IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	**CASE NO. 2017 CA 005989B**
Plaintiffs,	:	**Judge Hiram E. Puig-Lugo**
vs.	:	**Next Scheduled Event: 2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' OPPOSED MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

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INTRODUCTION

Defendants American Psychological Association ("APA") and Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman ("Sidley Defendants") (collectively, "Defendants") have filed special motions to dismiss Plaintiffs' Original and Supplemental Complaints under the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 ("Anti-SLAPP Act" or "the Act"), which are currently being briefed. The Act gives defendants in cases like this a substantive right to be "shield[ed] . . . from meritless litigation that might chill advocacy on issues of public interest." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1231 (D.C. 2016), *amended* Dec. 13, 2018. Plaintiffs seek an Order declaring the Act void in its entirety. Plaintiffs' arguments are without merit. First, in passing the Act, the Council of the District of Columbia acted well within its broad delegation of authority and thus did not violate the Home Rule Act of 1973. Second, the substantive protections provided by the Act do not violate Plaintiffs' First Amendment rights and are on sound constitutional footing. The Court should deny the motion.

BACKGROUND

Plaintiffs filed this lawsuit in August 2017, as the second of three substantively identical lawsuits against Defendants in Ohio, here, and in Massachusetts, arising from the publication of Sidley Austin's independent investigative report submitted to its client APA. The Ohio case was dismissed for lack of personal jurisdiction; the Massachusetts case is currently stayed in favor of the D.C. action under the first-filed rule. Two of the five original Plaintiffs—Drs. Stephen Behnke and Russell Newman—have been ordered to arbitrate their claims, leaving Plaintiffs Cols. (Ret.) L. Morgan Banks, Debra Dunivin, and Larry C. James (hereinafter "Plaintiffs").

After Defendants moved to dismiss the original Complaint under the Anti-SLAPP Act, Plaintiffs sought, and the Court ordered, limited discovery to oppose the motion. *See* Feb. 8,

2019 Hearing (citing D.C. Code § 16-5502(c)(2)).[1] The Court also permitted Plaintiffs to file a Supplemental Complaint with a new Count 11 directed to alleged August 2018 APA website changes. In March 2019, the Sidley Defendants and APA each filed additional anti-SLAPP motions to dismiss the Supplemental Complaint.[2]

ARGUMENT

I. THE ANTI-SLAPP ACT DOES NOT VIOLATE THE HOME RULE ACT

"[T]he D.C. Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference." *Tenley & Cleveland Park Emergency Comm. v. D.C. Bd. of Zoning Adjustment*, 550 A.2d 331, 334 n.10 (D.C. 1988). In the context of determining whether a statute is invalid under the District of Columbia's Home Rule Act ("HRA"), "[s]tatutes should generally be construed to avoid any doubt as to their validity." *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 723-24 (D.C. 1995). Plaintiffs nevertheless argue that, in enacting the Anti-SLAPP Act, the D.C. Council violated the HRA. This argument fails, as do the grounds on which Plaintiffs rely, because (i) the Anti-SLAPP Act establishes substantive rights that do not create any conflict with the Federal Rules of Civil Procedure; and (ii) the Act does not violate the HRA by interfering with the organization or jurisdiction of the District of Columbia courts.

[1] APA provided responses to interrogatories; Sidley produced nearly 32,000 Bates-stamped pages of documents reflecting interview memos and notes of eighteen interviewees identified by Plaintiffs, as well as communications with the interviewees; Sidley produced a copy of the entire desktop computer hard drive used by then-Plaintiff Behnke while employed at APA, containing 96 gigabytes of data; and APA produced more than 22,000 Bates-stamped pages of documents from the hard drive reflecting email communications among the five original Plaintiffs. Ex. A (Decl. of A. Kasner).

[2] Plaintiffs' assertion that Sidley leaked its report to the *New York Times*, Plaintiffs' Memorandum ("P. Mem.") 2, is false but irrelevant to this motion.

A. The Anti-SLAPP Act Creates Substantive Protections.

Plaintiffs repeatedly contend that the Anti-SLAPP Act creates a new procedural mechanism inconsistent with the HRA. P. Mem. 3, 4, 5. This is incorrect. The Anti-SLAPP Act creates substantive protections for parties who express views on matters of public interest.

Congress has the exclusive power of legislative authority over the District of Columbia. U.S. Const., art. I, § 8. Under the HRA, Congress delegated authority to the Council of the District of Columbia to enact local legislation, with limited exception. *See* D.C. Code § 1-201.02(a). Pursuant to this legislative authority, the Council enacted the D.C. Anti-SLAPP Act, joining two dozen other states at the time of enactment, P. Mem. Ex. A (Comm. Rep.) at 3.

The Act was intended to protect against litigation known as SLAPPs ("Strategic Lawsuits Against Public Participation") that seek to "chill or silence speech." *Mann*, 150 A.3d at 1229. Because of the harm caused to defendants from the time and expense spent engaging in discovery and otherwise defending against nonmeritorious claims, the Act's "purpose [is] to create a substantive right not to stand trial and to avoid the burdens and costs of pre-trial procedures." *Id.* at 1231. The Act creates a burden-shifting framework triggered by the party seeking the protections provided by the Act. *See* D.C. Code § 16-5502. After that moving party makes a "prima facie showing" that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest," the burden shifts to the opposing party to "demonstrate[ ] that the claim is likely to succeed on the merits." *Id.* §§ 16-5502(b), (d). This likelihood of success standard requires that a plaintiff "present evidence—not simply allegations—and that the evidence must be legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor." *Mann*, 150 A.3d at 1220-21. If the opposing party cannot show that likelihood of success, then the Act requires the court to

dismiss the complaint with prejudice. D.C. Code §§ 16-5502(b), (d).

