinion of the Justices (SLAPP Suit Procedure)*, 641 A.2d 1012, 1015 (N.H. 1994) (declaring that proposed Anti–SLAPP legislation would violate right to trial by jury guaranteed by New Hampshire state constitution).

[4] Applying the Anti-SLAPP Act would also infringe on the federal courts' discretion to dismiss a case without prejudice. The Act's requirement that dismissal be with prejudice is in "direct conflict with the Federal Rules." *3M Co.*, 842 F. Supp. 2d at 104. Rule 41(b) "expressly provides that the district court may specify that a dismissal is without prejudice" but "[u]nder the Anti-SLAPP Act . . . the federal court's hands are tied." *Id.* at 105.

(ECF No. 19-1). Defendants misstate the issue. The question here is not *how* to apply the Anti-SLAPP Act. It is *whether* the Act may be applied at all. As the Supreme Court and this Circuit have firmly established, that inquiry is a matter of federal law. *Shady Grove*, 559 U.S. at 398; *Abbas*, 783 F.3d at 1333. Indeed, the case on which Defendants rely, *Mann*, explicitly states that "[t]he applicability of the Anti-SLAPP statute in federal court is not for this court to determine." *Mann*, 150 A.3d at 1238 n.32.[5] The legal precedent is clear, applicable, and binding.[6] Defendants' special motions to dismiss must be denied.

B. DEFENDANTS' COMMERCIALLY MOTIVATED SPEECH IS EXPLICITLY EXCLUDED FROM THE ACT'S PROTECTION.

The D.C. Anti-SLAPP Act does not protect the type of commercially-motivated and false statements Defendants spread about Robo-Team – a key competitor in the field of robotics technology. The Act expressly denies protection to statements "directed primarily toward protecting the speaker's commercial interests":

> The term 'issue of public interest' shall not be construed to include *private interests, such as statements directed primarily toward protecting the speaker's*

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[5] Defendants also point to the inapposite *Easaw v. Newport*, No. 17-00028 (BAH) , 2017 WL 2062851, (D.D.C. May 12, 2017), which recognized the D.C. Court of Appeals' authority to interpret D.C. law under the *Erie* doctrine. But the question in this case is a federal one, and *Erie* '"has never been invoked to void a Federal Rule."' *Smith v. Peters*, 482 F.2d 799, 802 (6th Cir. 1973) (quoting *Hanna v. Plumer*, 380 U.S. 460, 470 (1965)).

[6] See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."); *Shady Grove*, 559 U.S. at 406 (when construing a federal rule, courts "cannot contort its text, even to avert a collision with state law"); *Willever v. United States*, 775 F. Supp. 2d 771, 779 (D. Md. 2011) ("The distinction between 'substantive' and 'procedural' state laws established in *Erie* does not come into play if the Federal Rule and the state law directly collide; if there is a collision, the Federal Rule controls, regardless of how the state law is characterized."); *Makaeff v. Trump University, LLC*, 715 F.3d 254, 275 (9th Cir. 2013) (Kozinski, J. concurring) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof.").

> *commercial interests* rather than toward commenting on or sharing information about a matter of public significance.

§ 16-5501(3) (emphasis added). The Act further limits its scope in Section 16-5505 – a full section devoted to excluding Defendants' exact conduct at issue in this case:

> This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is: (1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and (2) The intended audience is an actual or potential buyer or customer.

§ 16-5505.

The plain language of Sections 16-5501(3) and 16-5505 of D.C.'s Anti-SLAPP Act excludes Defendants' conduct from the Act's protection. *See Validus Reinsurance, Ltd. v. United States*, 19 F. Supp. 3d 225, 229-30 (D.D.C. 2014) (Berman Jackson, J.), *aff'd*, 786 F.3d 1039 (2015) ("Absent a persuasive reason to the contrary, courts give the plain language of an enactment their ordinary meaning.") (citing *Higgins v. Marshall*, 584 F.2d 1035, 1037 (D.C. Cir. 1978)); *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) ("'When the plain meaning of the statutory language is unambiguous, the intent of the legislature is clear, and judicial inquiry need go no further.'") (quoting *District of Columbia v. Gallagher*, 734 A.2d 1087, 1091 (D.C. 1999)).

