IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

CLOSE IT! TITLE SERVICES, INC., *ET AL.* *Plaintiff*, V. MICHAEL S. NADEL, *ET AL.* *Defendants*.	Case No. 2018 CA 005391 B Judge William M. Jackson Next Court Date: 10/26/18 at 9:30 a.m. Event: Initial Conference

DEFENDANTS MCDERMOTT WILL & EMERY LLP AND MICHAEL NADEL'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS AND SPECIAL MOTION TO DISMISS

Roger E. Warin (DC Bar # 90241)
Michael E. Stoll (DC Bar # 997294)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Counsel for McDermott Will & Emery LLP and Michael S. Nadel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Federal Title and Mr. Ewing avoid the substance of McDermott and Mr. Nadel's compelling arguments for dismissal of the Complaint, and instead make conclusory assertions that Defendants' Motion is "frivolous" and that the statements at issue are "plainly defamatory and not privileged." Opp. at 1, 15. Federal Title and Mr. Ewing operate at this surface level because digging deeper to explore the concepts underpinning this lawsuit reveals its true nature—a baseless pretext to personally retaliate against Mr. Smith and Ms. Wrona (and their attorneys) for suing Federal Title to recover the nearly $1.6 million Mr. Smith and Ms. Wrona lost while using Federal Title to close on their home.

The only issues before the Court are whether Federal Title and Mr. Ewing have stated claims for defamation, false light, or tortious interference under Rule 12(b)(6), and whether any of those claims are likely to succeed on the merits under the D.C. Anti-SLAPP Act. Federal Title and Mr. Ewing's Complaint fails both tests. Far from being "plainly defamatory and not privileged," Mr. Nadel's statements to a WAMU 88.5 reporter were protected by the fair-report privilege, which exists to encourage precisely the kind of dissemination of information regarding judicial proceedings in which Mr. Nadel participated. Viewed in context, Mr. Nadel's statement that Federal Title was either complicit in the theft of Mr. Smith and Ms. Wrona's funds or negligent with respect to the safeguarding of those funds cannot reasonably be regarded as defamatory. The setting in which the statement appeared made abundantly clear that Mr. Nadel was merely paraphrasing his clients' privileged allegations made in their lawsuit against Federal Title and Mr. Ewing.

Federal Title and Mr. Ewing's other claims also fail. Federal Title effectively concedes that its claim for false light cannot be maintained. Mr. Ewing also cannot state a false-light claim because the statements at issue do not reference him, even obliquely. Federal Title and

Mr. Ewing's tortious-inference claims fail because neither has met the low bar of identifying specific business expectancies with which McDermott and Mr. Nadel supposedly interfered.

Federal Title and Mr. Ewing cannot carry their heavy burden under the D.C. Anti-SLAPP Act of showing likelihood of success on the merits because each of their claims is facially deficient under Rule 12(b)(6), for the reasons already stated and further articulated below. Because Mr. Nadel's statements to WAMU are not actionable—and Federal Title and Mr. Ewing's Complaint turns entirely on those privileged, non-defamatory statements—the Complaint should be dismissed in its entirety with prejudice and the Court should award McDermott and Mr. Nadel their fees and costs under the Anti-SLAPP Act.

ARGUMENT

I. The Allegedly Defamatory Statements Are Protected by the Fair-Report Privilege.

A. The Fair-Report Privilege Is Not Limited to Members of the News Media.

Federal Title and Mr. Ewing contend that the fair-report privilege does not apply to Mr. Nadel's statements because it is purportedly a "media common law privilege" and Mr. Nadel is not a member of the media. Opp. at 3. They mischaracterize the breadth of the fair-report privilege.

While the fair-report privilege is typically invoked in the context of defamation cases against the press and media professionals, the privilege "***is not limited to defendants in the news business***." *Rosenberg v. Helinski*, 616 A.2d 866, 874 (Md. 1992) (emphasis added). "The privilege extends to protect reports of judicial proceedings by other persons as well." *Id.* In analyzing the applicability and scope of the fair-report privilege, courts in the District routinely look to the Restatement (Second) of Torts for guidance. *See, e.g.*, *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88 (D.C. 1980); *BuzzFeed, Inc. v. U.S. Dep't of Justice*, 318 F.