The Act was, by its own terms, a change to D.C. substantive law. The legislative history of the Act confirms that it was intended to create new "substantive rights." P. Mem. Ex. A (Comm. Rep.) at 1. The D.C. Court of Appeals has confirmed that the Anti-SLAPP Act "creat[es] substantive rights with regard to a defendant's ability to fend off" a SLAPP suit. *Mann*, 150 A.3d at 1226 (quotation marks omitted). Although Plaintiffs cite to *earlier* D.C. cases, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1334 (D.C. Cir. 2015), and *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014), for the proposition that the Act is procedural in nature, P. Mem. 3-4, more recently, in *Mann*, the D.C. Court of Appeals authoritatively disagreed with such a characterization of the Act. 150 A.3d at 1226, 1231, & 1238 n.32.

Based on this fundamental mischaracterization, Plaintiffs proceed to make two main sets of arguments: that the Anti-SLAPP Act violates the HRA by creating procedures conflicting with the Federal Rules of Civil Procedure, P. Mem. at 4 & n.4 (citing D.C. Code § 11-946), and because it alters or otherwise relates to the jurisdiction of D.C. courts, P. Mem. 4 (citing D.C. Code § 1-206.02(a)(4)). Both contentions are wrong.

B. The Anti-SLAPP Act Does Not Unlawfully Create New Procedures for D.C. Courts.

Plaintiffs argue that the Anti-SLAPP Act violates the HRA because it fails to comply with Congress's directive that the D.C. Superior Court "conduct its business according to the Federal Rules of Civil Procedure." P. Mem. 4 (citing Title 11, D.C. Code § 11-946). This argument relies on a superseded interpretation of D.C. law.

The Anti-SLAPP Act is consistent with § 11-946 of the D.C. Code, which provides that the Superior Court shall follow the Federal Rules of Civil Procedure unless the D.C. courts, not the Council, adopt new rules. As the Court of Appeals emphasized in *Mann*, however, the Act

created a substantive rule to protect speakers on matters of public concern against the burden on their speech posed by expensive and time-consuming litigation of claims lacking merit. *See* 150 A.3d at 1231.

Plaintiffs cite the D.C. Circuit *Abbas* decision for the proposition that the Act "conflicts" with the Superior Court's Rules (or the Federal Rules) because its "likelihood of success" standard is different from that of the Federal Rules and that standard is not found in those rules. P. Mem. 3-4 (citing *Abbas*, 783 F.3d at 1334). Section 11-946, however, only speaks of the Superior Court conducting its business "according to" the Rules. But in any event, after *Abbas*, the D.C. Court of Appeals in *Mann* made clear there is no conflict: "*Abbas* recognized that at the time, this court 'has never interpreted the D.C. Anti-SLAPP Act's likelihood of success standard to simply mirror the standards imposed by' Federal Rule 56. . . . We do so now." *Mann*, 150 A.3d at 1238 n.32 (citation omitted). Accordingly, the *Mann* court expressly held that the substantive standards of Federal Rule 56 and the Anti-SLAPP Act are not different but rather "substantively the same." *Id.* The framework that the Act created for addressing strategic lawsuits against public participation was well within the scope of the Rules and the Council acted within its proper authority when promulgating the Act.

C. The Anti-SLAPP Act Does Not Alter the Organization and Jurisdiction of D.C. Courts.

Nor is there any basis for Plaintiffs' contention that the Anti-SLAPP Act violates the HRA because it alters or intrudes upon the organization or jurisdiction of D.C. courts. The HRA, D.C. Code § 1-206.02(a)(4), prohibits the D.C. Council from "[e]nact[ing] any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)." Courts have "consistently held . . . that restrictions on the legislative authority of the Council in § 1-206.02(a)(4) must be narrowly construed, so as not to

thwart the paramount purpose [of] the HRA, namely, to grant to the inhabitants of the District of Columbia powers of local self-government." *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (internal quotation marks omitted).

Plaintiffs argue that the Act is a law "with respect to Title 11" for purposes of this exception, P. Mem. 4, but that argument is unsupported by law. The "narrow" § 1-206.02(a)(4) exception is concerned with the D.C. courts' jurisdiction or core functions, which are unaffected by the passage of the Act. *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016). This exception "does not, of course, in any way limit the Council's authority to enact or to alter the substantive law to be applied by the courts." *Umana*, 669 A.2d at 724 n.15. Where, as here, the Council's actions do not "run directly contrary to the terms of Title 11," courts do not "interpret this language rigidly, but rather to construe this limitation on the Council's power in a flexible, practical manner." *Woodroof*, 147 A.3d at 784.

The Anti-SLAPP Act, which provides substantive protections for free speech activity, is consistent with the HRA. Courts routinely reject these types of challenges to D.C. legislation under § 1-206.02(a)(4) where the legislation does not go to the jurisdiction or core functions of the D.C. courts. *See Woodroof*, 147 A.3d at 784, 787 (upholding Revised Uniform Arbitration Act, in which Council made orders granting motions to compel arbitration appealable); *see also Dimond v. District of Columbia*, 792 F.2d 179, 190 (D.C. Cir. 1986) (upholding 1982 No-Fault Insurance Act, which raised threshold of damages for tort cases in Superior Court to $5,000, as not violating exception); *District of Columbia v. Sullivan*, 436 A.2d 364, 365-66 (D.C. 1981) (upholding Traffic Adjustment Act, which treated certain traffic violations administratively that were previously Superior Court criminal offenses, as not running afoul of exception). Plaintiffs' argument that the Act runs afoul of § 1-206.02(a)(4) disregards decades of legal precedent.

