IN THE SUPERIOR COURT FOR
WASHINGTON D.C.
CIVIL DIVISION

ARI WILKENFELD,	:	
	:	
Plaintiff,	:	**Case No. 2017-CA-003420 B**
	:	
v.	:	
	:	**Judge John Campbell**
STEWARD PARTNERS HOLDINGS, LLC, JAMES GOLD, MICHAEL MCMAHON & HY SAPORTA,	:	**Next Court Date: August, 18 2017**
	:	
	:	
Defendants.	:	

DEFENDANTS' POINTS AND AUTHORITIES IN SUPPORT OF THEIR CONTESTED MOTION TO DISMISS THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND, ALTERNATIVELY, FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Defendants Steward Partners Holdings, LLC ("SPH"),[1] James Gold, Michael McMahon, and Hy Saporta (collectively "Defendants" or "Steward Partners") respectfully submit that Plaintiff Ari Wilkenfeld's ("Mr. Wilkenfeld") Complaint must be dismissed for several independent, dispositive reasons, as set forth below.

In a pending arbitration, Steward Partners is pursuing a defamation claim against Mr. Wilkenfeld under Delaware law. In this case, Mr. Wilkenfeld seeks a declaratory judgment that a District of Columbia Superior Court procedural rule, the District of Columbia Anti-SLAPP (Strategic Lawsuit Against Public Participation) law, D.C. Code § 16-5501 *et seq.* (2012), bars Steward Partners' defamation claim in an arbitration under Delaware law. Not so. To begin with, this Court lacks subject matter jurisdiction because this matter is already in arbitration pursuant to an exclusive arbitration clause in SPH's 2016 Limited Liability Company Operating Agreement (the "Agreement"). The Arbitrator, and not this Court, has sole jurisdiction to

[1] Mr. Wilkenfeld mistakenly refers to Steward as "Stewart" repeatedly. *See, e.g.*, Compl. ¶¶ 3, 7, 10, 13, 16-21, 23, 25 & n. 1.

determine the applicability of Mr. Wilkenfeld's putative defense to the claims in arbitration. Therefore, this matter must be dismissed for lack of subject matter jurisdiction.

Further, even if this Court had subject matter jurisdiction (which it does not), the Complaint would fail to state a claim upon which relief can be granted under the D.C. Anti-SLAPP law. That law is a procedural pleading rule providing that a defendant may file in this Court a special motion to dismiss a defamation claim, but only if the defamation claim is pending in this Court under District of Columbia law and the claim alleges defamation relating to the defendant's "act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a).[2] Recognizing that the law applies only to cases in this Court under D.C. law, and that it is a procedural rule that does not provide substantive legal rights, courts have rejected attempts to apply it in federal courts. *See, e.g., Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015); *see also ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, No. 1:14-CV-1118, 2015 WL 12517012, at *3 (E.D. Va. Apr. 21, 2015). No court decision has ever applied the D.C. Anti-SLAPP law to a claim in arbitration or a claim under any law other than District of Columbia law.

Even if this Court had jurisdiction (which it does not) and even if the D.C. Anti-SLAPP law applied to this dispute under Delaware law (which it does not), the D.C. Anti-SLAPP law would provide no remedy to Mr. Wilkenfeld. This matter falls squarely into the exceptions in the D.C. Anti-SLAPP law for matters of "private," not "public" interest. The claim against Mr. Wilkenfeld concerns his defamation of Steward Partners in order to advance the private interests of his client, Mr. Maurer, to the detriment of Steward Partners. It does not involve any "issue

[2] "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue *arises from an act in furtherance of the right of advocacy on issues of public interest*, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." *Id.* § 16-5502(b) (emphasis added).

related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place," as required under the D.C. Anti-SLAPP law. D.C. Code § 16-5501(3).

Moreover, even if the claim involved issues of "public interest" (which it does not), the claim would not survive Anti-SLAPP law scrutiny because the law immunizes claims on which the defamation plaintiff has a likelihood of success on the merits. Steward Partners are likely to succeed on the merits, because Mr. Wilkenfeld knowingly, and maliciously, published a false statement to a national wealth management industry publication. Mr. Wilkenfeld was fully aware that SPH's Board of Directors, including James Gold, Michael McMahon, and Hy Saporta, voted to expel Mr. Wilkenfeld's client, Mr. Maurer, for violations of fiduciary duty and breach of contract, pursuant to the Agreement. Further, Mr. Wilkenfeld knew that under the Agreement, Mr. Maurer's expulsion would not increase the equity shares held by Mssrs. Gold, McMahon, and Mr. Saporta. Nonetheless, Mr. Wilkenfled published a statement to a well-read industry publication, which falsely stated that Mssrs. Gold, McMahon, and Saporta had engaged in self-dealing in voting to expel Mr. Maurer. Since the publication of Mr. Wilkenfeld's statement, Steward Partners have lost business opportunities. Thus, Steward Partners are likely to succeed on the merits of their defamation claim against Mr. Wilkenfeld.