Supp. 3d 347, 351 (D.D.C. 2018); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 266 n.41 (D.D.C. 2016). The Restatement's formulation of the privilege does not limit the doctrine to the media:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

RESTATEMENT (SECOND) OF TORTS § 611. The Restatement's explanatory comments resolve any doubt on the subject:

> The privilege stated in this Section is commonly exercised by newspapers, broadcasting stations and others who are in the business of reporting news to the public. It is not, however, limited to these publishers. It ***extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public***.

RESTATEMENT (SECOND) OF TORTS § 611, cmt. c (emphasis added). Here, Mr. Nadel made an oral report of his clients' allegations in their lawsuit against Federal Title in response to an inquiry from a WAMU reporter. The underlying allegations regarding Federal Title's mishandling of Mr. Smith and Ms. Wrona's closing were already in the public sphere in the complaint filed against Federal Title and Mr. Ewing in this Court. Thus, Mr. Nadel's activity falls squarely within the protections of the privilege.

Several cases cited in McDermott and Mr. Nadel's Motion are instructive. In *Rosenberg*, the Court of Appeals of Maryland held that a psychologist who testified as an expert in a child custody matter was privileged to reiterate the substance of his testimony to journalists waiting for him afterward on the courthouse steps. 616 A.2d at 670, 674. In *Savage is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555 (S.D.N.Y. 1976), the court held that an attorney's statements to *Variety* describing and paraphrasing a recently filed complaint were privileged. *Id.*

at 561.[1] Like the defendants in these cases, Mr. Nadel paraphrased the substance of a civil complaint in response to a media inquiry. *Phillips*, which Federal Title and Mr. Ewing cite for the proposition that the fair-report privilege is solely a "media common law privilege," Opp. at 3, is not to the contrary. Indeed, that case did not address the question of whether the fair-report privilege extends to non-members of the media.

Nor did any of the other cases cited by Plaintiffs hold that the privilege is so limited. Federal Title and Mr. Ewing cite *Armenian Assembly of Am., Inc. v. Cafesjian*, 597 F. Supp. 2d 128 (D.D.C. 2009) and *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023 (D.C. 2015), to suggest that in the District the fair-report privilege does not extend to statements made by an attorney to the media regarding a judicial proceeding. Opp. at 4. But both cases are readily distinguishable. In *Armenian Assembly*, the issue was whether the absolute privilege for statements incidental to judicial proceedings (*i.e.*, the so-called litigation or judicial-proceedings privilege) applied, not the fair-report privilege. 597 F. Supp. 2d at 140. Likewise, in *Newmyer*, the issue was whether the litigation privilege applied. 128 A.3d at 1042. There, the Court of Appeals held that the litigation privilege would not apply to an attorney's act of affirmatively publicizing his complaint to media organizations immediately after filing. *Id.* Here, by contrast, an

[1] Plaintiffs contend that the *Savage is Loose* case "confirm[s] that the defamatory statements at issue here are not privileged" because it "turned on a specific New York statute that does not apply here and, importantly, unlike D.C. law, does not contain a proper attribution requirement." Opp. at 7. Try as they might to distinguish this case, however, Federal Title and Mr. Ewing cannot escape the fact that a defamation claim was dismissed on nearly identical facts. The New York statute at issue merely codifies a substantially similar fair-report privilege. *See Jeanty v. City of Utica*, 6:16-cv-00966, 2017 WL 6408878, at *16 (N.D.N.Y. Aug. 18, 2017); *Beary v. West Publishing Co.*, 763 F.2d 66, 68 (2d Cir. 1985) ("The purpose of the statute in part is to implement the public policy in favor of encouraging publication and dissemination of judicial decisions and proceedings as being in the public interest."). As discussed *infra*, the attribution requirement does not preclude application of the fair-report privilege here.

uncontroverted affidavit shows that Martin Austermuhle of WAMU reached out to Mr. Nadel for information regarding the recently filed complaint. Mot., Ex. 2 (Nadel Decl.) ¶ 2.

