IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DANIEL M. SNYDER, Plaintiff, v. CREATIVE LOAFING, INC., *et al.,* Defendants.	No. 2011 CA 3168 B Judge Todd E. Edelman Next court date: July 20, 2011 Event: Status Hearing

MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, D.C. COUNCILMEMBER MARY M. CHEH, THE AMERICAN SOCIETY OF NEWS EDITORS, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE ASSOCIATION OF ALTERNATIVE NEWSWEEKLIES, THE MARYLAND-DISTRICT OF COLUMBIA-DELAWARE BROADCASTERS ASSOCIATION, THE ASSOCIATION OF CAPITOL REPORTERS AND EDITORS, NATIONAL PUBLIC RADIO, INC., ALLBRITTON COMMUNICATIONS COMPANY, ATLANTIC MEDIA, INC., WUSA-TV, THE PUBLIC ACCESS CORPORATION OF THE DISTRICT OF COLUMBIA, POLITICO LLC, THE PUBLIC PARTICIPATION PROJECT, THE ENVIRONMENTAL WORKING GROUP, AND PUBLIC CITIZEN, INC., AS *AMICI CURIAE*

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MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF THE NATION'S CAPITAL, *ET AL.*, AS *AMICI CURIAE*

Pursuant to leave of Court granted on July 13, 2011, the American Civil Liberties Union of the Nation's Capital, D.C. Councilmember Mary M. Cheh, the American Society of News Editors, the Society of Professional Journalists, the Maryland-District of Columbia-Delaware Broadcasters Association, the Association of Alternative Newsweeklies, the Association of Capitol Reporters and Editors, National Public Radio, Inc., Allbritton Communications Company, Atlantic Media, Inc., WUSA-TV, the Public Access Corporation of the District of Columbia, POLITICO LLC, the Public Participation Project, the Environmental Working Group, and Public Citizen, Inc., hereby file this memorandum of points and authorities in support of the defendants' Special Motion to Dismiss.

INTEREST OF *AMICI*

The statements of interest of the *amici* are appended to this memorandum.

ARGUMENT

I. The New District of Columbia Anti-SLAPP Statute Was Enacted so that Abusive and Costly Lawsuits Instituted to Suppress Speech Would be Nipped in the Bud

A. The D.C. Statute is Part of a Growing Movement to Deter and Punish SLAPPs

In a seminal study about twenty-five years ago, law and sociology professors at the University of Denver identified a widespread pattern of abusive lawsuits, generally filed by wealthy, powerful interests against individuals or community organizations that had spoken out against them. They dubbed these cases "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press, 1996).

A defining feature of SLAPPs is that "winning is not a SLAPP plaintiff's primary motivation." *Blumenthal v. Drudge,* Civ. No. 97-1968, 2001 WL 587860, at *3 (D.D.C. Feb. 13, 2001):

> [L]ack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. . . . Thus, while SLAPP suits 'masquerade as ordinary lawsuits' the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so.

Id. (quoting *Wilcox v. Superior Court,* 33 Cal.Rptr.2d 446, 450 (1994)). As the D.C. Council recognized:

> [T]he goal of the litigation is not to win the lawsuit but to punish the opponent[s] and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony, "[*l*]*itigation itself* is the plaintiff's weapon of choice."

Council of the District of Columbia, Committee on Public Safety and the Judiciary,

Report on Bill 18-893, "Anti-SLAPP Act of 2010," Nov. 19, 2010 (hereafter "Committee Report"), at 4 (second alteration and emphasis in original).[1] The Committee further explained the need for the bill:

> Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantial[] amount of money, time, and legal resources [to defending the lawsuit]. The impact is not limited to named defendants['] willingness to speak out, but prevents others from voicing concerns as well. To remedy this[,] Bill 18-893 . . . incorporat[es] substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

Committee Report at 1.

Recognizing that SLAPPs are an abuse of the judicial system, a growing number of states have enacted anti-SLAPP legislation: "as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures." Committee Report at 3; *see also* The Public Participation Project, "Your State's Free Speech Protections," http://www.anti-slapp.org/?q=node/12 (summarizing and providing links to anti-SLAPP statutes in 26 states and Guam) (last visited July 18, 2011).[2] In general, these statutes permit the defendants in SLAPP-suits to obtain pre-discovery dismissal of the case against them if it meets the statute's definition of a SLAPP, together with attorney's fees from the plaintiff. The District of Columbia statute follows this model.