By way of background, the Act's commercial speech exclusion closely mirrors the language in the California Anti-SLAPP Act. The California Legislature enacted its Anti-SLAPP law in 1999, without any exclusion for commercially motivated speech. But in 2004, the Legislature acknowledged a "disturbing abuse" of the law, which had "undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose" of the Anti-SLAPP law. Cal. Civ. Proc. Code § 425.17(a). The

Legislature therefore enacted a commercial exemption,[7] which D.C.'s 2011 law closely mirrors in both Sections 16-5501(3) and 16-5505.

1. The False Statements Made To Protect Defendants' Commercial Interests Are Excluded By Section 16-5501(3) Of The Act.

Even if the D.C. Anti-SLAPP Act were applicable in federal diversity actions, Defendants' statements are excluded from the Act's protection, because their statements were "directed primarily toward protecting [Defendants'] commercial interests rather than toward commenting on or sharing information about a matter of public significance." § 16-5501(3).

The facts alleged in the Complaint surrounding Endeavor's false statements help define the commercial nature of Defendants' defamatory statements. In September 2015, Robo-Team was selected over Endeavor for a contract with the U.S. Air Force. Compl. ¶ 17. Immediately thereafter, Endeavor worked hard to persuade Robo-Team to partner with Endeavor on federal bids and otherwise. *Id.* ¶ 18. In fact, in May 2016, Endeavor's then Chief Technologist even appeared at the home of Robo-Team's CEO, to make an intense personal plea. *Id.*. Robo-Team declined to partner with Endeavor. *Id.* ¶ 19. During this time, the U.S. Army was preparing to issue a Request for Proposals ("RFP") for the Man Transportable Robot System Increment II ("MTRS") program, which has an estimated value of $250 million – one of the largest robotics contracts offered by the U.S. military in the previous 15 years. *Id.* ¶ 20. The RFP for the MTRS

[7] The California exemption provides, in pertinent part, that the Anti-SLAPP Law "does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services" if both of the following conditions are met: "(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services; [and] (2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation..." Cal. Civ. Proc. Code § 425.17.

program was issued in November 2016. *Id.* In addition, the U.S. Army was preparing to issue an RFP for an even larger program – the Common Robotics System – Individual ("CRS-I") – which it ultimately issued in May 2017. *Id.* ¶ 21.

Rather than compete fairly for robotics contracts, Defendant Endeavor hired Defendant Sachem to execute a defamatory campaign against Robo-Team. The "Sachem Memo" is but one example of Defendants' false statements, which resulted in the publishing of the Moulton Letter in December of 2016, and the Tsongas Letter in January of 2017, both lifting passages from the Sachem Memo. *Id.* ¶¶ 22-33. But this was no single-pronged conspiracy. Defendants also spread these false statements far and wide to recipients including 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. to Endeavor Mot. to Dismiss at 28-29 (ECF No. 16); Compl. ¶¶ 1-2, 4-5, 22-24, 25, 27-29, 31-32, 34-36.

To be clear, the Complaint alleges that *both* Defendants – Endeavor and Sachem – participated in disseminating these false statements. *See e.g.*, Compl. ¶¶ 2-6; *compare* Sachem Special Mot. to Dismiss at 2. But, in any event, Defendants are both liable for the full extent of their defamatory campaign under well-settled conspiracy doctrines. *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983) ("[O]nce the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action … so long as the purpose of the tortious action was to advance the overall object of the conspiracy.").

These false statements specifically target Robo-Team – a key commercial competitor – and identify the contracts for which Endeavor and Robo-Team are currently competing.[8] Defendants explicitly alleged that Robo-Team, "an Israeli company competing for MTRS . . . and CRS-I contracts" has "strong connections" with the Chinese government. *Id.*, Ex. 1, at 1-2 (referencing Robo-Team by name eight times in a four-page memo and mentioning no other company) (ECF No. 1-1). The Moulton Letter also specifically asked that the "Department of the Army carefully . . . examine the evidence of Chinese influence when considering the award of the MTRS Inc II and CRS-I contracts." *Id.*, Ex. 2 at 2 (ECF No. 1-2).