Accordingly, Steward Partners' respectfully request that the Court grant their Motion to Dismiss this Complaint for lack of subject matter jurisdiction, or, alternatively, failure to state a claim upon which relief can be granted.

I. BACKGROUND

On April 19, 2017, Steward Partners commenced an arbitration with the American Arbitration Association against Mr. Wilkenfeld, in his capacity as an agent of his client, Mr.

Maurer, along with claims against Mr. Maurer.[3] Compl. ¶ 15; *see also* Ex. A, Steward Partners' Complaint in Arbitration ("Arb. Compl.").[4] The arbitration arises under a clause in the Agreement providing that arbitration is the mandatory and exclusive remedy for disputes relating to the Agreement.[5] The Agreement specifies that that only Delaware law applies.[6]

In the arbitration, Mr. Wilkenfeld filed a Special Motion to Dismiss Steward Partners' defamation claim, alleging exactly the same defense raised here. *See* Ex. C, Mr. Wilkenfeld's Motion to Dismiss under D.C. Anti-SLAPP filed in arbitration.[7] In that motion, Mr. Wilkenfeld argues that the D.C. Anti-SLAPP law bars Steward Partners' defamation claim. *See id.* That motion is pending in the arbitration.

The underlying arbitration relates to the SPH's Board of Directors' vote to expel Mr. Maurer, formerly a member of the Board, pursuant to the Agreement. *See* Arb. Compl. ¶ 94; 2016 Ag. § 11.1. Mr. Maurer hired Mr. Wilkenfeld to serve as his agent and attorney regarding the expulsion. *See* Arb. Compl. ¶ 7. On or about March 7, 2017, Mr. Wilkenfeld, acting as an

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[3] Mr. Wilkenfeld inaccurately states that he represents Mr. Maurer in "an employment law action against Steward LLC." Compl. ¶ 9. In fact, no claims have been filed against Steward Partners in the arbitration.

[4] The Court can consider the underlying Arbitration Complaint, and the Agreement on a motion to dismiss, as all were published as part of a federal court filing. *See James Gold et al. v. Michael Maurer*, Case No. 1:17-cv-00734-CKK, Dkt Nos. 1-3, 2-1 (D.D.C. Apr. 20, 2017). A trial court may consider public documents without converting a motion to dismiss under Rule 12(b) to a motion for summary judgment under Rule 56. *See Smith v. Public Def. Servs.*, 686 A.2d 210, 212 (D.C. 1996) (holding that court filings were not "matters outside the pleading" within the meaning of Rule 12(b), and citing cases to the same effect involving other "public records"). Furthermore, it is appropriate to consider the underlying Arbitration Complaint and Arbitration Agreement as Mr. Wilkenfeld's claim relies upon them. *See* Compl. Intro. at 1-2, ¶¶ 25, 27.

[5] The arbitration clause in the Agreement broadly states:

> [a]ny dispute, claim, or controversy concerning this Agreement...will be submitted to arbitration under the rules of the American Arbitration Association ("AAA") in Washington, D.C., which will be the only forum for the resolution of disputes arising hereunder. A single arbitrator will be designated by the AAA. An arbitration award under the rules of the AAA will be final and judgment on the award rendered may be entered in any court, state or federal, having jurisdiction. . . .

Ex. B, 2016 Steward Partners LLC Operating Agreement ("2016 Ag.") § 15.22(b).

[6] The Agreement provides: "This Agreement and the rights of the parties hereunder shall be governed by, interpreted and enforced in accordance with the laws of the State of Delaware without regard to conflicts of law principles." Arb. Compl. ¶ 11; 2016 Ag. § 15.14.

[7] Mr. Wilkenfeld's Complaint relies upon the underlying arbitration of Steward Partners' defamation claim. As such, it is proper to consider the filings in such arbitration without converting this to a motion for summary judgment. *See supra* note 4.

agent of Mr. Maurer, published a quote in an online AdvisorHub article titled "Fast-Growing Advisory Firm Steward Partners Suffers Partner Clash." Compl. ¶¶ 10-11, Ex. A. Mr. Wilkenfeld was quoted stating:

> I want to characterize what has happened here as a rather ugly power grab. . . . There's no coincidence that his removal, which benefits those who remain, has occurred in such close proximity to the excellent forecasts regarding profitability going forward.