Federal Title and Mr. Ewing claim that there is no public policy basis for extending the fair-report privilege to Mr. Nadel's statements, Opp. at 4, but, in fact, the opposite is true. "As the public's interest in obtaining reports of court matters remains the same irrespective of the reporter's identity," public policy favors treating journalists and non-journalists like Mr. Nadel alike. *Rosenberg*, 616 A.2d at 874; *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (White, J., concurring) ("First Amendment gives no more protection to the press in defamation suits that it does to others exercising their freedom of speech").

In sum, Federal Title and Mr. Ewing's attempts to exclude Mr. Nadel from the protection of the fair-report privilege are contrary to law and public policy.

B. The Average Reader Would Understand Mr. Nadel to Have Been Paraphrasing the Allegations in the Complaint.

Perhaps recognizing the error of their argument that the fair-report privilege applies only to the media, Federal Title and Mr. Ewing stake out a fallback position, arguing that the fair-report privilege does not apply due to a lack of proper attribution on Mr. Nadel's part. Opp. at 5-6. However, even a cursory review of Plaintiffs' own cases shows this argument lacks merit.

Under District of Columbia law, the fair-report privilege is "unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or a summary of an official document or proceeding." *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985). "It must be apparent ***either from specific attribution or from the overall context*** that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings." *Id.* (emphasis added). In other words, the question is not whether the speaker explicitly refers to the

official document or proceeding in his or her remarks, but whether the average reader would understand the speaker to be drawing upon an official document or proceeding.

Here, the context leaves no doubt that Mr. Nadel was summarizing his clients' recently filed complaint. In the paragraph immediately preceding the allegedly defamatory statements, the reporter describes the lawsuit as alleging that Federal Title "either conspired to defraud [Mr. Smith and Ms. Wrona] of the $1.57 million or was so negligent in its online security that it all but allowed the money to be stolen by someone else." Compl., Ex. A at 2. As if that were not enough, the article linked directly to Mr. Smith and Ms. Wrona's complaint. It is thus completely implausible that the average reader would not have known that Mr. Nadel was describing allegations in his clients' recently filed lawsuit, rather than asserting historical facts.

Once again, Federal Title and Mr. Ewing's cases do not actually support their position. In *Dameron*, an air-traffic controller sued the *Washingtonian* magazine over an article that attributed a 1974 airplane crash to controller error. 779 F.2d at 738. The challenged passage was part of a brief "sidebar" about safety at National Airport. *Id.* at 740. The defendants argued that their reference to the cause of the crash should qualify for the privilege because it was based on conclusions of the NTSB, as laid out in its report of the incident. *Id.* However, the court held that the privilege did not apply because the challenged passage was "simply offered as a historical fact without any indication of its source." *Id.* The court elaborated:

> Neither the particular sentence in which the alleged defamation appears, nor the sidebar as a whole mentions the NTSB, and nothing in the piece indicates that the statement is intended as a summary of the NTSB's official report.

Id. The WAMU article at the center of this case is much different. First, the entire article at issue was a summary of a recently filed lawsuit. Second, the challenged quotes were immediately preceded by a paragraph describing the lawsuit's allegations of fraud and

negligence. Accordingly, unlike the piece in *Dameron*, the WAMU article very clearly signaled that the statements at issue were summarizing allegations in a recently filed official document.[2]

In sum, because the average reader would have understood that Mr. Nadel's statements were a synopsis of the allegations in Mr. Smith and Ms. Wrona's recently filed complaint, there is no attribution issue disqualifying Mr. Nadel's statements from the protections of the privilege.

C. The Allegedly Defamatory Statements Fairly and Accurately Report on the Allegations in Mr. Smith and Ms. Wrona's Complaint.

In addition, Federal Title and Mr. Ewing argue that Mr. Nadel's statements "do not qualify" for the privilege because they are not "a fair and accurate report of the then-recently filed federal complaint." Opp. at 4. This argument also lacks merit.

To qualify for the fair-report privilege, a defendant must show that the "publication was a 'fair and accurate report' of a qualified government source." *Boley v. Atlantic Monthly Grp.*, 950 F. Supp. 2d 249, 257 (D.D.C. 2013). "The fair reporting privilege reaches not only comprehensive accounts of judicial proceedings, but accounts focusing more narrowly on important parts of such proceedings." *Rosenberg*, 616 A.2d at 874 (collecting cases).

