**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| THE WASHINGTON TRAVEL CLINIC, PLLC, *et al.*, | * | |
| Plaintiffs, | * | Case No. 2013 CA 003233 B |
| | * | Judge Laura A. Cordero |
| v. | * | |
| | * | |
| JOHN KANDRAC, | * | |
| Defendant. | * | |

**OMNIBUS ORDER**

This matter comes before the Court on Defendant John Kandrac's Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act[1], or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6), filed on July 15, 2013, and Plaintiffs' Motion for Sanctions filed on September 24, 2013. Plaintiffs filed an Opposition to Defendant's Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act, or in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) on August 15, 2013. Defendant filed a Reply Memorandum of Points and Authorities in Support of Defendant's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6) on September 11, 2013. Defendant filed an Opposition to Plaintiff's Motion for Sanctions on October 11, 2013. Plaintiffs filed a Reply to Defendant's Opposition to Plaintiff's Motion for Sanctions on October 22, 2013. For the reasons stated below, Defendant's Special Motion to Dismiss is granted in part and denied in part and Plaintiffs' Motion for Sanctions is denied.

## I. BACKGROUND

This case involves a suit for defamation and tortious interference with a prospective business advantage arising out of a negative customer review posted on Yelp (www.yelp.com),

[1] SLAPP is an acronym for "Strategic Lawsuits Against Public Participation." D.C. Code § 16-5502.

an online forum that allows consumers to write reviews of businesses. Plaintiffs Washington Travel Clinic, PLLC, a professional limited liability company, and Dr. Ziad Akl filed a Complaint on May 9, 2013, against Defendant John Kandrac, a former patient. Plaintiffs filed an Amended Complaint on June 21, 2013.

On January 28, 2013, Plaintiffs claim that Defendant posted a review of Dr. Akl on Yelp containing the following language:

> I am giving one star b/c I would recommend people go elsewhere. Like others, I have received other patients' receipts (more than one!), and more than once he has taken long cell phone calls while I was waiting. To make matters worse, I could hear everything the person on the phone was saying (enjoy that trip to Nigeria, Erica..).
>
> Like the other commenter, I too had to wait outside of the office for him to arrive for about an hour after my scheduled appointment time. Other patients just left while we were waiting in the hallway, but my trip was so near I didn't feel comfortable getting the shot later than that day or I would have left.
>
> In addition, he told me he would schedule me an email to be sent 1 yr after my first visit, but it never came. The downside for me is that he got to charge me the annual visitation fee, which isn't cheap. I should have ignored his promise to send me emails in advance, but it was still annoying.
>
> Other than that, he really pushes on that plunger when administering shorts which yields an unpleasant sensation. Not such a big deal to me, but noticeably more uncomfortable than any other shots I've had which are no problem.
>
> To list the positives rather than keep going with the things I didn't like: He is fairly responsive if you send him an email, and the location is very good. anyway [sic] ...one star.

Am. Compl. ¶ 18. On January 28, 2013, Plaintiff Akl contacted Defendant and pointed out many aspects of Defendant's review that Plaintiff Akl believed were incorrect and asked Defendant to

make certain corrections. *Id.* at ¶ 20. Defendant responded on January 31, 2013 and made several edits to his original review. *Id.* at ¶¶ 20-21.

The edited review stated

> I am giving one star b/c I would specifically recommend avoiding this clinic. Like others below, I have received other patients' information from Dr. Akl via email. More than once once [sic] he has taken long cell phone calls while I was waiting. To make matters worse, I could hear everything the person on the phone was saying (enjoy that trip to Nigeria, Erica..).
>
> Like the another [sic] commenter, I too had to wait outside of the office for him to arrive for about an hour after my scheduled appointment time. Another patient just left while we were waiting in the hallway, but my trip was so near I didn't feel comfortable getting the shot later than that day or I too would have left.
>
> In addition, he told me he would schedule me an email to be sent 1 yr after my first visit, but it never came. The downside for me is that he charged me the annual visitation fee, which isn't cheap. I should have ignored his promise to send me emails in advance, but it was still annoying.
>
> Other than that, he really pushes on that plunger when administering shorts which yields an unpleasant sensation. Not such a big deal to me, but it feels noticeably more uncomfortable than any other shots I've had which are not noticeable. Maybe it's just me projecting the overall rushed feel of the place (e.g. he was on the phone while I'm on the chair seconds before he injects me), but I had this feeling before as well.
>
> To list the positives rather than keep going with the things I didn't like: He is fairly responsive if you send him an email, and the location is very good. anyway [sic]...one star.

*Id.* at ¶ 21. Plaintiffs allege that several of the statements made in the Yelp reviews are factually incorrect and defamatory. *Id.* at. ¶¶ 21 – 48. Plaintiffs also claim that insofar as Defendant's statements are defamatory, they interfere with Plaintiffs' reasonable expectation to enter into prospective business relationships. *Id.* at ¶¶ 49 – 53. As a result, Plaintiffs claim that

Defendant's conduct has caused and will continue to cause unspecified financial harm to the Plaintiffs. *Id.* at ¶¶ 54, 55.