Plaintiffs also cite a 2010 letter from the then-D.C. Attorney General, which noted that a draft of the anti-SLAPP bill "may" run afoul of § 1-206.02(a)(4). P. Mem. 5. That a draft bill "may" run afoul does not mean that it did, nor does that mean the final Act does. Indeed, Plaintiffs fail to acknowledge the D.C. Attorney General's comment in the letter that "I have not yet had the opportunity to study" the bill "in depth." P. Mem. Ex. A (Nickles letter) at 23. The letter provided no analysis on the point, merely suggesting that the Council study the issue further. And in fact, the Council *did* consider § 1-206.02(a)(4)'s constraints under the HRA when it designed and ultimately enacted the final Act. For instance, during drafting, the Council deleted a provision for immediate appeal of an anti-SLAPP motion because it would exceed the Council's authority under the HRA, as D.C. courts, not the Council, interpret the courts' jurisdiction conferring statute. *Burke*, 91 A.3d at 1039 n.12.[3]

Plaintiffs finally point to a "similar prior attempt" by the Council to legislate how D.C. courts conduct their affairs, the so-called 1976 "Shop-Book Rule Act," concerning an exception to the hearsay rule for business records that failed. P. Mem. 5-6. This "similar prior attempt" is inapplicable here for two reasons. First, it is not similar because the Anti-SLAPP Act is not a rule of evidence but an enactment of substantive law. The Acting Corporation Counsel, who opposed the Shop-Book Rule Act, noted that the judicial power vested in the District of Columbia "includes the long recognized authority of the District courts to prescribe rules of evidence." P. Mem. Ex. C, Document 3 (Mem. from Acting Corp. Counsel) at 4. He also noted that "rules of evidence have been generally considered to be predominantly procedural and not affecting substantive rights" and that the Federal Rules of Civil and Criminal Procedure already

[3] The D.C. Court of Appeals ultimately held in *Mann* that the denial of an anti-SLAPP motion is immediately appealable under the judicial collateral-order doctrine. 150 A.3d at 1220.

contained rules governing the admissibility of evidence, so only the D.C. courts could promulgate this rule. *Id*. at 5-6. Second, the Shop-Book Rule Act was never tested in court; it was ultimately vetoed and never enacted by the legislature. *See* P. Mem. Ex. C, Document 11.

II. THE ANTI-SLAPP ACT DOES NOT VIOLATE THE FIRST AMENDMENT

None of Plaintiffs' arguments attacking the constitutionality of the Anti-SLAPP Act has merit. First, Plaintiffs' facial attack on the Act as unconstitutionally overbroad misstates the nature of both the Act and the protections of the First Amendment. Second, Plaintiffs' contention that the Act restricts their right to petition has been repeatedly rejected in similar circumstances, including by the D.C. Superior Court and Court of Appeals alike, and Plaintiffs' analogies to Massachusetts's and Illinois's distinct anti-SLAPP regimes and case law are inapposite. Third, Plaintiffs' discovery arguments are refuted by the actual operation of the Act.

A. Facial Constitutional Challenges Such as Plaintiffs' Are Disfavored and Rarely Granted.

Plaintiffs' challenge to the Anti-SLAPP Act as unconstitutional "on [i]ts [f]ace," P. Mem. 6, is disfavored and faces a heavy burden. A constitutional challenge may either be "as-applied"—challenging a statute's constitutionality with respect to the particular facts before it—or "facial"—arguing the statute is unconstitutional generally. *Hodge v. Talkin*, 799 F.3d 1145, 1156 (D.C. Cir. 2015). Plaintiffs explicitly choose the latter, asking this Court to strike down the Act as to all cases. P. Mem. 13. Such "[b]road, facial challenges to the constitutionality of a statute impose a heavy burden on the parties and rarely succeed" because a plaintiff must "establish[] that no set of circumstances exist[] under which the act would be valid, i.e., that the law is unconstitutional in all of its applications." *Plummer v. United States*, 983 A.2d 323, 338 (D.C. 2009) (alterations, emphasis, and internal quotation mark omitted). Elsewhere in their supporting Memorandum, Plaintiffs claim to be challenging the Act "as applied." P. Mem. 10.

But their arguments have no tie to the particular facts of this case, *id.* 10-13, and therefore are not properly characterized as an as-applied challenge, *Dubose v. United States*, 213 A.3d 599 (D.C. 2019) ("[A]n as-applied challenge is a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." (quotation mark omitted)).

B. The Act Is Not Unconstitutionally Overbroad.

Plaintiffs argue that the Act is unconstitutionally overbroad, because it allegedly bans what should be protected speech by plaintiffs in filing lawsuits, and further, it allegedly shields defendant speech that does not merit protection. P. Mem. 7. Both arguments are groundless.

First, Plaintiffs contend that the Anti-SLAPP Act unduly restricts speech by plaintiffs—presumably the filing of a defamation lawsuit—because it does not "provide a mechanism for determining if a suit is a [SLAPP]." P. Mem. 6. But this is precisely the function of the Act: to first determine if the speech at issue is on an issue of public interest as defined by the Act, and then to determine if a plaintiff's claim nevertheless has a likelihood of success on the merits. D.C. Code § 16-5502(b). Plaintiffs' assertion that the Act is unconstitutional because it "proscribes protected speech" in which plaintiffs submit "legitimate grievances" to the court but are barred by the Act, P. Mem. 7, misstates the Act's operation. The Act gives plaintiffs the opportunity to demonstrate that their grievance is "legitimate" by making a showing regarding the merits of their defamation claims, backed by targeted, non-burdensome discovery. *Id.* § 16-5502(c)(2). Plaintiffs have not identified any ways in which this aspect of the anti-SLAPP mechanism is facially deficient. Plaintiffs instead merely string cite a list of cases in which the Supreme Court generally interpreted content-based restrictions on speech. P. Mem. 7 (citing cases). None of these cases addresses anti-SLAPP mechanisms, nor has any case held that the Act is a content-based restriction on speech. Requiring plaintiffs to demonstrate the merits of

their defamation claims is not a restriction on speech; rather, it is the basic function of litigation.