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[1] A copy of the Committee Report is attached as Exhibit 27 to the affidavit of Alia L. Smith, filed with the defendants' Special Motion to Dismiss. It is also online at http://www.dccouncil.us/images/00001/20110120184936.pdf.

[2] On June 17, 2010, Texas became the 27th State to adopt an Anti-SLAPP statute. *See* Reporters Committee for Freedom of the Press, *Texas governor signs anti-SLAPP bill into law*, http://www.rcfp.org/newsitems/index.php?i=11931 (last visited July 18, 2011).

B. The Adoption of the D.C. Anti-SLAPP Act of 2010

In June 2010, D.C. Councilmembers Mary Cheh and Phil Mendelson introduced Bill 18-893, titled the "Anti-SLAPP Act of 2010." Committee Report at 4. The bill was modeled on the "Citizen Participation Act of 2009," H.R. 4364 (111th Cong., 1st Sess.), which had been introduced by Rep. Steve Cohen (D-Tenn.) in December 2009 but not enacted. *See* Committee Report at 4 ("As introduced, this measure closely mirrored the federal legislation introduced the previous year.").[3] The Council's Committee on Public Safety and the Judiciary held a public hearing in September 2010; no witness opposed the bill. *See* Committee Report at 5.

After the public hearing, the committee adopted several strengthening amendments, *compare id*., Attachment 1 (Bill 18-893 as introduced) *with id*., Attachment 4 (Committee Print). In particular – and of importance to this lawsuit – the Committee expanded a portion of the definition of what is protected by the Anti-SLAPP law (an "act in furtherance of the right of advocacy on issues of public interest") from:

> Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

Bill 18-893 as introduced, § 2(1)(B), to:

> Any 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.

Bill 18-893, Committee Print, § 2(1)(B).

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[3] The text of the proposed Citizen Participation Act is online at http://www.govtrack.us/congress/billtext.xpd?bill=h111-4364. The Committee Report incorrectly cites the congressional bill as H.R. 4363.

This amendment was suggested by the ACLU, which explained that the original definition was

> backwards – it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.
>
> . . . This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides.

Testimony of the American Civil Liberties Union of the Nation's Capital on Bill 18-893 at 5 (September 17, 2010) (emphasis in original; footnote omitted).[4]

The Council adopted the Anti-SLAPP bill in late 2010 by a vote of 11-0 (with two members absent) on first reading and a vote of 12-0 (with one member absent) on final reading; it was signed by Mayor Gray on January 19, 2011. *See* http://www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (search for B18-893) (last visited July 18, 2011). After congressional review, it became effective on March 31, 2011. *See* 58 D.C. Register 741 (Apr. 29, 2011). This lawsuit was filed shortly thereafter, on April 26, 2011.

C. The Purpose and Operation of the D.C. Anti-SLAPP Act

In urging the Council to adopt Bill 18-893, the Committee on Public Safety and the Judiciary emphasized that the bill was intended to remedy the "nationally recognized problem" of abusive lawsuits against speech on public issues by providing defendants

[4] The ACLU's written testimony is reproduced in the Committee Report as the first part of Attachment 2.

"with substantive rights to expeditiously and economically dispense of litigation" that qualified as a SLAPP – in other words, to nip such lawsuits in the bud. Committee Report at 4. The substantive right was accurately described as providing "immunity" for those who engage in speech on issues of public interest. *Id*.

The basic operation of the new D.C. law is quite straightforward, establishing a lower substantive standard for motions to dismiss in SLAPP-suits: if a claim in a lawsuit "arises from an act in furtherance of the right of advocacy on issues of public interest," then that claim is subject to a "special motion to dismiss," which must be granted unless the plaintiff can show that he or she "is likely to succeed on the merits." D.C. Code § 16-5502. End of story.