On July 15, 2013, Defendant filed a Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act, or in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6). Defendant argues that Plaintiffs seek to use this litigation as a vehicle for punishing his negative review, chilling further negative reviews, and that such speech is a matter of public concern entitled to protection under the D.C. Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a). Def's Special Mot. to Dismiss the Compl. ¶ 2. Alternatively, Defendant claims that Plaintiffs have failed to state a claim upon which relief can be granted warranting dismissal under D.C. Sup. Ct. Rule 12(b)(6). *Id.* at ¶ 4.

In his Memorandum of Points and Authorities in Support of Defendant's Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6), Defendant makes several factual statements regarding Plaintiff Akl's previous lawsuit that Plaintiffs believe lack evidentiary support. Therefore, they have filed a Motion for Sanctions seeking attorney's fees and other expenses incurred because of Defendant's alleged violation of D.C. Sup. Ct. Rule 11. Mot. Sanctions ¶¶ 3, 4. Defendant responds that Plaintiffs' Rule 11 Motion is itself further evidence that the underlying lawsuit is a strategic lawsuit against public participation (SLAPP), and that the facts alleged have sufficient evidentiary support. Def's Op. to Mot. Sanctions. ¶¶ 2, 3. The Court addresses each of these matters in turn.

## II. STANDARD OF REVIEW FOR D.C. ANTI-SLAPP ACT

The D.C. Anti-SLAPP Act of 2010 was passed on January 19, 2011 and went into effect on March 31, 2011. 58 D.C. Reg. 741 (2011). This law "intentionally follows the lead of other

jurisdictions..." Rep. of the D.C. Comm. on Public Safety and the Judiciary on Bill 18-893 (Nov. 19, 2010) at 4. California was the first state to enact an Anti-SLAPP statute, and has been a model for other jurisdictions. *See* Cal. Civ. Proc. Code § 425.16 Historical and Statutory Notes. Therefore, where certain questions remain unresolved in this jurisdiction, California precedent is useful in interpreting certain aspects of the D.C. statute.

The D.C. Anti-SLAPP Act allows a party to file a special motion to dismiss any claim "arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). If a party filing a special motion to dismiss makes a *prima facie* showing that the claim at issue does actually arise from an act that would fall under subsection (a) of the Act, 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." D.C. Code § 16-5502(b).

While there appear to be no published decisions from the District of Columbia Court of Appeals that have addressed the applicable standard of review, lower courts have looked to cases interpreting the California statute ("probability of success on the merits") for guidance. *See e.g., Mann v. Nat'l Review, Inc.*, 2013 WL 4494944, at *1 - *13 (D.C. Super. July 19, 2013). Thus, "to establish the requisite probability of prevailing, the plaintiff need only have stated and substantiated a legally sufficient claim." *Navellier v. Sletten,* 29 Cal. 4th 82, 88 (Cal. 2002) (quotations and citations omitted).

A plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id.* at 88-89. Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified; rather, the plaintiff must adduce competent, admissible

evidence. *Roberts v. Los Angeles County Bar Assn.*, 105 Cal. App. 4th 604, 614 (Cal. Ct. App. 2003); *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 735 (Cal. Ct. App. 2008). If the court grants the special motion to dismiss, the claim must be dismissed with prejudice. D.C. Code § 16-5502(d).

## III. ANALYSIS OF D.C. ANTI-SLAPP ACT

Under the District of Columbia Anti-SLAPP Act of 2010, when faced with a strategic lawsuit against public participation arising from an act in furtherance of the right of advocacy on issues of public interest, a defendant may file a special motion to dismiss. D.C. Code § 16-5502. In an Anti-SLAPP motion, the court first determines whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002). If the cause of action arises from an activity contemplated by the statute, then the motion shall be granted unless the plaintiff can show probability of success on the merits. *Id.*

### 1. The D.C. Anti-SLAPP Act Applies to the Statements at Issue

The Act applies to claims based on 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.

D.C. Code § 16-5501(1)(A).

The Act also applies to "[a]ny other expression or expressive conduct that involves...communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). An "issue of public interest" is defined as one that is "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 marketplace... [but] 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).

In this case, the claims at issue fall under the broad umbrella of the Anti-SLAPP Act. Defendant's Yelp reviews were clearly his communication of views about Plaintiff Akl's practice to other members of the community and thus was related to a service in the marketplace. Thus it is covered by § 16-5501(1)(B). As Plaintiffs' claims fall within the ambit of the D.C. Anti-SLAPP Act, the second step of the inquiry – whether Plaintiffs have pled and provided such *prima facie* evidence to demonstrate a likelihood of success on the merits – will be addressed.