Id. ¶ 10, Ex. A.

This statement was, and is, demonstrably false. The Board of Directors had voted to expel Mr. Maurer due to his breaches of his fiduciary duty and his contract violations, as explained in detail in the Arbitration Complaint. *See* Arb. Compl. ¶ 102. Mr. Wilkenfeld was well aware of the reasons for Mr. Maurer's expulsion, and, nonetheless, he knowingly and falsely stated to a news publication that Steward Partners made a self-dealing decision to benefit their own interests. *Id.* ¶ 104. The recipient of this statement, AdvisorHub, is an important source of news in the wealth management industry. *Id.* ¶ 99. According to self-reported statistics, AdvisorHub receives over 500,000 page views per month, and 54% of their audience has over $100 million in assets under management. *Id.* ¶ 100. This readership includes Steward Partners' current and potential clientele, recruits, and industry partners. *Id.* ¶ 101. Thus, Mr. Wilkenfeld's statement was a deliberate attempt to impugn Steward Partners' reputations in front of Steward Partners' clients and potential clients. As a result of the AdvisorHub article, Steward Partners has experienced difficulty retaining and recruiting clients, recruits, and industry partners. *Id.* ¶¶ 106-09.

II. ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction Because the Arbitrator Has Exclusive Jurisdiction over this Dispute.

A complaint must be dismissed when the Court lacks subject matter jurisdiction. *See* D.C. R. Civ. P. 12(b)(1). Mr. Wilkenfeld does not, and cannot, dispute that Steward Partners' claim against Mr. Wilkenfeld must be exclusively adjudicated in arbitration. Mr. Wilkenfeld, as an agent of Mr. Maurer, is a party to the Agreement's clause requiring arbitration of all disputes concerning the Agreement. As Mr. Maurer's attorney, Mr. Wilkenfeld was acting as Mr. Maurer's "agent" at all relevant times. "Because a principal is bound under the terms of a valid arbitration clause, its agents, employees, and representatives are also covered under the terms of such agreements." *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1111 (3d Cir. 1993) (citing *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-82 (6th Cir. 1990); *Letizia v. Prudential Bache Sec.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986)); *see also TMIP Participants LLC v. DSW Grp. Holdings LLC*, No. CV 11328-ML, 2016 WL 490257, at *6 (Del. Ch. Feb. 4, 2016) (holding that a buyer's agent could enforce the arbitration clause in an escrow agreement and dismissing case).

Second, the claim necessarily concerns the Agreement. Mr. Wilkenfeld is being sued in arbitration for defamation because of the statement he made, as an agent of Mr. Maurer, to the press, about Mr. Maurer's expulsion, which took place under the terms of the Agreement. *See* Arb. Compl. ¶¶ 140-47. In the arbitration, Steward Partners will prove that Mr. Wilkenfeld's statement is false because, under the ownership structure established in the Agreement, the ownership interests of Mssrs. Gold, McMahon, and Saporta do not increase and they do not "benefit[]" from Mr. Maurer's removal. *Id.* ¶¶ 103-04, 141. Further, Steward Partners will demonstrate that the statement is false because SPH's Board of Directors fully complied with the

terms of Article 11 of the Agreement when expelling Mr. Maurer for cause. *Id.* ¶¶ 94-96; 2016 Ag. § 11.1. Thus, resolution of the arbitration will require the Arbitrator to interpret the Agreement. This claim concerns the Agreement.

Under Delaware's Uniform Arbitration Act, there is a strong presumption in favor of arbitration and it is "the public policy of this State...now to enforce agreements to arbitrate without regard to the justiciability of the underlying claims. 10 Del.C. § 5701. It is no longer of any consequence that a court, otherwise competent to hear the dispute, is ousted of its jurisdiction by the arbitration process." *Pettinaro Constr. Co. v. Harry C. Partridge, Etc.*, 408 A.2d 957, 961 (Del. Ch. 1979).

> The Uniform Arbitration Act reflects a policy designed to discourage litigation, to permit parties to resolve their disputes in a specialized forum more likely to be conversant with the needs of the parties and the customs and usages of a specific industry than a court of general legal or equitable jurisdiction, and to provide for the speedy resolution of disputes in order that work may be completed without undue delay.

Id. (citing *City of Wilmington v. Wilmington Firefighters*, 385 A.2d 720, 724 (Del. Supr. 1978)).