The timing of Defendants' defamatory statements and the fact that they target Robo-Team alone, are not matters of coincidence. These statements were made to protect and promote Endeavor's commercial interests by destroying Robo-Team's reputation, good will, business relationships, and prospects. The statements could not possibly have been made primarily for "protection of the U.S. robotics industry from Chinese influence and trade secrets theft[]" (Endeavor Special Mot. to Dismiss at 11), because there is not a shred of evidence that Robo-Team is backed by, connected to, or an agent of, the Chinese government, or that it exposed ITAR – restricted technology to any unauthorized person or entity. Abuhazira Decl., Ex. 1, ¶¶ 2-3.

Rather, Defendants' statements were made to injure and eliminate a specific competitor. *See L.A. Taxi Coop., Inc. v. Indep. Taxi Owners Ass'n of Los Angeles*, 191 Cal. Rptr. 3d 579, 587 (Cal. Ct. App. 2015) (holding that "[t]he commercial speech at issue was not about taxicab

[8] Robo-Team alleged in the Complaint, on information and belief, that Endeavor submitted or planned to submit bids on the MTRS and CRS-I programs. Endeavor has now filed two motions to dismiss and has not denied this allegation.

companies in general, but about a specific taxicab company" and thus was "purely commercial speech" and approving of a California Court of Appeal decision where "defendant company's statements to governmental agencies and customers concerning its alleged unlawful dumping of toxic chemicals [was] not protected under [the] anti-SLAPP statute [because] although pollution is [a] matter of public interest, [the] statements were not about pollution or potential public health and safety issues in general, but about [the] company's specific business practices.").

Defendants' defamatory statements were "protecting [Endeavor's] commercial interests"; therefore, they are excluded under the plain language of Section 16-5501(3).

2. The False Statements Made to Secure U.S. Government Contracts Are Also Exempted by Section 16-5505 of the Act.

The D.C. Council exempted Defendants' commercial conduct from the Anti-SLAPP Act through yet another provision, Section 16-5505. That section renders the Act inapplicable if the special motion to dismiss is brought against a person "primarily engaged in the business of selling . . . goods or services" – like Endeavor and Sachem – and the statement or conduct from which the plaintiff's claim arises is: (1) a representation of fact made for the purpose of promoting, securing, or completing sales of the person's goods or services; and (2) the intended audience is an actual or potential buyer or customer. § 16-5505.

For the reasons already summarized above, Defendants' conduct is squarely exempted by this provision. The only material difference between Section 16-5505 and 16-5501(3) for the purposes of this case is that Section 16-5505 requires the intended audience to be a potential buyer or customer. That element is easily satisfied, as Defendants' false and defamatory

statements about Robo-Team were published and republished[9] to: Undersecretary Kendall, who is ultimately responsible for awarding the contracts for the MTRS and CRS-I programs, as well as other U.S. Government officials, private company executives in the robotics industry, and Robo-Team's current and prospective customers. Compl. ¶¶ 4-5. Defendants' special motions to dismiss should therefore be denied because the Anti-SLAPP Act is inapplicable in all federal diversity actions and also to Defendants' conduct, which is expressly excluded by two separate provisions of the statute.

II. EVEN IF THE ANTI-SLAPP ACT WERE APPLICABLE, ROBO-TEAM IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS.

Even if this Court were to apply the "likely to succeed" standard of the D.C. Anti-SLAPP Act to the allegations in the Complaint, based on the record here, Robo-Team would still prevail. Defendants' special motions to dismiss under D.C.'s Anti-SLAPP Act merely rehash Defendants' previous arguments that their defamatory statements are privileged and protected speech. Endeavor Special Mot. to Dismiss at 14-15 (ECF No. 19-1); *compare* Endeavor Mem. in Supp. of Mot. to Dismiss at 17-20 (hereinafter "Endeavor Mot. to Dismiss") (ECF No. 10-1); Sachem Mem. in Supp. of Mot. to Dismiss at 1 (ECF No. 13-1) (hereinafter "Sachem Mot. to Dismiss"). Defendants also make a second attempt to muster up support that their defamatory statements about Robo-Team are somehow true, but fail once again. The "evidence" Defendants present is inadmissible, but even if it were not, it does nothing to establish that Robo-Team is

[9] Defendants are liable for republications under well-settled D.C. law. Opp. to Endeavor Mot. to Dismiss at 29-30; *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005) (The "publisher of a defamatory statement may be liable for republication if the republication is reasonable foreseeable.") (citations omitted).

backed by, connected to, or an agent of, the Chinese government, or that it exposed ITAR-restricted technology to any unauthorized person or entity.