**2. Likelihood of Success on the Merits**

Plaintiffs allege that Defendant's conduct is defamatory and tortiously interferes with Plaintiffs' prospective business advantages. Specifically, they argue that six separate comments made by the Defendant in his Yelp review are contrary to fact and unlawfully damage Plaintiffs' good commercial reputation. Am. Comp. ¶¶ 23 – 41, 51, 68. Defendant, in response, seeks to dismiss the complaint for failure to demonstrate a likelihood of success on the merits. Mem. Supp. Def's Special Mot. to Dismiss at 14. Both of Plaintiffs' claims are addressed in turn.

**A. Defamation**

Plaintiffs' first claim is that Defendant's comments are factually incorrect and harm Plaintiffs' good commercial reputation. In order to plead a claim for defamation, a plaintiff must show:

> (1) that the defendant made a false or defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of

> law irrespective of special harm or that its publication caused the plaintiff special harm.

*Williams v. District of Columbia*, 9 A.3d 484, 491 (D.C. 20120) (citing *Beeton v. District of Columbia,* 779 A.2d 918, 923 (D.C.2001)).

To determine whether Plaintiffs have demonstrated "that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted... is credited," *Navellier v. Sletten,* 29 Cal. 4th at 88-89, the Court addresses each of Defendant's comments in turn and the evidence adduced to show those comments are defamatory.

**i. Sufficiency of Evidence Submitted**

**a. Receiving Other Patients' Information**

In his original Yelp review, Defendant is alleged to have written "[l]ike others, I have received other patients' receipts (more than one!)." Am. Comp. ¶ 18. Plaintiffs allege that this statement is factually incorrect and defamatory. *Id.* at ¶ 24. In the edited review, this statement was amended to read, "Like others below, I have also received other patients' information from Dr. Akl via email." *Id.* at ¶ 22. Defendant Kandrac attached an affidavit to his Motion, which states that he received a notification email for tuberculosis testing for another patient and received at least one other patient's receipt by mistake, which he deleted. Kadrac Aff. ¶ 8. In Opposition, Plaintiffs point to the email exchange between the parties on January 28, 2013, in which Plaintiff Akl asserts that the tuberculosis testing email was actually for an appointment scheduled for Defendant in error. Ex. 2 to Mem. Supp. Pl's Op. to Def's Mot. Plaintiffs also attached an image of a page of a "sent" folder. Ex. 8 to Mem. Supp. Pl's Op. to Def's Mot. Plaintiff Akl's affidavit states that he did not send Defendant any receipt other than his own, except that he once mistakenly scheduled Defendant for a tuberculosis test. Akl Aff. ¶ 9. In his

Reply, Defendant attaches another affidavit, stating that he never attempted to schedule a tuberculosis test with Plaintiff Akl. Kandrac Reply Aff. ¶ 2.

In order to survive a Motion to Dismiss under the D.C. Anti-SLAPP Act, Plaintiffs must demonstrate "that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted... is credited." *Navellier,* 29 Cal. 4th at 88. Here, Defendant's edited review states that he received "other patients' information from Dr. Akl via email." Am. Compl. at ¶ 22. However, his affidavit states that he received the appointment notification about tuberculosis testing and recalls receiving "at least one patient's receipt by mistake," which has been deleted. Kandrac Aff. ¶ 8. The tuberculosis testing email did not have another patient's name or other information attached, but rather was addressed to Defendant by name. *See* Ex. 2 to Am. Compl. While Defendant maintains that he received "information" belonging to other patients, Defendant asserts in his affidavits that he only received receipts and apparently deleted email containing information about other patients. Therefore, Plaintiffs have put forward a sufficient prima facie showing of facts that could sustain a favorable judgment if credited by the trier of fact.

**b. Phone Calls During Patient Visits**

Plaintiffs also claim that Defendant wrote that "more than once [Dr. Akl] has taken long cell phone calls while I was waiting. To make matters worse, I could hear everything the person on the phone was saying (enjoy that trip to Nigeria, Erica!)." Am. Comp. ¶ 18. Plaintiffs allege that Defendant's statement that he "could hear everything the person on the phone was saying" is factually incorrect and defamatory. *Id.* ¶¶ 25, 32.

In *Roberts v. Los Angeles County Bar Ass'n.*, the California Court of Appeal for the Second District dismissed a complaint brought by a lawyer who sued for breach of contract and

fraud under the California Anti-SLAPP Act. In addressing the lawyer's complaint, the Court of Appeal noted that their inquiry was "made more difficult because even though she repeats her complaints about the Bar Association's rating process...Roberts provides no fact statement and almost no discussion of the allegations of her complaint or the evidence accompanying her opposition to the anti-SLAPP motion other than to state that her declarations support her allegations." *Roberts v. Los Angeles County Bar Ass'n*, 105 Cal. App. 4th at 616. Without more than the facts alleged in her complaint, the case was remanded with instructions to the district court to enter a new order granting defendant's motion to dismiss under the California Anti-Slapp statute. *Id.* at 619.