Recognizing that the claim is subject to arbitration, Mr. Wilkenfeld did not object to proceeding on Steward Partners' claims in arbitration. Yet, even if he had, any question of arbitrability would have to be resolved in arbitration, not in this Court: "[t]he scope of an arbitration agreement is ordinarily determined by the Arbitrator and not by a Court." *James Julian, Inc. v. Raytheon Serv. Co.*, 424 A.2d 665, 667 (Del. Ch. 1980) (collecting cases). And it would have to be resolved in favor of arbitration. "All doubts as to the arbitrability of an issue must be resolved in favor of arbitration." *Id.* (internal citation omitted). "[W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Tech. v. Commc'n Workers*, 475 U.S. 643, 650 (1986)

(quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960)); *see also Worthy v. Payne*, No. 16027-NC, 1998 WL 82992, at *1 (Del. Ch. Feb. 12, 1998) (citing *United Steelworkers* with approval and finding "no reason why the clear presumption in favor of arbitration does not apply to this case and the motion to dismiss the complaint in favor of arbitration is granted"). The District of Columbia also enforces a strong presumption in favor of arbitration.[8]

Whether or not Mr. Wilkenfeld has a valid defense under the D.C. Anti-SLAPP law (he does not) must be determined by the Arbitrator and not by this Court. This matter must be dismissed so that the Arbitrator can adjudicate the applicability of Mr. Wilkenfeld's putative defense.

B. The Complaint Fails to State a Claim upon Which Relief Can Be Granted Because the D.C. Anti-SLAPP Law Does Not Apply to this Matter.

Further, a complaint must be dismissed when the complaint fails to state a claim upon which relief can be granted. *See* D.C. R. Civ. P. 12(b)(6). The Complaint in this case fails to state a claim upon which relief can be granted, because the D.C. Anti-SLAPP law does not afford a defense to a claim (1) filed *in arbitration*; (2) under *Delaware law*; (3) involving purely *private* matters; or (4) on which the defamation plaintiff is *likely to succeed*, as set forth below.

1. The D.C. Anti-SLAPP law does not apply to claims in arbitration.

The D.C. Anti-SLAPP statute is a procedural pleading requirement that applies to defamation claims filed *in District of Columbia Superior Court*. The law is codified in the D.C. Code's Section on "Judicial and Judiciary Procedure," in which procedures in D.C. courts are

[8] *See also Carter v. Cathedral Ave. Co-op., Inc.*, 566 A.2d 716, 719 (D.C. 1989) (granting motion to compel arbitration due to the "presumption of arbitrability"); *Poire v. Kaplan*, 491 A.2d 529, 534 n. 8 (D.C. 1985) (holding that any ambiguity as to whether a matter is arbitrable "must be resolved in favor of arbitration"); *Sindler v. Batleman*, 416 A.2d 238, 243 (D.C. 1980) ("[C]ase law ... dictates that where there is ambiguity as to whether a matter is within the scope of the arbitrator's authority, the question is to be resolved in favor of arbitration.").

defined. *See* D.C. Code, Division II. The law refers repeatedly to application in "[t]he court." *See id.* §§ 16-5502(c)(2), (d); *see also id.* §§ 16-5504(1), (2). Claims covered by the law are defined as "any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil *judicial pleading or filing* requesting relief." D.C. Code § 16-5501(2) (emphasis added). The law contains no reference to application in arbitration.

When debating this law, the D.C. Council Committee on the Judiciary and Public Safety (the "Judiciary Committee") expressly endorsed this law to dispense of litigation," and evidenced absolutely no intent to extend the statute to arbitration. The Judiciary Committee's report repeatedly refers to "litigation" and "the court," and never to "arbitration" or "the Arbitrator."[9]

Consistent with the narrow interpretation of the D.C. Anti-SLAPP law to apply only in D.C. Superior Court, federal courts hold that the law applies only in *Superior Court*, and have refused to apply it in federal courts, including federal courts in the District of Columbia. *Abbas*, 783 F.3d at 1337 (holding that the D.C. Anti-SLAPP law is a D.C. Superior Court procedural pleading requirement that could not apply to a defamation claim filed in *federal* court); *see also ABLV Bank*, 2015 WL 12517012, at *3 (holding that D.C.'s Anti-SLAPP law "is tellingly codified in the section of the D.C. code titled 'Judiciary and Judicial Procedure'" and, as such, "does not create a substantive right but rather....simply creates a heightened pleading standard for certain libel actions" filed in D.C. courts). *C.f.*, *Sheppard v. Lightpost Museum Fund*, 146

[9] The Judiciary Committee stated that this law would allow a defendant to a SLAPP "to expeditiously and economically dispense of *litigation*." *See* Comm. Rpt. on Bill 18-893 (Nov. 18, 2010) at 4 (emphasis added). "The legislation also allows for the costs of *litigation* to be awarded to the successful party..." *Id.* at 6. The law "[p]rovides that, upon a prima facie showing that *the activity at issue in the litigation* falls under the type of activity protected by this act, *the court* shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits." *Id.* at 7 (emphasis added). *See also id.* at 2 (citing research reporting a "growing litigation 'phenomenon'" and "identification possible solutions to litigation aimed at silencing public participation"), *id.* at 3 (grassroots activism in D.C. has been "met with years of litigation"), *id.* at 4 ("the goal of the litigation is not to win the lawsuit"); *id.* at 5 (two public witnesses' testimonies concerned their "own experience in SLAPP litigation").