The special motion to dismiss must generally be granted prior to discovery, D.C. Code § 16-5502(c)(1), "[t]o ensure [that] a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish." Committee Report at 4. Thus, defamation claims arising out of speech on issues of public interest are not barred, but a plaintiff who seeks to pursue such a claim needs to have his proof in hand *before* he or she files suit; fishing expeditions hoping to discover missing elements of causes of action are not allowed.[5]

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[5] The court can, however, permit limited, "targeted discovery," if it appears that such discovery "will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome." D.C. Code § 16-5502(c)(2).

As introduced, Bill 18-893 authorized a court to allow "specified discovery" when this standard was met. *See* Committee Report, Attachment 1, § 3(c). That is also the phrase used in H.R. 4364, the federal bill on which the D.C. Act was modeled. But in the Committee Print, this phrase had changed to "specialized discovery." *See* Committee Report, Attachment 4, § 3(c).

No reason was given for this change and the enacted language makes no sense. Apparently the change was a scrivener's error that should be corrected by the Council.

The key term, an "act in furtherance of the right of advocacy on issues of public interest," is broadly but carefully defined to mean:

> (A) Any written or oral statement made:
>
> > (i) In 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) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any 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.

D.C. Code § 16-5501(1). The term "likely to succeed on the merits" is not defined, for the obvious reason that no definition is necessary; the phrase and its non-technical meaning are well known to every trial and appellate judge.

II. Applying the D.C. Anti-SLAPP Act, this Lawsuit Should be Nipped in the Bud

The only issue in this case requiring more than cursory analysis is whether the plaintiff can show that he is likely to succeed on the merits.

A. The Claims in this Lawsuit Arise from an Act in Furtherance of the Right of Advocacy on Issues of Public Interest

The plaintiff concedes that he is a public figure. Complaint ¶¶ 1, 4. It follows that expression about the plaintiff is expression about an "issue of public interest," because an "issue of public interest," is defined to include "an issue related to . . . a public figure." D.C. Code § 16-5501(3).[6]

[6] It is plain that the plaintiff can find no shelter in the definition's exception, that an "'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." D.C. Code § 16-5501(3).

The claims in this lawsuit arise from an article about the plaintiff that was published in the *Washington City Paper*, a weekly alternative newspaper that is read by thousands of Washingtonians. It follows that the claims arise from an "act in furtherance of the Right of Advocacy on Issues of Public Interest," because such an act is defined to include "[a]ny . . . expression . . . that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B).

It therefore also follows that "the motion [to dismiss] shall be granted unless the [plaintiff] demonstrates that [his] claim[s are] likely to succeed on the merits." D.C. Code § 16-5502(b).

B. The Plaintiff will be Unable to Demonstrate that he is Likely to Succeed on the Merits

While the plaintiff has not yet had an opportunity to make his case, and it would therefore be premature for *amici* to express an unqualified conclusion on the merits, the facts on the public record suggest that he is as likely to prevail on the merits here as Voldemort is to prevail over Harry Potter in their final battle.

As a public figure, plaintiff must scale a daunting cliff to prevail on a claim of defamation. As the Court of Appeals has explained, he must prove not only that defendants' statements about him were materially false statements of fact but must also prove, by clear and convincing evidence, that the defendants acted with "actual malice," *i.e.*, that they knew their statements were false or that they actually had serious doubts about the truth of their statements:

> "[P]roof of defamation and falsity alone affords an insufficient basis for recovery[,] . . . plaintiff[] must prove publication with 'actual malice' by 'clear and convincing proof' in order to establish the defendant's liability." *Nader v. Toledano*, 408 A.2d 31, 40 (D.C. 1979). *See also Foretich [v. CBS, Inc.],* 619 A.2d [48] at 59 [(D.C. 1993)] ("'[a]ctual malice' must be

> proved by clear and convincing evidence") (citations omitted). In addition, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant [v. Thompson*], 390 U.S. [727] at 731 [(1968)]. *See also Sweeney [v. Prisoners' Legal Services of New York]*: "To satisfy the reckless disregard standard, plaintiffs had to establish that defendants in fact entertained serious doubts as to the truth of [the] publication or that they actually had a high degree of awareness of [its] probable falsity." 647 N.E.2d [101] at 104 [(1995)] (citing *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989) (other citations and internal quotations omitted)).