*Roberts* is instructive in this case since any judgment for the Plaintiffs would be based on pure speculation. Plaintiffs allege that Defendant could not hear Dr. Akl speaking with a patient on the telephone during his visit – a practice Dr. Akl admits he does for business reasons. *See* Am. Comp. ¶ 19, Ex. 3. Defendant responds that his statement is true - he states that he could hear a conversation between Dr. Akl and a patient named Erica. Kandrac Aff. ¶ 4. Plaintiffs have not provided any evidence to show that Mr. Kandrac could not hear Dr. Akl's conversation with a patient or that Dr. Akl did not have a conversation with a patient named Erica. Without more, Plaintiffs have failed to show they are likely to succeed on this claim.

**c. Overhearing a Conversation Between Dr. Akl and a Patient Named Erica**

In that same paragraph, Plaintiffs allege that Defendant's statement "enjoy that trip to Nigeria, Erica!" is defamatory because Dr. Akl never stated "enjoy that trip to Nigeria, Erica" or, alternatively, because the statement "taken within the context of Defendant's claim that Plaintiffs are habitual HIPAA violators, is defamatory in that it reinforces that claim." Am. Comp. ¶ 33; Mem. Supp. Pl's Op. to Def's Mot. at 14.

In *Church of Scientology v. Wollersheim*, 42 Cal.App. 4th 628 (Cal. Ct. App. 1996), disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (Cal. 2002), the California Court of Appeal for the Second District affirmed a lower court order dismissing a motion by the Church of Scientology to set aside a judgment obtained by a former member in an underlying tort action. *Id.* The Church argued that the judge in the underlying tort action harbored actual malice and prejudice against the Church which tainted the trial. *Id.* at 638.

In rendering its opinion, the Court of Appeal explained that "[g]enerally a party cannot simply rely on the allegations in its own pleadings, even if verified to make the evidentiary showing required in the summary judgment context or similar motions...the same rule applies to motions under [the California Anti-SLAPP Act]. Here...the pleadings merely frame the issues to be decided...an assessment of the probability of prevailing on the claim looks to *trial*, and the evidence that will be presented at that time." (internal citations omitted). *Id.* at 658. Since the only evidence produced by the Church was inadmissible hearsay, the Court of Appeal affirmed the dismissal below. *Id.*

Applying *Wollersheim* to the instant case, it is clear that Plaintiffs have not shown a likelihood of success on this claim. In his Affidavit, Defendant claims that "[o]n one such occasion, I could overhear the conversation Dr. Akl was having with an individual on the other line apparently named 'Erica,' purportedly about an upcoming trip to Nigeria." Kandrac Aff. ¶ 4. In their Opposition to Defendant's Special Motion to Dismiss, Plaintiffs assert that "[the Defendant's] explanation that the person on the phone was actually named Erica would not withstand scrutiny. Phone records will support this fact." Mem. Supp. Pl's Op. to Def's Mot. at 15. Plaintiffs, however, have provided nothing – including phone records - to support their claim

that Dr. Akl never spoke to a patient named Erica. As *Wollersheim* shows, it is simply not enough for Plaintiffs to argue that further examination will reveal the falsity of Defendant's statement. Without more, the Court concludes Plaintiffs have failed to demonstrate likelihood of success on this claim.

**d. Waiting for About an Hour Outside the Office**

In the next paragraph, Defendant is alleged to have written "[l]ike the other commenter, I too had to wait outside of the office for him to arrive for about an hour after my scheduled appointment time." Am. Comp. ¶ 18. Plaintiffs allege that this statement is factually incorrect and defamatory. *Id.* at ¶ 27.

To support their claim, Plaintiffs provide a partially redacted screenshot of Dr. Akl's Microsoft Outlook Sent Folder showing what appear to be e-mails containing patient receipts. Ex. 8 to Pl's Op. to Def.'s Mot. The screenshot shows that the Defendant and another patient were e-mailed on January 13, 2012, at 2:54 pm. *Id.* Plaintiffs claim that this document, along with medical records not before the Court, establish that "Defendant was seen at the latest at 2:30 pm, if not earlier." *Id.* at 14. Plaintiffs, however, "do not concede that Defendant waited at all beyond his appointment time, let alone outside a locked office." *Id.*

In response, Defendant states that "Dr. Akl called me on my cell phone at approximately 2:03 p.m. to notify me that he was running late." Kandrac Aff. ¶ 6. To bolster this claim, he provides his phone records showing that he received a phone call at on January 13, 2012, at 2:03 pm. Kandrac Aff., Ex. 1.

*Wollersheim* is equally instructive here. The evidence Plaintiffs present only shows that Defendant and another patient may have been billed at 2:54 pm. Plaintiffs provide neither support for their claim that Dr. Akl arrived on time for his appointment, nor evidence to show

that Defendant did not have to wait outside before his appointment. As Plaintiffs can adduce no evidence which tends to suggest that Defendant's statement is false, Plaintiffs have failed to show they are likely to succeed on the merits of this allegation.