Cal. App. 4th 315, 323-24, 52 Cal. Rptr. 3d 821, 826 (2006) (holding that California's similar Anti-SLAPP law "was expressly intended to prevent abuse of the 'judicial process,' and its terms are not reconcilable with a legislative intent to extend it to arbitration claims filed only in private nonjudicial forums. It follows that the Legislature did not authorize superior courts to strike arbitration claims filed only in arbitral forums..."). Certainly, a statute that does not extend beyond Superior Court to federal courts in the District of Columbia cannot extend even further to arbitration. Steward Partners have not found a single case that applied the D.C. Anti-SLAPP law to claims filed exclusively in *arbitration*. As Steward Partners brought their claim against Mr. Wilkenfeld exclusively in arbitration, Mr. Wilkenfeld's Complaint attempting to apply the D.C. Anti-SLAPP defense must be dismissed.

2. Delaware law controls, and Delaware's Anti-SLAPP law plainly does not apply to this matter.

The D.C. Anti-SLAPP defense also does not apply because the Agreement provides that only Delaware law applies to matters arbitrated under the Agreement. *See* Arb. Compl. ¶ 11; 2016 Ag. § 15.14. As explained in greater detail *supra* Section I, Mr. Wilkenfeld has not disputed that Steward Partners' arbitration claim against him concerns the Agreement, and therefore is subject to the choice-of-law provision. Accordingly, given that District of Columbia law has no application in the underlying arbitration, the D.C. Anti-SLAPP law is inapplicable.

Mr. Wilkenfeld has not pleaded any claim under Delaware law. If he tried to amend the Complaint to do so, that would be futile, because Delaware's Anti-SLAPP law protects only "public . . . permittee[s]" who made statements involving "public petition and participation." Del. Code Ann. tit. 10, §§ 8136(a)(1), 8137.[10] A "public applicant or permittee" "mean[s] any

[10] The Delaware Anti-SLAPP law provides:

> [a] motion to dismiss in which the moving party has demonstrated that the action, claim, cross-claim or counterclaim subject to the motion is an action involving public petition and participation

person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." *Id.* § 8136(a)(4). A covered "action involving public petition and participation" is as a claim "that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permissions," e.g., for land use or development permits. *Id.* § 8136(a)(1). Anti–SLAPP statutes "provide a quick remedy for those citizens targeted by frivolous lawsuits *based on their government petitioning activities* by allowing them to bring a special motion to dismiss or motion to strike." 71 C.J.S. Pleading § 675 (2016) (emphasis added).[11]

Delaware's Anti-SLAPP statute is limited to this "narrow," "very traditional SLAPP paradigm," and is "available in only relatively rare circumstances." *Agar v. Judy*, 151 A.3d 456, 473-77 (Del. Ch. 2017). In *Agar*, a preferred investors' association wrote letters to investors of a company, opposing the reelection of the incumbent members of the company's board of directors. *Id.* at 459. Three incumbent directors lost their seats. *Id.* The former directors brought a claim for defamation against the association for the letter. *Id.* The libel defendants moved to dismiss under Delaware's Anti-SLAPP law. *Id.* The Court of Chancery held that Delaware's Anti-SLAPP statute did not apply because the libel defendants were not public applicants or permittees. *Id.* at 473-77. The Court specifically held that being defendants in a

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> as defined in § 8136 of this title shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.

Del. Code Ann. tit. 10, § 8137.

[11] Like the District of Columbia's Anti-SLAPP law, Delaware's Anti-SLAPP law also only applies to defamation claims pending in Delaware state court, and does not apply in arbitration. The law is codified in the Delaware Code's Section on "Courts and Judicial Procedure." *See* Del. Code X. The law repeatedly refers to implementation by "[t]he court." *See* Del. Code Ann. tit. 10, §§ 8137(a), (b). As with the District of Columbia's Anti-SLAPP statute, it would be inappropriate to apply Delaware's Anti-SLAPP statute to a claim brought only in arbitration.

court case, and participating in a publically-traded company, were not enough to render the libel defendants "public . . . permittee[s]." *Id.* The Court explained that the Delaware Anti-SLAPP law typically only applies in "an action brought by the developer against a community group or individual" opposing a land use or development project. *Id.* at 476.