Second, Plaintiffs contend that the Act's protection of speech is "grossly overbroad" in that it protects too wide a range of speech, beyond what the D.C. Council intended. P. Mem. 6-7. But D.C. courts regularly apply the Act to determine, under the first step of an anti-SLAPP motion, whether the speech at issue is "the sort that the Anti-SLAPP statute intends to protect." *Burke*, 91 A.3d at 1038. The Act was enacted for a number of reasons, not only to target demonstrably malicious suits, but also to "encourage 'engagement in political [and] public policy debates,'" *id.* at 1036 (quoting Comm. Report at 4), and "advocacy on issues of public interest," *Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, 2015 WL 4477660, at *4 (D.C. Super. Ct. Apr. 7, 2015). The D.C. courts' applications of the Act are consistent with its intent.

Even if that were not the case, Plaintiffs' argument would still fail. The D.C. Council's stated purpose does not create a legally cognizable limitation to the Anti-SLAPP Act—that is, a concern that animates legislation does not restrict what a legislature may in fact write in to a statute. The decisions of the California state courts on this argument are instructive: the D.C. Anti-SLAPP Act is modeled after the California anti-SLAPP statute in certain relevant respects,[4] and California state court cases therefore have been held to provide "guidance in predicting how the D.C. Court of Appeals would interpret [D.C.'s] own anti-SLAPP law." *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013). In rejecting similar arguments to Plaintiffs', California courts have noted that "[t]he fact the Legislature expressed a concern in the statute's

[4] The California anti-SLAPP statute similarly combats lawsuits brought "to chill the valid exercise of . . . freedom of speech" and to "encourage continued participation in matters of public significance." Cal. Civ. Proc. Code § 425.16(a). The California act allows early dismissal on the anti-SLAPP motion where (i) the defendant can show the challenged speech was "in connection with an issue of public interest," *id.* § 425.16(b)(1), (e), and (ii) the plaintiff cannot show "a probability that the plaintiff will prevail on the claim," *id.* § 425.16(b)(1).

preamble with lawsuits brought . . . to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute." *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 480 (2000).

Plaintiffs' affidavits, declaring the self-serving legal conclusion that they do not bring this suit "to muzzle or silence Defendants' rights to free speech," are of no relevance to disposition of their motion. P. Mem. 7 & Ex. D. The Act is not limited to merely punishing chilling SLAPPs. *See supra* p. 10. And the Act does not test the subjective intention of plaintiffs in bringing their defamation suit. *Equilon Enters., LLC v. Consumer Cause, Inc.*, 52 P.3d 685, 692-93 (Cal. 2002) ("Imposing a requirement of establishing bad faith or ulterior motive adds a needless burden to SLAPP targets seeking relief, and destroys the relatively value-free nature of existing anti-SLAPP structures . . . ." (quotation marks omitted)). Rather, an anti-SLAPP motion "utilizes a reasonable, objective test that lends itself to adjudication on pretrial motion," *id.* at 693, questioning simply whether the allegedly defamatory statements concern the public interest and whether a plaintiff's suit nevertheless has merit.

C. The Act Does Not Infringe the Right to Petition.

Plaintiffs argue that the Act violates their right to petition. It does not. Indeed, in a 2017 decision that Plaintiffs do not cite or acknowledge, the D.C. Superior Court (Wellner, J.) considered this argument, and determined that such a "challenge to [the Act] under the First Amendment right to petition fails." Order, *Gordon v. Forest Hills Neighborhood All., Inc.*, 2016 CA 006397 B (Ex. B), at 17 (D.C. Super. Ct. May 18, 2017), *appeal pending*, 17-cv-1202 (D.C.). For the reasons set forth below, Plaintiffs' constitutional challenge should likewise fail.

1. The D.C. Court of Appeals Has Already Ruled that the Act Is Calibrated To Account for the Constitutional Interests of Both Defendants and Plaintiffs.

Plaintiffs begin by arguing the Act is subject to "exacting scrutiny," P. Mem. 10, emphasizing in general terms the importance of the right to petition and access to the courts, P. Mem. 8 (collecting cases). But however important an abstract "right[] of access to the courts" is, P. Mem. 8, "baseless litigation is not immunized by the First Amendment right to petition," *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (quotation marks omitted). Likewise, Plaintiffs provide no authority for the proposition that the Anti-SLAPP Act is subject to heightened scrutiny. P. Mem. 10. The Act, on its face, "does not address or restrict the ability" of a plaintiff to file a petition. *Nat'l Ass'n for the Advancement of Multijurisdictional Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015). The Act simply provides an expedited mechanism to test whether a defamation claim is without merit, and does not restrict a plaintiffs' right to assert a claim or alter his burden of proof in doing so. *See Gordon* (Ex. B) at 16.

As *Gordon* notes, the D.C. Court of Appeals "explained [in *Mann*] that the D.C. Anti-SLAPP Act properly accounts for the [First Amendment] rights of plaintiffs and defendants." *Id.* (quoting *Mann*, 150 A.3d at 1239). The Act is "a tool calibrated to take due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial." *Mann*, 150 A.3d at 1239 (emphasis in original). The Act "strikes the right balance between the interests of the parties," both "deter[ring] meritless claims filed to harass the defendant [from] exercising First Amendment rights," while still preserving issues of fact for the jury. *Id.* Therefore "the constitutional right of a plaintiff who has presented evidence that could persuade a jury to find in her favor is

respected." *Id*. Moreover, under D.C. Code § 16-5502(c)(2), plaintiffs have the benefit of discovery for the specific purpose of defeating an anti-SLAPP motion, a provision used by Plaintiffs here.