**e. Patients Leaving While Waiting in the Hallway**

Defendant is also alleged to have written that "other patients left while we were waiting in the hallway, but my trip was so near I didn't feel comfortable getting the shot later than that day or I would have left." Am. Comp. ¶ 18. Plaintiffs claim that "since Defendant did not have to wait in the hallway, no patient left while Defendant was 'waiting in the hallway.'" *Id.* at ¶ 28. Thus, they argue that this statement is factually incorrect and defamatory.

Plaintiffs offer no evidence to substantiate this claim. Their argument appears to be that since Dr. Akl was on time or only slightly late, Defendant could not have waited "in the hallway." As Defendant could not have waited "in the hallway," it would be logically impossible for him to have observed another patient leaving. Op. to Def.'s Mot. at 13. This argument is premised on a timetable created from records not submitted to the Court. *Id.* at 13, 14.

**f. Defendant's Critique of Dr. Akl's Vaccine Technique**

Finally, Defendant is alleged to have written that "he really pushes on the plunger when administering shots which yields an unpleasant sensation." Am. Comp. ¶ 18. Plaintiffs claim that this statement is "false and has no basis in fact." Am. Comp. ¶ 29.

Not all statements subject the speaker to tort liability. In *Guilford Transp. Industries, Inc. v. Wilner,* 760 A.2d 580, 597 (D.C. 2000) the District of Columbia Court of Appeals quoted approvingly from the D.C. Circuit opinion in *Washington v. Smith*, 80 F.3d 555 (D.C. Cir. 1996) stating that "[a] statement of opinion is actionable only if it has an explicit or implicit factual

foundation and is therefore objectively verifiable. Assertions of opinion on a matter of public concern receive full constitutional protection if they do not contain a provably false factual connotation." *Washington*, 80 F.3d at 556, 57 (internal citations omitted).

Analyzing whether a statement is one of fact or opinion can involve some difficulty. As the District of Columbia Court of Appeals noted in *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 47 (D.C. 1983) "[s]ome statements are obviously on one side of the line or the other, but it is not always a simple matter to distinguish actionable statements of fact from constitutionally protected statements of opinion" *Id.* Thus, when determining whether a statement is one of fact or one of opinion, the Court must

> examine the allegedly defamatory words in the context of the entire document in which they appear. Even where it appears that the words, in context, are merely a statement of opinion, the court must also determine whether the opinion could be said to imply undisclosed defamatory facts. In addition, the court must consider whether the allegedly defamatory words are susceptible to proof of their truth or falsity. Statements that cannot readily be proven true or false are, of course, more likely to be viewed as statements of opinion, not fact. Finally, the court must consider the context in which the document containing the allegedly defamatory reference is published.

*Id.* (citations omitted).

The statement Plaintiffs claim is defamatory is an opinion, entitled to First Amendment protection. Reading the entire statement in context, it is clear that Defendant was describing his subjective experience receiving a shot from Dr. Akl. This is supported by his Affidavit where he states "Dr. Akl's technique of administering vaccinations was much more painful to me than other vaccinations I had received from other doctors, and I felt that Dr. Akl applied more pressure on the injection than those I had received from other doctors." Kandrac Aff. ¶ 5.

Furthermore, the statement of opinion does not have any explicit or implicit factual foundation that would make the opinion objectively verifiable. Whether Dr. Akl "pushes hard on

the plunger" is a question answered by his individual patients weighing their experience with Dr. Akl against the sum total of their individual experiences receiving injections. Such a measure will naturally be subjective and prone to a great degree of deviation depending on factors specific to each patient. Any inquiry by this Court into whether Dr. Akl administers vaccines in a manner that is more painful to Defendant than his other doctors would necessarily begin and end with Mr. Kandrac's subjective judgment of the pressure each doctor applies when administering vaccines. As such, the Court cannot ascertain any explicit or implicit factual foundation that would make the opinion objectively verifiable.

As the Court concludes that Defendant's statement is an opinion, and regards a matter of public concern, it is constitutionally protected. Therefore, Plaintiffs cannot establish that they are likely to succeed on the merits of this claim.

**B. Tortious Interference with Prospective Business Advantage**

Plaintiffs also claim that Defendant's comments tortiously interfered with prospective business advantages. In order to make out such a claim, the plaintiff must allege: "(1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." *Onyeoziri v. Spivok*, 44 A.3d 279, 286 (D.C. 2012) (internal citations omitted). This tort differs from the similar tort of interference with a contract by allowing the plaintiff to recover based on a demonstrated "prospective advantageous business transaction," rather than on an actual contract. *Casco Marina Development, L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 84 (D.C. 2003) (internal citations omitted). To sufficiently plead this prospective relationship, however, a plaintiff must allege "business expectancies, not grounded on present contractual relationships, but which are commercially reasonable to anticipate."