Beeton v. District of Columbia, 779 A.2d 918, 924 (D.C. 2001) (some alterations in original).[7] Plaintiff's only hope of scaling this cliff lies in persuading this Court to apply a requirement of literal exactness – that readers would understand the statements to mean that he *personally* forged signatures, *personally* sprayed Agent Orange on trees in his backyard, and was literally removed from the Board of Six Flags.

But literal exactness is not the proper standard for this Court to apply. Unhappily for the plaintiff, but happily for freedom of speech, a showing of material falsity requires a showing of departure from the truth *that would matter to a reader* – not a departure that would matter to a cite-checker or a copy editor, but to the readers in whose opinion the plaintiff alleges he has been harmed. As Judge Burgess explained:

> When the defamatory sting of a statement is substantially true, the statement is not false. *See, e.g., Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990) (finding that if a publication is substantially true – in the sense that its "gist" or "sting" is true – the statement is not false); *Tavoulareas v. Piro*, 817 F.2d 762, 788 [D.C. Cir. 1987)] ("Since the only derogatory implication of the dispatch statement is undisputedly correct, it is not actionable"); *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991) (holding that a statement is substantially true if the allegedly defamatory "gist" or "sting" of the statement is true: "Minor inaccuracies

[7] *Beeton* involved a public official; the standard for a public figure is the same. *Ayala v. Washington*, 679 A.2d 1057, 1063 n.3 (D.C. 1996)

do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”).

Paul v. News World Communications, No. 01-CA-917, 2003 WL 25290663, at *6 (D.C. Super. Ct., Sept. 15, 2003) (Burgess, J.).

Defendants have persuasively shown, in the memorandum supporting their special motion to dismiss, that the “sting” of the alleged defamation here is substantially true – *i.e.,* true in its essence:

• Plaintiff (*i.e.,* his agents) apparently *did* cut down many trees on protected land without having obtained all the necessary government permissions and thereby obtained a better view of the Potomac River from his home.[8] It is unlikely that any reader visualized the plaintiff in a HAZMAT suit spraying toxic defoliant around his back yard.

• Plaintiff apparently *was* excluded from the Board of Six Flags as part of a corporate reorganization.[9] Readers would not care that his departure from the Board occurred in the context of a reorganization rather than otherwise; that detail certainly does not change the “sting” of the assertion.

• Plaintiff (*i.e.,* his agents) apparently *did* forge telephone customers’ signatures, and apparently on a massive scale.[10] It is altogether common for the actions of agents to be recounted in the name of their boss; if a headline said, “MURDOCH HACKED CELL PHONES OF YOUNG MURDER VICTIM AND BRITISH TROOPS KILLED IN AFGHANISTAN,” no sensible reader would visualize Rupert Murdoch sitting at a keyboard with earphones on his head, typing computer code.

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[8] *See* defendants’ memorandum at 16-17.

[9] *See* defendants’ memorandum at 17-19.

[10] *See* defendants’ memorandum at 13-15.

Where a reasonable jury could not find the sting of the alleged defamation to be substantially false, the Court can so rule as a matter of law. *Paul v. News World Communications,* 2003 WL 25290663, at *6-*7. And here the Anti-SLAPP statute has added yet another layer of difficulty for the plaintiff: the Court need not find that a reasonable jury *could not* find the sting of the alleged defamation to be substantially false; it is sufficient to dismiss the case if the Court finds that a reasonable jury *would not be likely to* find the sting to be substantially false. D.C. Code § 16-5502(b).

Absent exceptionally dramatic and unexpected revelations by the plaintiff, his ability to demonstrate a *likelihood* of prevailing on the merits appears to be of the same order of magnitude as the likelihood of the Redskins winning this year's Super Bowl.