The California Supreme Court has similarly held that a California anti-SLAPP motion is not "a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances." *Equilon*, 52 P.3d at 693. Anti-SLAPP protections are not absolute, as "[t]he anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits." *Id.* Anti-SLAPP motions therefore contain "substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism." *Id*. Accordingly, such constitutional challenges to anti-SLAPP motions have no basis. *Id.*

Plaintiffs' argument that actual malice is a "state-of-mind issue[]" that "should not be resolved pretrial on an abbreviated record," P. Mem. 12, is wrong. To the contrary, courts routinely grant summary judgment to defendants in actual-malice defamation cases.[5] Indeed, courts grant motions to dismiss based on the failure "to plausibly alleged facts that support an inference of actual malice in a defamation case." *Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 143 (D.D.C. 2017).[6]

[5] *See, e.g.*, *Kendrick v. Fox Television*, 659 A.2d 814, 822 (D.C. 1995) (affirming summary judgment); *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016) (affirming summary judgment); *Von Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 117 (D.C. Cir. 2017) (reversing and granting summary judgment).

[6] *See, e.g.*, *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 218-19 (D.D.C. 2012) (dismissing complaint); *Boley*, 950 F. Supp. 2d at 262-63 (dismissing complaint on anti-SLAPP motion without granting targeted discovery)

2. The Massachusetts and Illinois Anti-SLAPP Acts Involved Unique Constitutional Issues Not Present Here.

Plaintiffs argue that the Anti-SLAPP Act is unconstitutional because Massachusetts and Illinois courts needed to affirmatively limit the scope of their respective state anti-SLAPP acts to preserve their constitutionality. P. Mem. 9. But the Massachusetts and Illinois anti-SLAPP acts were found to pose issues that the D.C. Anti-SLAPP Act does not.

Unlike the D.C. Act, the Massachusetts anti-SLAPP statute *did not* test whether plaintiffs could show a likelihood of success on the merits. *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 165 (1998) (Anti-SLAPP statute "fails to test fully whether [plaintiff's] claim lacks merit."). Rather, once a defendant made a showing that he was engaged in protective activity, plaintiffs faced the burden of showing defendant's activity was "devoid of any reasonable factual support or any arguable basis in law." *Id.* Plaintiffs faced a burden unconnected to the merits of their claims, therefore, in the court's view, threatening the right to petition. *Id.* The Illinois anti-SLAPP statute faced a similar problem, premising the success of a motion not on the merits of the plaintiff's claims, but rather on whether such claims were "based on" the defendant's allegedly defamatory speech. *Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012). The Illinois statute did not ask whether the plaintiff was bringing a "suit[] with reasonable merit." *Id.* at 432. The D.C. Act undoubtedly does. D.C. Code § 16-5502(b) (anti-SLAPP motion defeated if "responding party demonstrates that the claim is likely to succeed on the merits").

Indeed, *Mann* explicitly upheld the constitutionality of the D.C. Act precisely because it ties the success of an anti-SLAPP motion to the merits of a plaintiff's claim. 150 A.3d at 1239. And in upholding the constitutionality of the D.C. Act, *Mann* explicitly distinguished it from the Massachusetts and Illinois statutes that needed to be limited to preserve their constitutionality, *id.* (distinguishing *Duracraft* and *Sandholm*), a critical point that Plaintiffs fail to mention.

3. The Anti-SLAPP Act's Fee-Shifting Provision and Discovery Mechanisms Pose No Constitutional Concerns.

Plaintiffs' contention that the "threatened imposition of costs" on unsuccessful plaintiffs in anti-SLAPP suits "is presumptively inconsistent with the First Amendment," P. Mem. 13, has no basis. The D.C. Court of Appeals has upheld the validity of the fee provisions of the Act, finding them essential to vindicating the constitutional rights *of defendants*. *Doe v. Burke*, 133 A.3d 569, 575-76 (D.C. 2016). The Supreme Court of California has likewise rejected the argument that "such a fee-shifting provision overburdens those who exercise the First Amendment right of petition by filing lawsuits." *Equilon*, 52 P.3d at 691-92 (Cal. 2002).

Plaintiffs further imply that the Act is "unconstitutional" because it "eviscerates normal discovery procedures." P. Mem. 11. Plaintiffs' contention relies upon a fundamental misunderstanding of an anti-SLAPP motion. A court may grant discovery under the Act, as the Court has done in this case. D.C. Code § 16-5502(c)(2). This is not an "obstacle[] to full discovery," P. Mem. 11, but rather merely prioritizes discovery such that the issues in an anti-SLAPP motion are addressed first, allowing plaintiffs to demonstrate the merits of their claims in the face of whatever issues defendants have raised, *Mann*, 150 A.3d at 1233.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiffs' motion.

Dated: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on this 15th day of November, 2019, that a true copy of the foregoing was filed through the Court's ECF system and served upon all registered participants.

/s/ Thomas G. Hentoff
Thomas G. Hentoff

EXHIBIT A

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al.*,	:	**CASE NO. 2017 CA 005989 B**
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vs.	:	**Next Scheduled Event: 2020 Hearing, To Be Determined**
DAVID H. HOFFMAN, *et al.*,	:	
Defendants.		

DECLARATION OF ALEXANDER J. KASNER IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' OPPOSED MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

I, Alexander J. Kasner, state that:

1. I submit this declaration in support of the foregoing Opposition to Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Statute Unconstitutional, on behalf of Defendants Sidley Austin LLP, Sidley Austin (DC) LLP, and David H. Hoffman ("Sidley"), and American Psychological Association ("APA"). I make this declaration based upon personal knowledge, and I am competent to testify regarding the matters stated below.

2. I am an attorney with the law firm Williams & Connolly LLP and serve as counsel for Sidley in the above-captioned case.

3. On February 8, 2019, this Court granted in part Plaintiffs' motion to compel limited discovery to oppose Defendants' pending special motions to dismiss pursuant to the D.C. Anti-SLAPP Act, D.C. Code § 16-5502 *et seq.*

4. In compliance with this Court's order, Sidley timely produced the following to Plaintiffs' counsel:

a. 31,851 Bates-stamped pages of documents reflecting interview memos and notes of eighteen interviewees identified by Plaintiffs, as well as communications with the interviewees; and

b. A copy of the desktop computer hard drive used by Plaintiff Dr. Stephen Behnke while employed at APA, in its entirety, which contained approximately 96 gigabytes of data.