*Democratic State Committee of District of Columbia v. Bebchick*, 706 A.2d 569, 573 (D.C. 1998) (quoting *Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978

In their Amended Complaint, Plaintiffs allege that they "have a reasonable expectation to enter into prospective relationships with existing and new patients." Am. Comp. ¶ 64. They further allege that "as a result of Defendant's false statements, Plaintiffs have been deprived of their good commercial reputation" and "Defendant's statements did cause and will continue to cause financial harm to Plaintiffs in the future." *Id.* at ¶¶ 68, 69. Plaintiffs claim that Defendant "published his false statements knowing they were false and with ill will and malice, as demonstrated above." *Id.* at ¶ 65. Finally, Plaintiffs assert that "Defendant's statements did cause and will continue to cause financial harm to Plaintiffs in the future."

Defendant argues that Plaintiffs' claim is a mere "tag-along" claim and should be dismissed in light of a strong policy against permitting "Plaintiffs from seeking to perform an end-run around a deficient claim for defamation by recasting it as a claim for tortious interference." Mem. Supp. Def's Special Mot. to Dismiss at 29 - 31.

Here, Plaintiffs' claim of damages is not adequately plead and this count would not survive a motion to dismiss. A complaint must, at a minimum, contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. D.C. Super. Ct. R. Civ. P. 8(a)(2). Such a statement must give the opposing party fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 963 (D.C. 2008). Although a complaint does not require detailed factual allegations, it will not suffice if it tenders naked assertions devoid of some further factual enhancement. *See Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). "'Where a complaint pleads facts that are 'merely consistent with' defendant's liability, it 'stops short of the line between possibility and

plausibility of 'entitlement to relief.'" *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543-44 (D.C. 2011) (quoting and adopting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

Here, the allegation that Defendant's statements caused Plaintiff's financial harm is merely conclusory and contains no factual information.. Therefore, as this claim would fail under Rule 12(b)(6), Plaintiffs are not likely to succeed on the merits on this claim and it is dismissed pursuant to the Anti-SLAPP Act. Additionally, under the Anti-SLAPP Act standard, Plaintiffs' claim is not likely to succeed on the merits because it is not "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted... is credited," *Navellier,* 29 Cal. 4th at 88-89. Plaintiffs have produced no evidence showing that they have suffered any damages as a result of Defendant's reviews, or that they will suffer harm in the future. Therefore, this claim is also dismissed.

## IV. STANDARD OF REVIEW FOR MOTION FOR SANCTIONS

Under Rule 11(c), sanctions may be ordered when a party violates Rule 11(b), which states that when a party presents "a pleading, written motion, or other filing," the party is "certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,"

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support after a reasonable opportunity for further investigation or discovery;
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

D.C. Sup. Ct. Civ. R. 11. Furthermore, pursuant to Rule 11(c)(2), "a sanction imposed for a violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." *Id.* This may include "directives of a non-monetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id.* Under Rule 11(c)(3), "[w]hen imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." *Id.* Finally, a Rule 11 Motion also must be served on the opposing party, but not filed with the Court until twenty-one days later.

As the D.C. Court of Appeals said in *Kleiman v. Aetna Cas. & Sur. Co.*, 581 A.2d 1263, 1266 (D.C. 1990) (internal citations omitted):

> The affirmative duty imposed on attorneys by Rule 11 is the duty to reasonably inquiry into the facts, the law, and the client's purpose *before* signing a "paper." This duty is satisfied upon the filing of a "paper". The Rule does not impose a continuous duty to conform these papers to new discoveries or changed strategies. Under Rule 11, therefore, sanctions are imposed only if reasonable pre-filing inquiry would have disclosed that the pleading, motion, or paper was not well grounded in fact, was not warranted by existing law, or was interposed for an improper purpose. Papers must not be viewed "with 20/20 hindsight." Rather, the trial judge should "test the signer's document by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.

When determining whether sanctions are appropriate, "the trial court has broad discretion," *Peddlers Square, Inc. v. Scheuermann*, 766 A.3d 551, 556 (D.C. 2001), however, the Court of Appeals has cautioned that "Rule 11 sanctions are not to be imposed simply because the allegations in the changed pleading are found wanting. 'A signer's failure to make a reasonable

factual inquiry must be a flagrant one before sanctions are warranted.'" *Gray v. Washington,* 612 A.2d 839, 842 (D.C. 1992) (citations omitted).

## V. ANALYSIS OF MOTION FOR SANCTIONS

Plaintiffs also seek sanctions under D.C. Sup. Ct. Rule 11 against Defendant, and his counsel Seth Berlin and Shaina Jones, for alleging "that Akl misused the judicial system in a number of proceedings that they cited." Pl's Mot. Sanctions ¶¶ 2, 3. They argue that Defendant and his attorneys made representations to the Court that do not have evidentiary support and that they failed to perform a reasonable inquiry into their allegations before including them in their motions. Mem. Supp. Pl's Mot. for Sanctions at 3 – 8. Moreover, they argue that Defendant's claims are presented for an improper purpose. *Id.* at 9.