It follows that – absent such dramatic and unexpected revelations – the defendants' special motion to dismiss should be granted.[11]

III. The Anti-SLAPP Act Should be Applied According to its Terms

Plaintiff may argue that applying the D.C. Anti-SLAPP Act to his case will deprive him of the ability he would otherwise have to win his case under the prevailing law of defamation. Assuming, for the sake of argument (and contrary to the likely reality), that this is true, it is not a reason to refuse to apply the Anti-SLAPP Act. To the contrary, this Court should be "guided by the familiar canon of statutory construction that

[11] Although not the basis of a legal claim, plaintiff's accusation that the cover illustration on defendants' article was anti-Semitic is risible. Drawing the devil's horns and goatee on a photograph of a famous person or a photograph of an advertising model is a prank so shopworn as to be boring. Drawing such graffiti on a photograph of a stereotypical orthodox Jew might be anti-Semitic, depending on the context, but the obvious reason for including them on the cover illustration of the plaintiff was to convey the message that he is Mephistophelian – which was, after all, the theme of the article. That message was sharp, and it may or may not have been justified, but it was no more anti-Semitic, in 2010 Washington D.C., than a child wearing a devil costume on Halloween.

remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

A. The Legislature Can Define Terms as it Pleases

Plaintiff may point out that the definition of a SLAPP under the D.C. Anti-SLAPP Act is broader than the definition contained in professors Pring and Canan's book, or in the anti-SLAPP statutes of other states. This is true. It reflects a legislative policy judgment – apparently in response to the ACLU's testimony, *see* p. 5 above – that a broader definition is desirable.

A legislature can define statutory terms as it chooses. "Humpty Dumpty used a word to mean 'just what [he chose] it to mean-neither more nor less,' and legislatures, too, are free to be unorthodox." *Lopez v. Gonzales*, 549 U.S. 47, 54 (2006) (quoting L. Carroll, Alice in Wonderland and Through the Looking Glass 198 (Messner 1982)) (alterations by the Court). Thus, "[w]hen a legislature defines the language it uses, its definition is binding upon the court even though the definition does not coincide with the ordinary meaning of the words." *Ball v. Arthur Winn General Partnership/Southern Hills Apartments*, 905 A.2d 147, 151 (D.C. 2006) (internal quotation marks and citations omitted). Plaintiff may disagree with the D.C. Council's policy judgment, but unless that judgment resulted in an unconstitutional enactment the statute must be applied according to its terms, and the terms must be applied as they are defined in the statute.

B. The Council has the Authority to Abolish or Modify Torts, and to Create Immunities from Tort Liability

The D.C. Anti-SLAPP Act does not violate any right of the plaintiff's. A contrary argument would have to rest on the proposition that the First Amendment creates a ceiling, rather than a floor, for the protection of speech, so that any speech not protected

by the First Amendment must be subject to a tort action for damages. But that is incorrect:

> [T]he substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution.

Mills v. Rogers, 457 U.S. 291, 300 (1982).

Legislatures regularly protect speech that the First Amendment does not protect. *See, e.g.*, the Communications Decency Act, 47 U.S.C. § 230 (granting Internet publishers absolute immunity from liability for material provided by third parties). This provision of federal law provides an apt analogy to the D.C. Anti-SLAPP Act. The Internet can enable any person to publish a defamatory message to the whole world, greatly harming the subject of the message. Yet, in order "to preserve the vibrant and competitive free market that presently exists for the Internet . . . , unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), Congress "made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others." *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998).

This is no different in principle from the legislative judgment made by the D.C. Council to immunize speakers on matters of public interest from tort liability and from the burdens of litigation for allegedly defamatory statements, except that instead of providing speakers with an absolute immunity (as the Communications Decency Act does), the Council provided speakers with only a qualified immunity, for the immunity recedes if the speaker's statements were so clearly defamatory that the person claiming

defamation could show at the outset a likelihood of prevailing on the merits.[12]

Like other legislatures, the D.C. Council has established immunities from liability for allegedly defamatory speech in a wide variety of contexts. *See, e.g.,* D.C. Code § 4-1321.04 (providing immunity to any person making a report regarding a neglected or abused child); D.C. Code § 5-417 (providing immunity to persons providing information regarding arson); D.C. Code § 7-1908 (providing immunity to "[a]ny person who reports an alleged case of abuse, neglect, self-neglect, or exploitation" to Adult Protective Services); D.C. Code § 16-1057 (providing immunity to any person providing information to the Domestic Violence Fatality Review Board); D.C. Code § 22-3225.13 (providing immunity to any person "reporting any suspected insurance fraud").[13] Just as the Council concluded that these categories of speech sufficiently serve the public interest