5. In compliance with this Court's order, APA timely produced the following to Plaintiffs' Counsel:

a. 22,212 Bates-stamped pages of documents from the Behnke hard drive reflecting email communications among the five original Plaintiffs to this litigation; and

b. Responses to Interrogatories from Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2019.

Alexander J. Kasner

EXHIBIT B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

PETER GORDON *et al.*, **Plaintiffs,** **v.** **FOREST HILLS NEIGHBORHOOD ALLIANCE, INC. *et al.*,** **Defendants.**	**Case No. 2016 CA 006397 B** **Judge Steven M. Wellner** **Civil Calendar 14**

ORDER

Before the Court is Defendants' Special Motion To Dismiss, filed October 24, 2016 ("the Special Motion To Dismiss").[1] For the reasons stated below, the Special Motion To Dismiss is granted in part and denied in part.

I. BACKGROUND

Plaintiffs Peter Gordon and John Gordon ("Plaintiffs") bring this action against Jane Solomon, Forest Hills Neighborhood Alliance, Inc., Forest Hills Citizens Association, Inc., and Forest Hills Citizens Association, an unincorporation association, ("Defendants") for fraudulent misrepresentation to a third person and tortious interference with a contract. On November 17, 2016, Plaintiffs filed their Second Amended Complaint ("the Complaint"). In the Complaint, Plaintiffs assert the following:

Plaintiffs inherited their mother's home at 3020 Albemarle Street, NW, in the Forest Hills neighborhood ("the Gordon home") after her death in November 2014. Compl. ¶ 22. In February 2015, Plaintiffs entered into a contract with Long & Foster Real Estate, Inc., ("Long &

[1] Defendants' Special Motion To Dismiss Second Amended Complaint, filed on March 14, 2017, renewed their Special Motion To Dismiss to encompass Plaintiffs' Second Amended Complaint.

Foster") to sell the home. *Id*. at ¶ 24. Jane Solomon submitted a petition in the name of the Forest Hills Neighborhood Alliance, Inc. ("the Alliance") to the Historic Preservation Review Board ("HPRB"), asking HPRB to designate the Gordon home as a historic landmark under the Historic Landmark and Historic District Protection Act, D.C. Code § 6-1101 *et seq*. *Id*. at ¶ 15, 34. On July 23, 2015, HPRB held a hearing to consider Ms. Solomon's petition. *Id*. at ¶ 36. HPRB voted 3-2 to designate the Gordon home as a historic landmark. *Id*.

Ms. Solomon was vice president of the Alliance from July 2007 until May 2011. *Id*. at ¶ 41. Ms. Solomon asserts she is president of the Forest Hills Citizens Association ("the Association"). *Id*. at ¶ 52.

On or about March 18, 2015, Plaintiffs received an offer to purchase the Gordon home for $1,550,000 from Ewell Storm and Ashley Pehrson, but Mr. Storm and Ms. Pehrson withdrew their offer when they learned the home may be designed a historic landmark. *Id*. at ¶ 49. In August 2015, Plaintiffs received an offer to purchase the Gordon home for $1,200,000 from Mr. Storm and Ms. Pehrson. *Id*. at ¶ 50. Mr. Storm and Ms. Pehrson stated they lowered their offer because the Gordon home was designated a historic landmark. *Id*.

In their Complaint, Plaintiffs seek relief against the following Defendants: (Count 1) Jane Solomon for fraudulent misrepresentation to a third person; (Count 2) Jane Solomon for tortious interference with a contract; (Count 3) the Alliance for fraudulent misrepresentation to a third person; (Count 4) the Alliance for tortious interference with a contract; (Count 5) the Association for fraudulent misrepresentation to a third person; and (Count 6) the Association for tortious interference with a contract.

In their Special Motion To Dismiss, Defendants argue Plaintiffs' Complaint should be dismissed under: (1) D.C. Code § 16-5501 *et seq*., the D.C. Anti-SLAPP Act of 2010; (2) Super.

Ct. Civ. R. 12(b)(6); and (3) the *Noerr-Pennington* doctrine. Defendants also request reasonable attorney's fees and costs under D.C. Code § 16-5504(a).

Plaintiffs filed an Opposition To Defendants' Special Motion To Dismiss And To Defendants' Rule 12(b)(6) Motion To Dismiss on November 18, 2016, ("Opposition"). In the Opposition, Plaintiffs assert that the Special Motion To Dismiss should be denied because (1) D.C. Code § 16-5501 *et seq.* violates Plaintiffs' First Amendment right to petition and Seventh Amendment right to a jury trial; (2) Defendants were not engaged in protected conduct and fail to prove Plaintiffs are not likely to succeed on the merits under D.C. Code § 16-5502(b); (3) Plaintiffs allege sufficient facts to state claims for tortious interference and fraudulent misrepresentation under Super. Ct. Civ. R. 12(b)(6); (4) Defendants' reliance on the *Noerr-Pennington* doctrine is without merit. Plaintiffs also request targeted discovery under D.C. Code § 16-5502(c)(2) and an evidentiary hearing under D.C. Code § 16-5502(d) if Defendants' arguments under Super. Ct. Civ. R. 12(b)(6) are denied.

On January 13, 2017, the District of Columbia filed a Notice of Intervention to defend the constitutionality of D.C. Code § 16-5501 *et seq*., the D.C. Anti-SLAPP Act. On January 31, 2017, the Court granted the District of Columbia's request to intervene and set a briefing scheduling on the constitutionality of the D.C. Anti-SLAPP Act.