Mr. Nadel's statements to the WAMU reporter fairly and accurately represented the thrust of Mr. Smith and Ms. Wrona's allegations against Federal Title. Mr. Nadel said, "Federal Title either caused our money to be stolen or stole it, and we need to get our money back."

---

[2] The case of *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), Opp. at 6, is also readily distinguishable. In that case, the plaintiff sued the *Washington Post* and NBC for defamation in connection with reporting on the results of plaintiff's drug tests. *Id.* at 514. NBC broadcast a report on the questionable handling of the plaintiff's drug tests, but did not attribute the facts underlying its reporting to the police investigation on which they were based. *Id.* at 516. The court held that the NBC's report was not covered by the privilege because it "presented a story as a matter of historical fact without any indication that the statements were intended as a summary of an official document." *Id.* at 528. Mr. Nadel's statements, by contrast, were not presented as a matter of historical fact, but rather as a paraphrased summary of the allegations in a recently filed complaint. None of the same problems of attribution are present.

Compl., Ex. A at 2. This directly parallels the alternative theories of liability set forth in their federal-court complaint. *See* Ex. 1, D.D.C. Compl. ¶ 69 ("Defendants' negligence in securing their email accounts and not following up or having a policy of orally confirming large monetary transfers was the proximate cause of Plaintiffs' loss of $1.57 million."); *id.* ¶ 41 ("Upon information and belief, the theft of Plaintiffs' money was accomplished by an enterprise formed by Federal Title, Close It!, Schifflett, JMZ Equities, and Zorbo.").[3] The disjunctive nature of Mr. Nadel's statement underscores that Mr. Nadel was summarizing legal theories rather than making a provably false statement of fact. Mot. at 14.

Federal Title and Mr. Ewing claim, without support, that Mr. Nadel's statements were "not a summary of the complaint, which is never even referred to by Nadel" but rather "Nadel's own conclusions that Federal Title committed professional and criminal misconduct." Opp. at 5. But this argument takes Mr. Nadel's statements entirely out of context. In the paragraph immediately preceding Mr. Nadel's quote, the reporter establishes that Mr. Nadel is speaking about a recently filed lawsuit: "Last week, the couple filed a lawsuit against the company, alleging that Federal Title either conspired to defraud them of the $1.57 million or was so negligent in its online security protocols that it all but allowed the money to be stolen by someone else." Compl., Ex. A at 2. Plaintiffs' argument that Mr. Nadel's statements were not a summary of the complaint because he did not explicitly refer to the complaint ascribes talismanic

[3] In a footnote, Federal Title and Mr. Ewing argue that Mr. Nadel's statements are not a fair and accurate summary of the federal-court complaint in part because the average reader would understand "caused our money to be stolen" to mean "that Federal Title made the theft happen, not that Federal Title is legally responsible for the theft under the complex concept of proximate cause." Opp. at 5 n.3. This tortured interpretation of Mr. Nadel's statement is unreasonable, as it would effectively render the words "stole it" redundant.

significance to use of the word "complaint," which has no basis at law and, indeed, is contrary to the law's requirement that allegedly defamatory statements be viewed in context. Mot. at 12-13.

In *Savage is Loose*, the court held that "no basis for a defamation claim exist[ed]" where the plaintiffs' attorney engaged in precisely the same activity of "restating the allegations of a complaint that was both privileged and available to the public." 413 F. Supp. at 561. The Court should reach the same conclusion here.

II. Federal Title and Mr. Ewing Have Not and Cannot Plead a Plausible Claim for Defamation.

A. Viewed in Context, Mr. Nadel's Statements Are Not Reasonably Capable of Bearing a Defamatory Meaning.

In their Opposition, Federal Title and Mr. Ewing rely heavily on the standard of review applicable to defamation claims at the motion-to-dismiss stage. Opp. at 2-3, 9. But the standard of review provides no safe harbor for Federal Title and Mr. Ewing's obviously deficient claims.