[12] In practical effect, therefore, the operation of the Anti-SLAPP Act with respect to defamation claims may be akin to the operation of the "innocent construction rule," a rule of decision in defamation cases that has been adopted in several states, and which provides that if an allegedly defamatory statement "may reasonably be innocently interpreted, it cannot be actionable *per se*." *Harrison v. Chicago Sun Times*, 793 N.E.2d 760, 772 (Ill. 2003). *See also Walker v. Kansas City Star*, 406 S.W.2d 44, 51 (Mo. 1966) ("in considering whether a publication is libelous *per se*, words to be considered actionable should be unequivocally so, and should be construed in their most innocent sense") (internal citation omitted); *Mendise v. Plain Dealer Publishing Co*., 591 N.E.2d 789, 792 (Ohio App. 1990) ("if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted"); *Monnin v. Wood*, 525 P.2d 387, 389 (N.M. App. 1974) ("Defamatory character will not be given the words unless this is their plain and obvious import, and the language will receive an innocent interpretation where fairly susceptible to it."). If a speaker's words can have *no* non-defamatory construction – and if the other requirements of defamation law are satisfied (*e.g.,* that the words were of and concerning the plaintiff) – then a plaintiff would presumably be able to demonstrate a likelihood of success on the merits of his or her claim.

Of course the D.C. Council, had it been so disposed, could have enacted a statute adopting the innocent construction rule as the law in the District of Columbia.

[13] *See also* D.C. Court of Appeals, Rules Governing the District of Columbia Bar, Rule XI (a) ("*Immunity.* Complaints submitted to the Board or Bar Counsel shall be absolutely privileged, and no claim or action predicated thereon may be instituted or maintained.").

that they should receive extra protection, so it concluded that speech about "issues of public interest" (including speech about public figures) should receive extra protection in the form of a qualified immunity.

The Council's authority to provide absolute or qualified immunity from liability and from the burdens of litigation for common-law torts such as defamation flows from its basic power to override the common law. Thus, the Council could, if it wished, abolish the tort of defamation altogether, as it has, for example, abolished the common-law torts of breach of promise, alienation of affections, and criminal conversation. *See* D.C. Code § 16-923 (doing so). *See also Howard v. Lightner*, 214 A.2d 474, 476 (D.C. 1965) (recognizing that where the D.C. Worker's Compensation Act applies, it "abolishes the ordinarily available defenses of contributory negligence, assumption of risk of employment, or that the cause was a fellow-employee's negligence"); *Mendes v. Johnson*, 389 A.2d 781, 787 (D.C. 1978) (*en banc*) (recognizing that D.C. landlords' common-law right to self-help eviction had been abrogated by statute); *Monroe v. Foreman*, 540 A.2d 736 (1988) (recognizing that the D.C. No-Fault Act precluded, in many cases, the right to bring common-law tort claims for personal injury arising out of motor vehicle accidents).

In considering whether to enact this legislation creating a qualified immunity for speech on issues of public interest (including speech about public figures), the D.C. Council may well have agreed with what the Supreme Court said in another context:

> [T]he Act's approach recognizes that the best remedy for misleading or inaccurate speech contained within materials subject to the Act is fair, truthful, and accurate speech. *See generally Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by

> the processes of education, the remedy to be applied is more speech, not enforced silence.").

Meese v. Keene, 481 U.S. 465, 481 (1987). Public figures generally have the ability to tell their side of a story. Certainly the plaintiff here has the ability to tell his side of the story.[14] Unless he can demonstrate at the threshold that he is likely to succeed on his claims that defendants' statements about him were defamatory, he should be remitted to the preferred remedy of "more speech."

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[14] Indeed, defendants aver that the *City Paper* offered plaintiff the opportunity to publish a "guest column" responding to the article at issue. *See* defendants' memorandum at 9, citing the Smith affidavit at ¶ 17 and its Exhibit 15.