Here, Mr. Maurer and Mr. Wilkenfeld are plainly not public applicants or permittees, and they are not opposing a land use or development project. As in *Agar*, Mr. Wilkenfeld's participation in arbitration, and in this suit, does not avail him of public permittee status. Therefore, an Anti-SLAPP defense under Delaware law would fail as a matter of law.

3. Even if the D.C. Anti-SLAPP Law Applied, it Would Not Help Mr. Wilkenfeld Because this Matter Does Not Arise from Advocacy on Issues of Public Interest.

Even if the District of Columbia's Anti-SLAPP law applied (and it does not as explained above), Mr. Wilkenfeld would be unable to present a *prima facie* case. His claims would fail because the underlying statement at issue in the defamation suit concerns a private matter that does not "arise from an act in furtherance of the right of advocacy on issues of public interest."

Under the D.C. Anti-SLAPP law, "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy *on issues of public interest* within 45 days after service of the claim." D.C. Code § 16-5502(a) (emphasis added). "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue *arises from an act in furtherance of the right of advocacy on issues of public interest*, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." *Id.* § 16-5502(b) (emphasis added).

The D.C. Anti-SLAPP law contains several definitions which make clear that its protections apply only to a limited array of public speech on issues of public concern, such as legislation, petitioning the government, and the health, safety or well-being of the community:

- An "'[act] in furtherance of the right of advocacy on issues of public interest' means...any written or oral statement made: (i) [i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or (ii) [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 petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1).
- "'Issue of public interest' means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).

Speech directed at the speaker's *private* or *commercial* interests is expressly not protected: "The term 'issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." *Id.* § 16-5501(3). The statute reiterates that it does not protect statements made for business purposes: "[t]his 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) [t]he intended audience is an actual or potential buyer or customer." *Id.* § 16-5505.

The statement at issue in this case squarely fits into the exceptions for private or commercial interests. *Id.* § 16-5501(3). The relevant statement – falsely asserting that Mr. Maurer's expulsion from SPH benefitted Steward Partners' own interests to the detriment of Mr. Maurer's interests – was "directed primarily toward protecting the speaker's commercial

interests rather than toward commenting on or sharing information about a matter of public significance." *Id.* Mr. Wilkenfeld was speaking as the agent/attorney of Mr. Maurer. The subject is Mr. Maurer's own financial interest in SPH, a privately-held Limited Liability Company. Thus, the subject is nothing other than the speaker's private commercial interests. Moreover, the statement was made to Mr. Maurer's and Steward Partners' current and potential clients and business partners, via the media, and was meant to promote Mr. Maurer's reputation, and to defame Steward Partners'. The underlying statement was "made for the purpose of promoting" Mr. Maurer's "goods or services" and its "intended audience" included "potential...customer[s]." *Id.* § 16-5505. For these reasons, the statement clearly falls into the "private interests" exceptions.

For similar reasons, the statement does not fit into the "economic wellbeing" provision. The only economic interests at issue are Mr. Maurer's – which he asserted to the media via his attorney. Nothing in the statement concerns any topic of potential public interest. For example, the challenged speech says nothing about the economic interests of third-party account-holders. The only economic interests addressed are Mr. Maurer's. Moreover, the economic interest at stake is in a *private* LLC, not a *public* company in which outside shareholders might have an interest.

Mr. Wilkenfeld implies that this is a matter of public interest based on an exhibit to his Complaint asserting "[a] simple google news search retrieved 1530 results on Stewart [*sic*] LLC." Compl. ¶ 17; *see also id.* ¶¶ 18-21; *id.*, Ex. B. Even if that were true, [12] that Steward

[12] The manner in which this search was conducted would necessarily lead to over-inclusive results. The search was for: steward partners holdings llc. The search did not put these words in quotations (e.g., the search was not for "steward partners holdings llc"). Thus, the search looked for pages that had the words "holdings" or "llc" or "partners" or "steward," in any order. That is how the search returned a top ten result about "BRR Holding LLC" purchasing "5911 Steward St." It is highly unlikely that the other 1,530 news articles were actually about Defendants given that even the first ten results revealed the shortcomings of the search algorithm.