A defamation claim survives a motion to dismiss only if "the communications of which the plaintiff complains were reasonably susceptible of a defamatory meaning." Mot. at 12 (quoting *Klayman v. Segal*, 783 A.2d 607, 612 (D.C. 2001)). To determine whether Mr. Nadel's statements were reasonably susceptible of such a meaning, the "publication must be taken as a whole and in the sense in which it would be understood by the readers to whom it was addressed." *Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013) (citation omitted). Here, taking context into consideration, as the Court must, the statements at issue are not reasonably capable of bearing a defamatory meaning. As noted previously,

- The statements were part of a larger neutral news piece describing Mr. Smith and Ms. Wrona's allegations and Federal Title's position in response;
- The headline of the article identified Mr. Smith and Ms. Wrona as the victims of hackers, not Federal Title or Mr. Ewing, and the same surmise appears in the body of the article;

- The allegedly defamatory statements were immediately preceded by a paragraph showing them to be a mere summary of Mr. Smith and Ms. Wrona's allegations; and

- The article itself linked directly to the underlying federal-court complaint.

Mot. at 13-15. Given the context of Mr. Nadel's statements, no reasonable reader could conclude that Mr. Nadel was acting in any capacity other than advocate for his clients' interests. Correspondingly, no reasonable reader could conclude that Mr. Nadel was offering his "own conclusions." Opp. at 5.

Federal Title and Mr. Ewing's argument that Mr. Nadel's statements are defamatory "regardless of whether or not the WAMU article as a whole is a balanced news story," Opp. at 9, misses the point. The context of the speech determines "the way in which the intended audience will receive [it]," *Farah*, 736 F.3d at 535, and, here, the context—a balanced news story with competing narratives and a link to the underlying complaint—makes clear to the reader that Mr. Nadel is not asserting historical facts, but describing his clients' allegations. The context is crucial and cannot be ignored.

The fact that WAMU gave Federal Title an opportunity to comment also matters, Federal Title and Mr. Ewing's argument to the contrary notwithstanding. Opp. at 9. In *Zimmerman v. Al Jazeera America, LLC*, 246 F. Supp. 3d 257 (D.D.C. 2017), a news article regarding PED use by professional baseball players was determined not to be reasonably capable of conveying a false and defamatory message in part because the athletes were given an opportunity to provide emphatic denials on the record. *Id.* at 279-80. "All things considered" and "taking into account the entire context of the article," the court explained, the passage at issue in the article could not be reasonably read to imply the assertion of the false and defamatory fact about which plaintiffs complained. *Id.* at 280. The same is true here. All things considered, taking into account the

entire context of the WAMU article, Mr. Nadel's statements cannot be read to imply, as a matter of historical fact, that Federal Title stole the $1.57 million that Mr. Smith and Ms. Wrona lost during closing.

B. The Statements at Issue Do Not Concern Mr. Ewing.

Mr. Ewing cannot state a claim for defamation because the statements implicate his company, not him personally. To state a defamation claim, a plaintiff must be able to show that the statements at issue at least lead the listener to conclude "that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or is misnamed." *Jankovic v. Int'l Crisis Grp.*, 494 F.3d 1080, 1088-89 (D.C. Cir. 2007). Neither of the allegedly defamatory statements makes any reference to Mr. Ewing whatsoever.

It is not enough that Mr. Ewing is the CEO and founder of Federal Title. Mot. at 15-16. Nor is it enough that Mr. Ewing is "well-known" within the real estate community as holding these positions, as he now alleges. Opp. at 11. Tellingly, Federal Title and Mr. Ewing simply ignore *Provisional Gov't of Republic of New Afrika v. Am. Broad. Cos., Inc.*, 609 F. Supp. 104 (D.D.C. 1985), which provides that "statements which refer to an organization do not implicate its members." *Id.* at 108. *Dameron*, cited as evidence that an unnamed individual can be defamed, Opp. at 11, is inapposite. There, the issue was whether the plaintiff was a limited-purpose public figure, not whether an individual can be defamed by implication. 779 F.2d at 741-42.

Because Mr. Nadel's allegedly defamatory statements do not concern Mr. Ewing personally—by name, description, or otherwise—Mr. Ewing's defamation claim fails as a matter of law.