A. DEFENDANTS' STATEMENTS ARE NOT PRIVILEGED.

Robo-Team has already demonstrated that its Complaint alleges facts which destroy each claim of privilege. Opp. to Endeavor Mot. to Dismiss at 26-32; Opp. to Sachem Mot. to Dismiss at 6-8 (ECF No. 17). Specifically, Defendants: (1) "excessively published" their defamatory statements about Robo-Team; and (2) planned and executed their defamatory campaign in bad faith – both of which are fatal to a claim of privilege.

Defendants' defamatory statements are not privileged as "unsolicited communications to a legislative body." Opp. to Endeavor Mot. to Dismiss at 26-29. First, this privilege only applies when statements are: (1) made in the course of, or preliminary to a legislative proceeding; and (2) relate to the underlying proceeding. *See Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128, 139-40 (D.D.C. 2009); *see also* Restatement (Second) Torts § 590A, cmt. a. (1977). Defendants have not identified any legislative proceeding that has taken place and, to Robo-Team's knowledge, there has been none. *See Webster v. Sun. Co.*, 561 F. Supp. 1184, 1189 (D.D.C. 1983), *vacated and remanded on other grounds*, *Webster v. Sun. Co.*, 731 F.2d 1 (D.C. Cir. 1984) (finding the challenged statements were relevant "ultimately to actual legislative proceedings"). The "bare possibility" of a proceeding "is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered." Restatement (Second) of Torts § 588, cmt. e. (1977).

Second, "excessive publication" – or publishing a statement to those not having an

interest in or connection to the legislative proceeding[10] – destroys this qualified privilege. *Webster*, 731 F.2d at 5, 8, n.9 ("Publication[s] to individuals not associated with the legislature and republication by the legislator are not covered by this privilege."); *see also Armenian Assembly of Am., Inc.*, 597 F. Supp. 2d at 139-40 (citations omitted). Again, Defendants have not identified any legislative proceeding. Further, as pled in the Complaint, Defendants' defamatory statements were spread far and wide to recipients including 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. to Endeavor Mot. to Dismiss at 28-29; Compl. ¶¶ 1-2, 4-5, 22-24, 25, 27-29, 31-32, 34-36. There can be no question that the statements published or republished to those outside the "legislature or its investigative arm" destroy this privilege. *See Webster*, 731 F.2d at 5, 8, n.9.[11]

Defendants' defamatory statements are also not privileged under the common law "fair comment" privilege. Opp. to Endeavor Mot. to Dismiss at 30. This privilege is "obsolete in light of the broader first amendment protections afforded [to] expressions of opinion", but, in any event, this "defense goes only to opinion, not to misstatements of fact." *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1503-04 (D.D.C. 1987). Defendants' defamatory statements are

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[10] *See Moss v. Stockard*, 580 A.2d 1011, 1024 (D.C. 1990) (Excessive publication is defined as "publication to those with no common interest in the information communicated, or publication not reasonably calculated to protect or further that interest...").

[11] Defendants' contention that their defamatory campaign against Robo-Team is shielded from liability under the *Noerr-Pennington* doctrine is wrong. *See* Endeavor Mot. to Dismiss at 23, n. 22; Endeavor Special Mot. to Dismiss at 15, n. 27. Defendants' defamatory campaign is not entitled to protection because "neither the *Noerr-Pennington* doctrine nor the First Amendment more generally protects petitions predicated on fraud or deliberate misrepresentation." *See United States v. Philip Morris, USA Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009). In addition, Defendants' statements are not privileged as "communication[s] to one who may act in the public interest." Restatement (Second) of Torts § 598 (1977). In any event, this qualified privilege would be destroyed by Defendants' conduct, including knowingly spreading false information and excessive publication. *Id.*, cmt. a.

not opinions – they are statements of fact that can be disproven. Opp. to Endeavor Mot. to Dismiss at 29-30; *see also* Endeavor Mot. to Dismiss at 19 (admitting that Sachem Memo "recites publicly-reported facts"); *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 109-110 (D.D.C. 2009). Furthermore, Defendants' conduct, as pled in the Complaint, destroys this qualified privilege. *See* Restatement (Second) of Torts § 599 (1977). Defendants knowingly spread false information about Robo-Team and excessively published such information. Compl. ¶¶ 1-3, 4-6, 16, 18-19, 22-25, 27-29, 31-33, 34-36, 42; *see also* Opp. to Endeavor Mot. to Dismiss at 17-18, 28-29, 30-32; Opp. to Sachem Mot. to Dismiss at 6-8.