Partners has been mentioned in the news says nothing about whether the specific defamatory comment by Mr. Wilkenfeld addressed a matter of public interest. No case holds that news articles about a private company that are *unrelated to the underlying statement at issue*, can prove that the *underlying statement* is an issue of public interest. Further, Mr. Wilkenfeld has not provided the full text of these articles, only one page of headlines from his counsel's Google News search results. Compl., Ex. B. But based on the first page of headlines alone, it is clear that none of these articles concerns the expulsion of Mr. Maurer. *Id.* One of the articles is not even about Steward Partners, as the highlighted words for "Steward" and "Holdings" correspond to *BRR "Holding" LLC* and *5911 "Steward" St. Id.* Eight of the ten cited articles are only SPH's own press releases. It is absurd to suggest that a company, or its Directors, would lose the right to file a defamation claim in arbitration because its public relations department promoted its business via press releases.

Mr. Wilkenfeld has not pled that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest. Thus, he has failed to make a prima facie showing that the D.C. Anti-SLAPP law applies to the underlying statement in this case. That statement plainly pertains only to "private interests."

4. Defendant s Are Likely to Succeed on the Merits of their Defamation Claim in Arbitration against Mr. Wilkenfeld.

If the D.C. Anti-SLAPP law applied in this case (which it does not) and if Mr. Wilkenfeld had pled a *prima facie* defense under the that law (which he has not), then Steward Partners could defeat it by demonstrating a likelihood of success on the merits. D.C. Code § 16-5502(b). The "likelihood of success on the merits" standard is a pleading standard:

> [I]t is possible to meet these requirements by strong evidence in support of the claim. The immunity created by the Anti-SLAPP Act shields only those defendants who face unsupported claims that do not meet established legal standards. . . . [I]t is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima

> facie case that the claim arises from activity covered by the Act...To sum up, it is not the court's role, at the preliminary stage of ruling on a special motion to dismiss, to decide the merits of the case but to test the legal sufficiency of the evidence to support the claims.

Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1239-40 (D.C. 2016).

Steward Partners are likely to prevail on the merits in the arbitration by proving that Mr. Wilkenfeld published defamatory and false statements to third parties causing Steward Partners harm. Under Delaware law, a "plaintiff must plead five elements in a defamation action: (1) defamatory communication; (2) publication; (3) the communication refers to the plaintiff; (4) a third party's understanding of the communication's defamatory character; and (5) injury." *Wright v. Pepsi Cola Co.*, 243 F. Supp. 2d 117, 124 (D. Del. 2003); *see also* Restatement (Second) of Torts § 558 (1977); *Gonzalez v. Avon Prod., Inc.*, 609 F.Supp. 1555, 1558 (D. Del. 1985) (Delaware courts rely on the Restatement (Second) of Torts as an authoritative source on Delaware's law of defamation).[13]

a. **Mr. Wilkenfeld's Statement Was False and Defamatory.**

Mr. Wilkenfeld's statement that Steward Partners expelled Mr. Maurer due to self-interest was false. The Board of Directors expelled Defendant for cause pursuant to Section 11 of the Agreement, due to his repeated breaches of his fiduciary duty and violations of the LLC's Operating Agreement. *See* Arb. Compl. ¶ 102; *see* 2016 Ag. § 11.1. In fact, none of the individual Steward Partners received any of Mr. Maurer's ownership units after his expulsion. Arb. Compl. ¶ 103. The number of shares/units owned by each individually named Defendant did not increase with Mr. Maurer's expulsion. 2016 Ag. § 11.2. Therefore, the suggestion that

[13] The requirements are similar under District of Columbia law: A plaintiff must prove "(i) that he was the subject of a false and defamatory statement; (ii) that the statement was published to a third party; (iii) that publishing the statement was at least negligent; and (iv) that the plaintiff suffered either actual or legal harm." *See Ayissi–Etoh v. Fannie Mae*, 712 F.3d 572, 578 (D.C. Cir. 2013) (citing *Crowley v. N. Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n. 2 (D.C. 1997)). Falsity and defamatory meaning "are distinct elements of ... defamation and are considered separately." *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

Steward Partners took away his ownership to enhance their own interests is false. Further, the Board of Directors had notified Mr. Maurer and Mr. Wilkenfeld of the reasons for Mr. Maurer's termination. Arb. Compl. ¶ 104. Mr. Wilkenfeld was fully aware that Mr. Maurer was expelled for cause and not due to self-dealing.