Even without that offer, plaintiff has the means to tell his story to a Washington audience. A letter sent on plaintiff's behalf to *City Paper*'s owners before this lawsuit was filed stated:

> *Mr. Snyder has more than sufficient means* to protect his reputation and defend himself and his wife against your paper's concerted attempt at character assassination. We presume that defending such litigation would not be a rational strategy for an investment fund such as yours. Indeed, the cost of litigation would presumably quickly outstrip the asset value of the Washington City Paper.

Complaint, Exhibit D (emphasis added). For what it will cost him to pursue this lawsuit, plaintiff probably could have purchased full-page advertisements telling his side of the story in every issue of the *City Paper* for a year, if not a decade. His decision to pursue litigation rather than "more speech," and his not-even-thinly-veiled threat to make the defense of this lawsuit financially untenable for *City Paper's* owners, make clear that this case fits the mold of SLAPP suits as articulated by the Council:

> [T]he goal of the litigation is not to win the lawsuit but [to] punish the opponent[s] and intimidate them into silence.

Committee Report at 4.

CONCLUSION

For the reasons stated above, defendants' Special Motion to Dismiss should be granted and this action should be dismissed with prejudice.

July 18, 2011

Respectfully submitted,

Arthur B. Spitzer
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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of the Nation's Capital

The American Civil Liberties Union (ACLU) of the Nation's Capital is the local affiliate of the American Civil Liberties Union, a nationwide not-for-profit membership corporation that, with more than 500,000 members and supporters, strives to defend and expand the civil rights and civil liberties of all Americans. The ACLU of the Nation's Capital is a District of Columbia non-for-profit membership corporation, celebrating its 50th anniversary in 2012. With approximately 5,000 members, it strives to defend and expand the civil rights and civil liberties of the people of Washington, D.C., through litigation, legislative advocacy, and public education. It has often filed briefs as amicus curiae in the federal and local courts in the District of Columbia.

This is the first case in the Superior Court involving the new District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501 to 16-5505, enacted by the D.C. Council in December 2010 and effective (after congressional review) on March 31, 2011. The ACLU was the principal non-government entity involved in drafting and advocating the new D.C. law and has previous experience with SLAPP suits in the District of Columbia and involving D.C. residents, as detailed in its testimony to the D.C. Council.

D.C. Councilmember Mary M. Cheh

D.C. Councilmember Mary M. Cheh is the representative of Ward 3 on the Council of the District of Columbia. She chairs the Committee on the Environment, Public Works, and Transportation, and was both co-author and co-introducer of the District of Columbia Anti-SLAPP Act of 2010.

The American Society of News Editors

With some 500 members, the American Society of News Editors (ASNE) is an organization that includes directing editors of daily newspapers throughout the Americas. Founded in 1922 as the American Society of Newspaper Editors, ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Society of Professional Journalists

The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of

ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

The Association of Alternative Newsweeklies

The Association of Alternative Newsweeklies (AAN) is a diverse group of 129 alternative newsweeklies covering every major metropolitan area and other less-populated regions of North America. AAN members have a combined weekly circulation of over 6.5 million as well as a print readership of nearly 17 million active, educated and influential adults in the U.S. and Canada. In addition, AAN-member content is viewed by millions of additional adults via the web and mobile devices.
To meet the association's rigorous membership standards, weekly newspapers must demonstrate that they produce high-quality journalism that offers a valuable alternative to the mainstream media in their area. As a result, only 30 percent of the papers that apply for membership are admitted to the organization. The 129 papers that now make up the association publish in 42 states and the District of Columbia in the United States, and in four Canadian provinces. There is a wide range of publications in AAN. What ties them together are a strong focus on local news, culture and the arts; an informal and sometimes profane style; an emphasis on point-of-view reporting and narrative journalism; a tolerance for individual freedoms and social differences; and an eagerness to report on issues and communities that many mainstream media outlets ignore. *Washington City Paper,* the defendant in this case, is one of the best examples of the type of newspaper published by AAN members, thus its success in this punishing lawsuit is of critical important to all AAN members.