On February 21, 2017, Plaintiffs filed a Supplemental Brief On The Constitutionality Of D.C. Code § 16-5501 *et seq.* ("Pl. Supp. Brief"). On March 7, 2017, Defendants filed a Response To Plaintiffs' Supplemental Brief On Constitutionality Of D.C. Anti-SLAPP Act ("Def. Supp. Brief") and the District of Columbia filed a Brief Of Intervenor ("D.C. Supp. Brief"). Plaintiffs filed a Reply To Defendants' And Intervenor's Supplemental Briefs On The Constitutionality Of D.C. Code § 16-5501 on March 16, 2017 ("Pl. Reply").

Although Plaintiffs rely primarily on their Opposition to contest Defendants' Special Motion To Dismiss, Plaintiffs filed an Opposition To Defendants' Motion To Dismiss Second Amended Complaint ("Second Opposition") on April 4, 2017. The Second Opposition incorporates their Opposition and adds additional arguments regarding the constitutionality of D.C. Code § 16-5501 in light of the District of Columbia Court of Appeals' December 22, 2016, decision in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016).

II. LEGAL STANDARD

A. Super. Ct. Civ. R. 12(b)(6)

To survive a motion to dismiss under Super. Ct. Civ. R. 12(b)(6), a complaint "must allege the elements of a legally viable claim, and its factual allegations must be enough to raise a right to relief above the speculative level." *Tingling-Clemmons v. District of Columbia*, 133 A.3d 241, 245 (D.C. 2016) (internal quotations and citations omitted). The complaint must also "be specific enough to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* In determining whether a complaint sufficiently sets forth a claim, the Court must construe the complaint in the light most favorable to the plaintiff and must take the facts alleged in the complaint as true. *Casco Marina Dev., L.L.C., v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

III. DISCUSSION

A. Super. Ct. Civ. R. 12(b)(6)

As part of their Special Motion To Dismiss, Defendants assert that Plaintiffs fail to state claims for which relief can be granted under Super. Ct. Civ. R. 12(b)(6).

1. Count 1: Fraudulent misrepresentation to a third person against Jane Solomon

Plaintiffs allege that Jane Solomon is liable for fraudulent misrepresentation to a third person for the following reasons: By signing the petition nominating the Gordon home for historic landmark status, Jane Solomon falsely represented to HPRB "(a) that the Alliance was a functioning corporation able to take action; (b) that the Alliance did take action and decided to nominate the Gordon home as a historic landmark; (c) that Ms. Solomon was authorized to act or speak on behalf of the Alliance; and (d) that the Alliance had standing or was qualified to submit a petition to HPRB." Compl. ¶ 63. Ms. Solomon knew the statements were false and intended that HPRB rely on her statements and designate the Gordon home as a historic landmark. *Id*. at ¶ 64-65. HPRB reasonably relied on Ms. Solomon's knowingly false statements when it designated the Gordon home as a historic landmark. *Id*. at ¶ 66. In addition, Ms. Solomon intended that Plaintiffs themselves rely on her misrepresentations regarding her status and standing in the Alliance, as well as the misrepresentations regarding her authority to act on behalf of the Alliance. *Id*. at ¶ 67. The Gordons themselves reasonably relied on Ms. Solomon's misrepresentations by not challenging the standing of the Alliance or Ms. Solomon's asserted authority on behalf of the Alliance. *Id*. Plaintiffs claim they suffered a pecuniary loss as a result of Ms. Solomon's knowingly false statements to HPRB. *Id*. at ¶ 68.

To succeed on a claim for fraudulent misrepresentation, a plaintiff must prove that a person or entity "(1) made a false representation of or willfully omitted a material fact; (2) had

knowledge of the misrepresentation or willful omission; (3) intended to induce [another] to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as a result of [that] reliance." *Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1130 (D.C. 2015) (citing *Schiff v. American Ass'n of Retired Persons*, 697 A.2d 1193, 1198 (D.C. 1997)).

Plaintiffs allege that Ms. Solomon made a false representation to HRPB; that Ms. Solomon had knowledge of the misrepresentation, and that they themselves suffered damages as a result of the reliance. Compl. ¶ 63-65, 68. As far as the fourth requirement – that the "other person acted in reliance on that misrepresentation" – Plaintiffs allege that both they and HPRB acted in reliance on Ms. Solomon's misrepresentations. Compl. ¶ 66-67. Plaintiffs assert that they relied on Ms. Solomon's misrepresentations by not challenging the standing of the Alliance or Ms. Solomon's asserted authority on behalf of the Alliance and that HRPB relied on Ms. Solomon's misrepresentations by designating the Gordon home as a historic landmark. *Id*.

Construing the Complaint in the light most favorable to Plaintiffs and taking all facts alleged in the Complaint as true, Plaintiffs allege facts sufficient to support a fraudulent misrepresentation claim against Ms. Solomon relating to Plaintiffs' reliance. The party bringing a claim for fraudulent misrepresentation must allege facts supporting the proposition that he or she took an action in reliance on the alleged misrepresentation. *See Schiff*, 697 A.2d at 1198 (in order to prove fraudulent misrepresentation, Schiff must show "that Schiff acted in reliance on that misrepresentation"); *Railan v. Katyal*, 766 A.2d 998, 1009 (D.C. 2001) (in order to prove fraudulent misrepresentation, the Katyals must prove an "action taken by [the Katyals] in reliance upon the representation."). Plaintiffs' action of not challenging the standing of the Alliance or Ms. Solomon's asserted authority on behalf of the Alliance is sufficient to meet this

threshold. Thus, Plaintiffs' claim of fraudulent misrepresentation to a third person against Ms. Solomon relating to Plaintiffs' reliance raises a right to relief above the speculative level and is specific enough to give her fair notice of the claim.