III. Plaintiffs Have Failed to Rebut McDermott and Mr. Nadel's Showing That Neither Federal Title nor Mr. Ewing Can State a Claim for False Light.

Plaintiffs' Opposition contains nothing more than a conclusory assertion that Mr. Ewing has stated a claim for false light. Opp. at 10. Because Federal Title has not even responded to Defendants' argument that it cannot state a claim for false light as a matter of law, its claim should be dismissed. Mr. Ewing's false-light claim should be dismissed because he has not been placed in any light, false or otherwise. As discussed above, the statements in this case concern Federal Title, not him.

IV. Federal Title and Mr. Ewing Have Failed To Plead a Plausible Tortious-Interference Claim.

To state a claim for tortious interference, a plaintiff must allege knowing interference with "a valid contractual or other business relationship." Mot. at 17. Plaintiffs have failed to carry even this modest burden.

In *Nat'l R.R. Passenger Corp. v. Veolia Transp. Svs., Inc.*, 592 F. Supp. 2d 86 (D.D.C. 2009), on which Federal Title and Mr. Ewing rely, Opp. at 11, the court held that Amtrak sufficiently alleged the existence of a valid business expectancy where its complaint contained allegations that Amtrak had a legitimate expectation of winning a specific contract because it "met the stringent bid requirements, had highly qualified employees, had an opportunity to acquire the [transportation authority] as a new customer, and Amtrak and [the defendant] were the only bidders." *Id.* at 98. Federal Title and Mr. Ewing's allegations contain none of this specificity. They point to no specific business transactions that Federal Title has been denied, and they offer no factual basis whatsoever for an inference that, but for Mr. Nadel's statements to WAMU, Federal Title would have had the benefit of those expectancies. To the contrary, Federal Title and Mr. Ewing merely allege that over the past twenty years, they have established valid "business relationships" with unspecified lenders, insurers, real estate brokers, homebuyers,

and sellers. Compl. ¶ 39. That is inadequate to establish the existence of a valid business expectancy, let alone knowing interference with such an expectancy through communication with a WAMU reporter about a recently filed lawsuit. Accordingly, the tortious-interference claim should be dismissed.

V. Mr. Nadel's Statements Were Not Commercial Speech Excluded from the Coverage of the D.C. Anti-SLAPP Act.

Federal Title and Mr. Ewing's main argument against dismissal of this action pursuant to the D.C. Anti-SLAPP Act is that the law does not apply to "statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance." Opp. at 12 (quoting D.C. Code § 16-5501(3)). Citing no authority, Federal Title and Mr. Ewing assert that "the underlying lawsuit is a private commercial dispute that does not relate to any political issue or public policy debate, and is therefore excluded from the Act." *Id.* at 13. This self-serving argument is contrary to law.

As noted in Defendants' Motion, given the lack of Court of Appeals decisions interpreting the D.C. Anti-SLAPP Act, courts in the District often look to other jurisdictions for guidance on how the Court of Appeals would rule on anti-SLAPP issues, and particularly to California, which has well-developed anti-SLAPP jurisprudence. Mot. at 20 n.8 (quoting *Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1 (D.D.C. 2013)). Like the District, California has a "commercial speech exemption" to the anti-SLAPP procedure, codified at California Civil Procedure Code § 425.17(c). *See Stutzman v. Armstrong*, No. 2:13-CV-00116, 2013 WL 4853333, at *9 (E.D. Cal. Sept. 10, 2013). But the breadth of the commercial-speech exemption does not match Federal Title and Mr. Ewing's wishes.

Under California law, causes of action are exempt from the anti-SLAPP law if, among other things, the cause of action arises from a statement or conduct "consisting of representations