Finally, Defendants' defamatory statements are not protected by the "common interest" privilege. Opp. to Endeavor Mot. to Dismiss at 31-32. This privilege applies only in situations where a person speaks "pursuant to 'a duty to a person having a corresponding… duty'" *Cruz-Roldan v. Nagurka*, No. 16-CV-1308 (RLJ), 2017 WL 1214403, at *4 (D.D.C. Mar. 31, 2017) (citation omitted). An explicit requirement of the privilege is "good faith" and whether Defendants acted in good faith is a question for the jury. *Id.* As detailed in the Complaint, Defendants acted in bad faith by carrying out a fraudulent scheme to harm Robo-Team – they did not act pursuant to any "duty." Compl. ¶¶ 1-3, 4-6, 16, 18-19, 22-25, 27-29, 31-33, 34-36, 42. Furthermore, Defendants' conduct – including knowingly making false statements about Robo-Team and excessively publishing those statements – destroys this qualified privilege. *See* Restatement (Second) of Torts § 596 (1977); *Moss*, 580 A.2d at 1024 (citations omitted).

B. ROBO-TEAM IS LIKELY TO PREVAIL ON EACH OF ITS CLAIMS.

Robo-Team is likely to prevail on the merits of its claims. Under the D.C. Anti-SLAPP Act, Robo-Team need only proffer evidence sufficient to show that a properly instructed jury could reasonably find in its favor. *Mann*, 150 A.3d at 1233. Based on the record before the

Court, Robo-Team meets this test and Defendants' special motions to dismiss should be denied.

With regard to defamation claims, the Supreme Court has held, "[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 341 (1974). The Supreme Court also recognized that:

> Minor inaccuracies do not amount to falsity so long as the substance, *the gist*, the sting, of the libelous charge be justified. Put another way, the statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (emphasis added) (internal citations and quotations omitted).

Robo-Team provided numerous specific examples of the defamatory statements in the Complaint (¶¶ 1-6, 22-37), and discussed them in detail in its Opposition to Endeavor's Motion to Dismiss under Rule 12(b)(6) (*See* Opp. to Endeavor Mot. to Dismiss at 2-6 and 25-31). Those facts and arguments are incorporated by reference here. One of Defendants' defamatory statements, however, merits repeating:

- "More disturbingly, Roboteam recently hosted a coalition of Chinese delegates at sensitive locations in Israel, exposing Chinese nationals to ITAR restricted technology, in apparent violation of ITAR regulations."

This defamatory statement claims that Robo-Team has violated the law by exposing ITAR-restricted technology to unauthorized persons or entities. The gist of Endeavor's fraudulent campaign is that Robo-Team is backed by, connected to, or an agent of the Chinese government. The sting of the charge is that Robo-Team is unfit for contracts with the U.S. military because it has exposed military technology to and is an agent of the Chinese government. These statements are false, and there is no evidence in the record supporting such falsehoods.

Defendants' do not claim that they did not make the challenged statements, but rather, they contend that the statements are true. *See* Endeavor Mot. to Dismiss at 14 ("The statements Robo-Team alleges are 'defamatory' track widely-reported and truthful information about Robo-Team"). Incredibly, Defendants have failed to submit a shred of admissible evidence that Robo-Team is an agent for, or is tied in any way, to the Chinese government.

Given that the relief sought by Defendants under the Act is the dismissal of the Complaint with prejudice, if the Court elects to ignore the *Abbas* decision and to apply the Act, it must at least do so within the confines of Rule 56. This would require the Court to base its ruling on admissible evidence. *See* Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible evidence."). *Nnadili v. Chevron U.S.A., Inc.*, 435 F. Supp. 2d 93, 104 (D.D.C. 2006) ("It is 'well-settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'") (citation omitted).