The Maryland-District of Columbia-Delaware Broadcasters Association

The Maryland-District of Columbia-Delaware Broadcasters Association unites public and commercial radio and television stations across Maryland, D.C. and Delaware. The purpose of the Association is to foster and promote the interests of broadcasters and the broadcasting industry, communicate relevant information to its members through meetings and publications, and to provide support and educational services through webinars, workshops and other means in order to better serve the public

The Association of Capitol Reporters and Editors

The Association of Capitol Reporters and Editors (d/b/a “Capitolbeat”) was founded in 1999 and has approximately 200 members. It is the only national journalism organization for those who write about state government and politics

National Public Radio

National Public Radio, Inc. ("NPR") is an award-winning producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership

organization, NPR serves a growing audience of more than 26 million listeners each week by providing news programming to 268 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information.

Allbritton Communications Company

Allbritton Communications Company is an indirect, wholly-owned subsidiary of privately held Perpetual Corporation and is the parent company of entities operating television stations in seven markets including Washington, DC where it operates the ABC Network affiliate, WJLA-TV; the 24-hour, local, all-news television channel, NewsChannel 8; and the Internet news websites, WJLA.com and TBD.com.

Atlantic Media, Inc.

Atlantic Media, Inc., is a privately-held integrated media company that publishes The Atlantic, National Journal, and Government Executive. These award-winning titles address topics in national and international affairs, business, culture, technology, and related areas, as well as cover political and public policy issues at federal, state, and local levels. The Atlantic was founded in 1857 by Oliver Wendell Holmes, Ralph Waldo Emerson, Henry Wadsworth Longfellow, and others.

WUSA-TV

WUSA-TV (Channel 9) is a Gannett-owned, CBS-affiliated television station located in Washington, D.C. In the Washington metropolitan area, the station has a television audience of 4.9 million and reaches 3.2 million people online.

The Public Access Corporation of the District of Columbia

The Public Access Corporation of the District of Columbia (DCTV) is a membership-based, non-profit, public access television network, dedicated to building communities through telecommunications. Since 1988, DCTV has provided a forum for residents of the District of Columbia, young and old, the opportunity to create and telecast their own programs for DC communities on cable television, and many such programs are devoted to commenting on issues of public interest

POLITICO

POLITICO LLC is a wholly-owned subsidiary of privately held Capitol News Company, LLC and is a nonpartisan, Washington-based political journalism organization that produces a newspaper and Internet website covering politics, the legislative/ regulatory process and public policy.

The Public Participation Project

The Public Participation Project was started in 2011 in response to a growing concern that, because many states lack anti-SLAPP laws, and because state laws do not apply to federal claims in federal court, people's First Amendment rights would depend on where they spoke out, or where they were sued. It supports passage of a federal Anti-SLAPP law and strong interpretation and enforcement of state laws.

The Environmental Working Group

The Environmental Working Group is a 501(c)(3) non-profit organization dedicated to using the power of information to protect public health and the environment. As part of that mission, Environmental Working Group's scientists, policy experts, and lawyers conduct extensive research and advocate policies that protect vulnerable segments of the population at the local, state, and federal levels. The Environmental Working Group's cutting-edge research and advocacy sometimes engenders hostility on the part of powerful corporate interests, and the robust protection of anti-SLAPP statutes in the District of Columbia and elsewhere provide important protection for our ability to do our work.

Public Citizen

Public Citizen, Inc., is a public interest organization based in Washington, D.C. It has more than 225,000 members and supporters. Since its founding in 1971, Public Citizen has encouraged public participation in civic affairs, and has brought and defended numerous cases involving the First Amendment rights of citizens who participate in civic affairs and public debates. *See generally* http://www.citizen.org/litigation/briefs/internet.htm. Public Citizen's members and supporters are often threatened by Strategic Lawsuits Against Public Participation ("SLAPP"). Public Citizen attorneys have defended many SLAPP cases around the country, and have pursued anti-SLAPP motions or appeared as friends of the court in support of anti-SLAPP motions in several different state and federal courts around the country. Public Citizen has also lobbied in support of the adoption of a federal anti-SLAPP statute, and supported efforts in several states to adopt new anti-SLAPP laws. Public Citizen brings this experience to bear in arguing about how DC's new anti-SLAPP law should construed.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2011, I served the foregoing Memorandum of the American Civil Liberties Union of the Nation's Capital, *et al*., as *Amici Curiae*, via the Court's electronic filing system upon all counsel who are so servable, and upon the following additional counsel by first class mail, postage prepaid:

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