Defendant and his counsel respond that their characterization of Dr. Akl's prior litigation is supported by the facts. Def's Op. to Pl's Mot. Sanctions at 7. Specifically, they point to language from a ruling by Judge Kendrick in the Arlington Circuit Court in Virginia and to the number of suits filed by Dr. Akl which "arise out of the same nucleus of facts," and have subsequently been dismissed by reviewing courts. *Id.* at 8. To support these arguments, Defendant and his attorneys point to the voluminous trial records attached to their Motion. *Id.* at 13, Jones Aff. Ex. 1 – 14. In addition, they argue that their claims were not presented for an improper purpose. Def's Op. at 14. Instead, they claim that their characterization of Dr. Akl as a serial litigator who uses the courts to silence his detractors is to demonstrate that his claims fall within the ambit of the D.C. Anti-SLAPP statute.

### 1. Making Statements that Lack Evidentiary Support

Plaintiffs first argument is that Defendant and his attorneys have made statements that do not have evidentiary support. Mem. Supp. Pl's Mot. Sanctions at 3. The gist of their argument

is that "Respondents did not submit any evidence in support of their claim relating to the other suits that were subsequently filed after October 2, 2006, or suits that were filed prior to that date but were not before Judge Kendrick." *Id.* at 3. Since Defendant and his attorneys did not introduce evidence supporting their claim, they contend that they must have violated Rule 11(b)(3).

In *Gray v. Washington*, 612 A.2d 839, 841 (D.C. 1992), the Court of Appeals reversed an order by the trial court granting sanctions where Plaintiff failed to offer documentary support of plaintiff's testimony. The trial court had concluded that the Plaintiff "had engaged in sanctionable behavior by filing a complaint based solely on the oral representations of clients without the benefit of independent corroboration." *Id.* at 842. The Court of Appeals, however, disagreed. *Id.*

The *Gray* Court made clear that the threshold for sanctionble conduct is high in the District of Columbia. Drawing from *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), the Court of Appeals noted that "'[R]ule 11 is violated only when it is 'patently clear that a claim has absolutely no chance of success.'" *Gray,* 612 A.2d at 842. Addressing the case before it, the Court of Appeals concluded that there were sufficient facts from which the attorney could reasonably infer the plaintiffs were entitled to the relief they sought. *Id.* at 843. Here, the Court concludes that Defendant and his attorneys have sufficient evidence to support to claims regarding Dr. Akl. In his Opposition, Defendant and his counsel point to language from numerous cases regarding Dr. Akl. Def's Op. at 8.

**2. Failure to Perform a Reasonable Inquiry Into the Allegations**

Plaintiffs also argue that Defendant and his attorneys made statements without first performing a reasonable inquiry into the allegations. Mem. Supp. Pl's Mot. Sanctions at 5 – 8.

Their claim appears to be based on technical errors made by Defendant and his attorneys while describing Dr. Akl's prior litigation history. *Id.*

In *Bredehoft v. Alexander*, 686 A.2d 586, 590 (D.C. 1996), the Court of Appeals reversed a lower court grant of sanctions where the inquiry performed by the attorneys was reasonable. The Court of Appeals concluded that the investigation and "approximately a dozen interviews" prior to Mr. Bredehoft's filing in Superior Court "amounted to a 'reasonable inquiry' into the facts of Mr. Cerutti's case and that the trial court's contrary finding is clearly erroneous." *Bredehoft v. Alexander*, 686 A.2d at 593.

Addressing the scope of Rule 11, the Court of Appeals stated that "whether a prefiling inquiry was reasonable is determined by an objective assessment of the facts and law relied on for the filing...the court must determine if the complaint was well-grounded in fact, warranted by existing law, or whether it was utilized for an improper purpose." *Id.* at 590.

Based on the evidence provided, the Court concludes that Defendant and his attorneys performed a reasonable investigation into the factual basis for their allegations. As part of their theory of the case, Defendant and his counsel wish to demonstrate that Dr. Akl is a serial litigator who files frivolous lawsuits to silence critics, thus necessitating the invocation of the Anti-SLAPP Act. To accomplish this end, they have cited numerous cases brought by Dr. Akl that have been dismissed on various grounds. Def's Op. at 8, 11 – 13; Jones Aff., Ex. 1 – 14. This inquiry is sufficient to support Defendant's statements.