Defendants rely, however, not on sworn Declarations that might be admissible as evidence in this Court, but rather on inadmissible hearsay news articles. Newspapers offered in evidence as proof of the facts recited therein are out-of-court declarations generally held to be inadmissible hearsay. *Spotts v. United States*, 562 F. Supp. 2d 46, 54–55 (D.D.C. 2008); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115, 123 (D.D.C. 2002); *Watford v. Evening Star Newspaper Co.* 211 F.2d 31 (D.C. Cir. 1954). Even though newspaper articles may be self-authenticating, statements made to or by reporters are inadmissible hearsay absent a proper hearsay exception. *See Spotts*, 562 F. Supp. 2d at 54 ("newspaper articles constitute inadmissible hearsay, which cannot serve as evidence of the truth of the matter asserted, because they 'provide no evidence of the reporter's perception, memory or sincerity and, therefore, lack circumstantial

guarantees of trustworthiness.'") (internal citations omitted); *Hutira*, 211 F.2d at 123. This Court need go no further, because Endeavor has failed to submit admissible evidence supporting its defense that its statements are true. The only admissible evidence on any material facts are the facts set forth in the Declaration of Robo-Team's CEO, which are undisputed. Abuhazira Decl., Ex. 1.

Moreover, the hearsay news articles never make any connection between Robo-Team and the Chinese government. In fact, not one single article links Robo-Team with the Chinese government or makes any suggestion that Robo-Team has, or even might in the future, leak U.S. military secrets to the Chinese government. Not surprisingly, none of the hearsay makes any reference to Robo-Team having violated ITAR by exposing its technology to anyone – let alone agents of the Chinese government. Neither Endeavor nor Sachem even attempt to defend their false allegations of ITAR violations. They offer no factual defense or support—not even rank hearsay—because there is no support for such baseless falsehoods. Thus, none of Endeavor's so-called "evidence" offers a scintilla of support for Endeavor's baseless claims.

On the contrary, the hearsay news articles actually demonstrate that Defendants' defamatory statements were *knowingly* false. The articles indicate that Robo-Team's corporate parent received investment from *Singaporean* investors. They say nothing about *Chinese government* backing, however, because any such statement would be false. Specifically, the articles provide:

- Robo-Team "received $50 million from Israeli and Singapore investors." *Id.*, Exh. B (Washington Post).
- The privately held firm has fortified itself with $50 million in fresh equity investment secure primarily from Singaporean investment funds." *Id*, Exh. C (Defense News)
- "Much of this new funding has been secure through Singaporean investment funds." *Id.*, Exh. D (Geektime)

- "[T]he main investor in Roboteam's most recent fundraising effort were Singaporean investment firms." *Id.*, Exh. E (JOL).

To the extent that Endeavor is relying on these articles to support the truth of its statements that Robo-Team is backed by the Chinese government or is guilty of ITAR violations, its reliance is sadly misplaced. To the contrary, these articles demonstrate that Endeavor *knew* the truth, but recklessly chose to ignore the truth and circulate false statements about Robo-Team.

Indeed, even the hearsay news article from the South China Morning Post offered by Defendants, indicating that one of the investors in Robo-Team's corporate parent has an office in China (and Singapore), or that Robo-Team's corporate parent may sell products in China – just like many global corporations – is immaterial. Even if true, the mere fact that an investor has an office in China, or a corporate parent may do business in China, is a far cry from supporting the gist of Defendants' campaign that Robo-Team is an agent of the Chinese government and has violated ITAR. Otherwise, one could argue that countless other corporations are agents of the Chinese government, including: Boeing (50% market share in China),[12] General Motors (14.9% market share in China),[13] and Walmart (439 stores in China).[14] Such a statement would be false, just as Endeavor's statements identified in the Complaint are false.

The evidence in the record demonstrates that Defendants' statements are false and defamatory. Robo-Team is not backed by, connected to, or an agent of the Chinese government.

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[12] *Boeing raises China 20-year aircraft demand, says outlook rosy*, REUTERS (Aug. 25, 2015), http://www.reuters.com/article/us-boeing-china-outlook-idUSKCN0QU0EL20150825.

[13] General Motors Co., 10-Q (Apr. 28, 2017), *available at* https://www.sec.gov/Archives/edgar/data/1467858/000146785817000070/0001467858-17-000070-index.htm.