of fact about [the speaker's] or a business competitor's business operation, goods, or services." Cal. Civ. Proc. Code § 425.17(c); *accord Simpson Strong-Tie Co., Inc. v Gore*, 230 P.3d 1117, 1129 (Cal. 2010)). This case—arising out of an attorney's statements to a reporter regarding his clients' recently filed lawsuit—does not meet that test. Mr. Nadel did not make any representations about his own legal services or those of a competitor. That Mr. Nadel's statements related to a commercial dispute between Federal Title and his clients does not make his speech "commercial" in the legal sense. *See Language Line Svs., Inc. v. Language Svs. Assoc., LLC*, No. C-10-02605, 2011 WL 5024281, at *6 (N.D. Cal. Oct. 13, 2011) ("Although California law does provide a commercial speech exception to the anti-SLAPP statute, California courts have clearly stated that the commercial speech exception only applies to individuals who are *themselves* 'primarily engaged in the business of selling or leasing goods or services,' and does not apply to individuals who are acting 'on behalf of' individuals who are primarily engaged in such business."). Nor do the private aspects of the underlying dispute mean that Mr. Nadel's statements did not concern matters of public interest. As noted previously, an issue of public interest is any issue in which the public is interested. Mot. at 20. By Federal Title and Mr. Ewing's own admission, the incident giving rise to the underlying lawsuit serves "as a reminder to the public about the importance of cybercrime awareness and education." Compl., Ex. A at 3.

Accordingly, the burden shifts to Federal Title and Mr. Ewing to demonstrate that they are likely to succeed on the merits of their claims. For the reasons already discussed herein and in McDermott and Mr. Nadel's Motion, Federal Title and Mr. Ewing have not stated claims upon

which relief can be granted and, accordingly, cannot carry the heavy burden of showing they are likely to succeed on the merits.[4]

CONCLUSION

For the aforementioned reasons and those set forth in the Motion, the Court should dismiss the Complaint with prejudice and McDermott and Mr. Nadel should be awarded their attorney's fees under the Anti-SLAPP Act.

Dated: October 9 , 2018

Respectfully submitted,

By: /s/ Roger E. Warin

Roger E. Warin (DC Bar # 90241)
Michael E. Stoll (DC Bar # 997294)
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000
rwarin@steptoe.com
mstoll@steptoe.com

Counsel for Defendants McDermott Will & Emery LLP and Michael S. Nadel

[4] In a desperate attempt to avoid dismissal of this action based on Defendants' meritorious anti-SLAPP motion, Federal Title and Mr. Ewing request that they be permitted to conduct discovery into the facts asserted in Mr. Nadel's affidavit. Opp. at 14. Because Plaintiffs have failed to demonstrate how such discovery would not be unduly burdensome or would allow Plaintiffs to defeat Defendants' motion, the request should be denied. *Boley*, 950 F. Supp. 2d at 263 (citing D.C. Code § 16-5502(c)(2)). Federal Title and Mr. Ewing's request for an award of attorney's fees and costs, Opp. at 15, should also be denied. Far from being frivolous or for purposes of delay, D.C. Code § 16-5504(b), McDermott and Mr. Nadel's anti-SLAPP motion should be granted. As set forth previously, Mr. Nadel's statements concerned an issue of considerable public interest: the susceptibility of local title companies to cybercrime. Mot. at 19-21. The statements were in furtherance of the right of advocacy, as defined by the Act, because they were made in connection with a recently initiated civil lawsuit. *Id.* at 20.

Copies to:

Andrew J. Lawrence
5335 Wisconsin Avenue NW, Suite 700
Washington, DC 20015

Counsel for Plaintiffs Federal Title and Todd Ewing

Brian A. Carey
Conn Maciel Carey LLP
5335 Wisconsin Avenue NW, Suite 660
Washington, DC 20015

Counsel for Defendants Sean Smith and Erin Wrona

Roger E. Warin
Michael E. Stoll
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

Counsel for Defendants McDermott Will & Emery and Michael Nadel

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2018, I caused a true and accurate copy of Defendants McDermott Will & Emery LLP and Michael Nadel's Reply Memorandum of Points and Authorities in Support of their Motion to Dismiss and Special Motion to Dismiss to be served via the CaseFileXpress e-filing and service system on the following:

Andrew J. Lawrence
5335 Wisconsin Avenue NW, Suite 700
Washington, D.C. 20015
Attorney for Plaintiffs Close It! Title Services, Inc. and Todd Ewing

Bryan A. Carey
Conn Maciel Carey LLP
5335 Wisconsin Avenue NW, Suite 660
Washington, D.C. 20015
Attorney for Defendants Sean Smith and Erin Wrona

Michael E. Stoll
Michael E. Stoll