**3. Allegations are Made For an Improper Purpose**

Finally, Plaintiffs argue that Defendant's arguments regarding past suits against judges and law clerks are presented for the purpose of "gaining the sympathy of the Court – an improper purpose in violation of Rule 11(b)(1)." Mem. Supp. Pl's Mot. Sanctions at 9. In Opposition,

Defendant argues that the statements regarding Plaintiff Akl's past lawsuits were merely advocacy in support of Defendant's position. Def. Opp'n to Mot. Sanctions at 14. Defendant also asserts that Plaintiff Akl's history of bringing lawsuits to punish and silence critics is relevant to a Motion pursuant to the Anti-SLAPP Act, which is designed to address such litigants. *Id.* at 15-16.

As the D.C. Superior Court Rule 11 is identical to the federal rule, the Court will look to these cases as persuasive authority on what constitutes an improper purpose. *Kleiman v. Kleiman*, 633 A.2d at 1382 n. 17 (citing *Gray v. Washington*, 612 A.2d at 842; *Stansel v. American Sec. Bank*, 547 A.2d 990, 995 n 8 (D.C. 1988)).

In *Ridge v. U.S. Postal Service*, 154 F.R.D. 182, 184 (N.D. Ill. 1992), the U.S. District Court for the Northern District of Illinois stated that "the Rule is analogous to the common law torts of abuse of process, based on the filing of objectively frivolous suits, and malicious prosecution, based on the filing of a colorable suit in order to impose expense on the defendant." (citing *Szabo Food Svcs, Inc. v. Canteen Corp,* 823 F.2d 1073 (7th Cir. 1987) (Easterbrook, J)). Thus, a party may not use a "pleading, motion, or other paper 'for purposes of delay, harassment, or increasing the costs of litigation.'" *Id.* at 184.

In determining whether a claim has been brought for an "improper purpose" the federal courts have applied an objective standard of reasonableness. *Sussman v. Bank of Israel*, 56 F.3d 450, 458 (2d Cir. 1995). Thus, as the U.S. District Court for the Eastern District of Virginia explained "it is not enough that the injured party subjectively believes that a lawsuit was brought to harass or to focus negative publicity on the injured party; instead such improper purposes must be ascertained from the lack of a factual or legal basis for the lawsuit." *Guidry v. Clare*, 442 F.Supp. 2d 282, 289 (E.D.Va. 2006) (citing *Stevens v. Lawyers Mut. Liab. Ins. Co. of North*

*Carolina,* 789 F.2d 1056, 1060 (4th Cir. 1986)); *See also, Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 253 (2d. Cir. 1985) (attorney's subjective good faith belief that paper is valid does not provide safe harbor). Therefore, courts applying the rule should consider such factors as

> whether particular papers or proceedings caused delay that was unnecessary, whether they caused increase in the costs of litigation that was needless, or whether they lacked any apparent legitimate purpose. Findings on these points would suffice to support an inference of an improper purpose. The court can make such findings guided by its experience in litigation, its knowledge of the standards of the bar of the court, and its familiarity with the case before it, and by reference to the relevant criteria under the Federal Rules such as those in Rule 1 and Rule 26(b)(1)...if a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate.

*Sussman v. Bank of Israel,* 56 F.3d at 458.

Applying this test, the Second Circuit in *Sussman* reversed a finding by the district court that "the filing of [a] complaint with a view of exerting pressure on defendants through the generation of adverse and economically disadvantageous publicity reflected an improper purpose." *Id.* at 459. The court noted that "[t]o the extent that a complaint is not held to lack foundation in law or fact," such a complaint is not improper. *Id.*

As the several pages of Defendant's Motion that addressed Plaintiff Akl's litigation history and the relevant exhibits created no delay, were intended to support Defendant's position that the Anti-SLAPP Act applies to this case, and were contained within a proper Motion to dismiss this case, these statements were not presented for an improper purpose. There was a legal purpose for the inclusion of such litigation history in discussing the Anti-SLAPP Act, and the bulk of the filing was devoted to Defendant's arguments for dismissal. Therefore, the claims made by Defendant are not improper.

## VI. ORDER

Upon consideration of the Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act and Plaintiffs' Motion for Sanctions, it is this 16th day of December 2013, hereby:

**ORDERED**, that Defendant John Kandrac's Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act is **GRANTED IN PART** as to Plaintiffs' claim of defamation based on Defendant's statements that Plaintiff Akl's took phone calls, that he overheard a conversation between Plaintiff Akl and a patient named Erica, that he waited for an hour outside the office, that a patient left while he was waiting in the hallway, that he finds Plaintiff Akl's vaccination technique painful, and as to the tortious interference with a prospective business advantage claim **AND DENIED IN PART** as to Plaintiffs' claim of defamation based on Defendant's statement that he received other patients' receipts or information; and it is further

**ORDERED**, that Plaintiffs' Motion for Sanctions is **DENIED.**

**SO ORDERED**.

**Laura A. Cordero**
Associate Judge
*(Signed in Chambers)*

Copies to:

Michael Troy, Esq.
*Counsel for Plaintiffs*

Seth D. Berlin, Esq.

Shaina D. Jones, Esq.
*Counsel for Defendant*