[14] Wal-Mart Stores, Inc., 10-K (Mar. 31, 2017), *available at* https://www.sec.gov/Archives/edgar/data/104169/000010416917000021/0000104169-17-000021-index.htm.

Abuhazira Decl., Ex. 1 at ¶ 2. Robo-Team has never exposed any ITAR-restricted technology to any unauthorized person or group. *Id.* at ¶ 3. Furthermore, John Wu and Matt Hu, co-founders of FengHe Investment Group, and the apparent focus of Defendants' false claims, are citizens of Singapore. *Id.* at ¶ 4. There is no evidence cited in any of Defendants various motions to support Defendants' malicious false statements, which were aimed squarely at eliminating Endeavor's major competitor for U.S. government robotics contracts.

This case is nearly identical to *Parsi v. Daioleslam*, 595 F. Supp. 2d 99 (D.D.C. 2009). In *Parsi*, the Defendant published statements saying plaintiff was part of the "Iranian lobby." Defendant argued the gist of his statements were true, noting that plaintiff was a lobbyist, that plaintiff's goals aligned with those of Iran, and that plaintiff previously had been in an organization that did say it lobbied on behalf of Iranian causes. This Court stated:

> [D]efendant parses his statements too finely. The 'sting of the charge' is not, as defendant would have it, that plaintiffs are lobbyists. Nor does the assertion that plaintiffs' goals align with the Iranian government's goals carry real bite. Truthful or not, those statements do not form the core of plaintiffs' defamation claim. Rather, the sting of the charge is that plaintiffs are agents of the Iranian government.

Parsi, 595 F. Supp. 2d at 108. This Court said it could not as a matter of law find the statements substantially true, and denied defendant's summary judgment motion on this point. *Id.* at 109. This same is true here. The sting of Endeavor's charge is that Robo-Team is an agent of the Chinese government and that doing business with Robo-Team exposes U.S. military secrets to the Chinese government. This is defamation – plain and simple. The only admissible evidence in the record demonstrates that Robo-Team is likely to succeed on the merits of its defamation claim.

So too is Robo-Team likely to succeed on the merits of it other claims. In this regard, Defendants' special motions to dismiss under the D.C. Anti-SLAPP Act merely repeat the exact

same arguments put forth in their original motions to dismiss, but to no avail. Based on the facts in the record, a jury could reasonably find that Endeavor, a U.S. government contractor, and Sachem, engaged in a conspiracy to knowingly use false, defamatory statements to damage Robo-Team's reputation with current and future customers, and at the same time, eliminate Endeavor's main competitor from being eligible for government contracts. Based on the legal arguments previously set forth in Robo-Team's oppositions to Defendants' motions to dismiss (*See* Opp. to Endeavor Mot. to Dismiss at 30-33; Opp. to Sachem Mot. to Dismiss at 5-9), and undisputed facts in the record before the Court, (*see*, Abuhazira Decl., Ex. 1), Robo-Team is likely to succeed on its tortious interference, conspiracy, and unfair competition claims.

C. ROBO-TEAM IS ENTITLED TO TARGETED DISCOVERY.

Should the Court find that the D.C. Anti-SLAPP Act applies in this case, that Defendants have satisfied their burden under the Act, and that Robo-Team has not demonstrated that it is likely to succeed on the merits of any of its claims, Robo-Team requests targeted discovery under Section 16-5502(c)(2) of the Act so that Robo-Team may present further evidence supporting its claims.

Section 16-5502(c)(2) of the Act provides: "[w]hen 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." While it should not be necessary in view of the binding precedent of *Abbas*, the plain language of the Act that excludes Defendants' commercial speech, and the undisputed evidence in the record, targeted discovery by Robo-Team should be a prerequisite to giving serious consideration to granting Defendants' special motions to dismiss.

CONCLUSION

For the foregoing reasons, Robo-Team respectfully request that this Court deny Defendant Endeavor's special motions to dismiss under the D.C. Anti-SLAPP Act and Defendant Sachem's special motion to dismiss under the D.C. Anti-SLAPP Act. Should the Court find any basis to grant the motions, in whole or in part, Robo-Team requests that the Court grant leave for targeted discovery under Section 16-5502(c)(2) of the Act.

Dated August 25, 2017

Respectfully submitted,

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