Mr. Wilkenfeld's statement absolutely had defamatory meaning; these are not imagined slights. "A defamatory communication is one that tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." *Stephen G. Perlman, Rearden LLC v. Vox Media, Inc.*, No. CV 10046-VCP, 2015 WL 5724838, at *15 (Del. Ch. Sept. 30, 2015) (internal citation and quotation omitted). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Spence v. Funk*, 396 A.2d 967, 969 (Del. 1978) (quoting Restatement (Second) of Torts § 559 (1977)); *see also Stephen G. Perlman, Rearden*, 2015 WL 5724838, at *17 (denying motion to dismiss defamation claim where plaintiff claimed defendants "defamed [plaintiff] in his professional capacity in relation to his conduct as an officer and director of a corporation.").

Mr. Wilkenfeld made a factual statement. He said that "It is no coincidence," that the Steward Partners' decision to expel Mr. Maurer occurred close to "excellent forecasts regarding profitability going forward" since the decision "benefits" Steward Partners. Compl., Ex. A. This statement was clearly meant for the reader to conclude that the decision to expel Mr. Maurer was made intentionally ("no coincidence") by the Defendant Directors who sought to capture for themselves Mr. Maurer's share of "profits."

This is plainly an allegation of self-dealing by fiduciaries. The absence of the words "self-dealing" and "breach of fiduciary duty" does not change the fact that Mr. Wilkenfeld alleges it. Even Mr. Wilkenfeld's alleges that "Steward LLC interpreted the above statement by Wilkenfeld to only mean: that Stewart's [*sic*] Board of Directors have breached their fiduciary duties under the terms of the 2016 Agreement and that the Board was engaging in self-dealing." Compl. ¶ 13. This is the interpretation that Steward Partners' prospective clients and recruits have cited to Steward Partners as they decline or delay contracts. Arb. Compl. ¶¶ 104, 108. Steward Partners are likely to succeed on the merits in proving that the statement is defamatory and false.

b. **The Statement Was Published to a Third Party.**

Mr. Wilkenfeld's Complaint admits that Mr. Wilkenfeld's statement was published to a third party. Compl. ¶ 11; Compl., Ex. A.

c. **Mr. Wilkenfeld Published the Statement Maliciously.**

Mr. Wilkenfeld published the statement *knowing* of its falsity. Mr. Wilkenfeld had seen the Agreement; he knew that Steward Partners did not receive Mr. Maurer's shares/units as a result of Mr. Maurer's ouster under that Agreement. As stated above, under the 2016 Agreement, the number of shares/units owned by each Defendant did not increase with Mr. Maurer's expulsion. Arb. Compl. ¶ 103; 2016 Ag. § 11.2. Furthermore, Steward Partners had notified Mr. Wilkenfeld of the Board's reason for expelling Mr. Maurer for cause pursuant to the Agreement. Arb. Compl. ¶ 104. Given Mr. Wilkenfeld's knowledge of the reasons for expulsion, and the Agreement provision regarding units after expulsion, his comments were published maliciously.

d. **Mr. Wilkenfeld's Statements Are Defamatory *Per Se*, Meaning Steward Partners Do Not Need to Prove Damages. Nonetheless, Steward Partners Can Prove Damages.**

Mr. Wilkenfeld's statement that Steward Partners violated their fiduciary duties is "libelous on its face," or *per se*, and thus, "actionable without pleading or proof of special damages." *Spence*, 396 A.2d at 970; *McLeod v. McLeod*, No. CV N11C-03-111 MJB, 2015 WL 853334, at *3 (Del. Super. Ct. Feb. 26, 2015) ("statements that malign one in a trade, business, or profession," and "statements that impute a crime" are "facially defamatory statements that constitute defamation per se and hence are actionable without proof of special damages"). Because Mr. Wilkenfeld's statement impugned Steward Partners' business and accused them of self-dealing, the statement was libelous on its face and defamatory *per se*.

Even though Steward Partners need not prove special damages, it can do so. Due to Mr. Wilkenfeld's post-expulsion comments, Steward Partners suffered injury to their recruiting operations, and ability to attract and retain clients and prospective clients. Arb. Compl. ¶ 108. Since the publication of the article, various current and potential clients and recruits have contacted Steward Partners to alert them that they want to stall, limit, or retract current or prospective deals with SPH due to the Article. *Id.* Therefore, Steward Partners are likely to succeed on the merits of their underlying defamation claim in arbitration.

III. CONCLUSION

For all these reasons, Mr. Wilkenfeld's Complaint must be dismissed as this Court lacks subject matter jurisdiction over a matter exclusive to arbitration. Alternatively, Mr. Wilkenfeld's Complaint fails to state a claim upon which relief can be granted.

Respectfully submitted,

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By: /s/ Barbara Brown, Esq.

Barbara Berish Brown, Esq.
Kenneth M. Willner, Esq.
Sarah G. Besnoff, Esq.
Paul Hastings LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-170