However, Plaintiffs do not allege facts sufficient to support a claim of fraudulent misrepresentation to a third person against Ms. Solomon relating to HPRB's reliance. Plaintiffs address this in their Opposition by stating they are asserting a claim for "indirect fraud" based on a third person (HPRB) taking an action in reliance on the misrepresentation. Oppos. at 15. To support the validity of their "indirect fraud" claim, Plaintiffs do not cite any cases from a controlling court. Rather, Plaintiffs rely on the Restatement (Second) of Torts § 533 and a dissenting opinion from a recent New York case, *Pasternack v. Laboratory Corp. of America Holdings, N.Y.*, 27 N.Y.3d 817, 827, 835-39 (2016). Oppos. at 15-18. In *Pasternack*, however, the court held that a fraud claim requires a plaintiff, not a third party, to have relied on a defendant's misrepresentation.

Furthermore, a motion to dismiss tests the legal sufficiency of the Complaint, not the sufficiency of a plaintiff's unpled allegations. *Taylor v. District of Columbia*, 626 F. Supp. 2d 25, 28 n.2 (D.D.C. 2009) ("[T]he Court [will not] permit plaintiffs to supplement the . . . allegations in their complaint with additional assertions from their brief. It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.") (quoting *Jung v. Ass'n of Am. Med. Colls.*, 300 F. Supp. 2d 119, 163 (D.D.C. 2004)). Accordingly, Plaintiffs' Complaint fails to allege facts sufficient to support a fraudulent misrepresentation claim against Ms. Solomon based on HPRB's reliance.

2. Count 3: Fraudulent misrepresentation to a third person against the Alliance

Plaintiffs allege, in the alternative, that the Alliance is liable for fraudulent misrepresentation to a third person for the following reasons: The Alliance authorized Ms. Solomon to sign and submit a petition nominating the Gordon home for historic landmark designation. Compl. ¶ 80. The Alliance fraudulently misrepresented to HPRB that it was a Historic Preservation Organization as defined by 10C DCMR § 9901 because it knew it was not a functioning corporation able to act in May 2015 and knew it did not have members; thus, it was not a Historic Preservation Organization. *Id*. at ¶ 81. The Alliance knew its statements were false and intended that HPRB rely on its statements and designate the Gordon home as a historic landmark. *Id*. at ¶ 83. HPRB reasonably relied on the Alliance's statements when it designated the Gordon home as a historic landmark. *Id*. at ¶ 84. The Alliance intended that Plaintiffs rely on its misrepresentation regarding the statements in the petition. *Id*. at ¶ 85. Plaintiffs did not challenge the standing of the Alliance because they reasonably relied on the Alliance's misrepresentations and believed it was a functioning corporation with standing to nominate the Gordon home as a historic landmark. *Id*. at ¶ 85. Plaintiffs suffered a pecuniary loss as a result of the Alliance's false representations. *Id*. at ¶ 86.

As stated above, to succeed on a claim for fraudulent misrepresentation, a plaintiff must allege facts showing that a person or entity "(1) made a false representation of or willfully omitted a material fact; (2) had knowledge of the misrepresentation or willful omission; (3) intended to induce [another] to rely on the misrepresentation or willful omission; (4) the other person acted in reliance on that misrepresentation or willful omission; and (5) suffered damages as a result of [that] reliance." *Sundberg*, 109 A.3d at 1130 (citing *Schiff*, 697 A.2d at 1198).

Plaintiffs allege that the Alliance made a false representation to HRPB; that the Alliance had knowledge of the misrepresentation, and that Plaintiffs themselves suffered damages as a result of the reliance. Compl. ¶ 80-86. As far as the fourth requirement – that the "other person acted in reliance on that misrepresentation" – Plaintiffs allege that both they and HPRB acted in reliance on Ms. Solomon's misrepresentations. *Id*. at ¶ 84-85. Plaintiffs assert that they relied on Ms. Solomon's misrepresentations by not challenging the standing of the Alliance or Ms. Solomon's asserted authority on behalf of the Alliance and that HRPB relied on Ms. Solomon's misrepresentations by designating the Gordon home as a historic landmark. *Id*. at ¶ 85.

Construing the Complaint in the light most favorable to Plaintiffs and taking all facts alleged in the Complaint as true, Plaintiffs allege facts sufficient to support a fraudulent misrepresentation claim against the Alliance based on their own reliance but not a fraudulent misrepresentation claim based on HPRB's reliance. *See Schiff*, 697 A.2d at 1198; *Railan v. Katyal*, 766 A.2d at 1009. Thus, Plaintiffs' claim of fraudulent misrepresentation to a third person against the Alliance relating to Plaintiffs' reliance raises a right to relief above the speculative level and is specific enough to give the Alliance fair notice of the claim.

3. Count 2: Tortious interference with a contract against Jane Solomon

Plaintiffs allege that Jane Solomon is liable for tortious interference with a contract between Plaintiffs and Long & Foster for the following reasons: Plaintiffs and Long & Foster executed a contract in February 2015 in which Long & Foster agreed to help Plaintiffs sell their home. Compl. ¶ 71. Ms. Solomon knew about the contract and intended to interfere with the contract by intending to prevent any sale of the Gordon home until the home was designated a historical landmark. *Id*. at ¶ 72-73. Ms. Solomon interfered with the contract because the possibility of a historic landmark designation scared off a *bona fide* buyer. *Id*. at ¶ 74. As a

result of the filing of Ms. Solomon's petition, the Gordons were forced to pull the home off the market because potential buyers withdrew their interest when they discovered the pending historic landmark designation. *Id*. at ¶ 77. Ms. Solomon's interference was the actual and proximate cause of losses suffered by Plaintiffs. *Id*. at ¶ 75.

To succeed on a tortious interference with a contract claim, a plaintiff must allege "(1) existence of a valid contract or other business relationship; (2) knowledge of the relationship; (3) intentional interference with that relationship by [the defendant]; and (4) resulting damages." *Newmyer v. Sidwell Friends Sch.*, 128 A.3d 1023, 1039 (D.C. 2015). Interference is actionable when it "induc[es] or otherwise caus[es] the third person not to perform" and it "need not cause an actual breach of the business relationship, but instead may cause 'merely a failure of performance' by one of the parties." *Id*. (quoting *Onyeoziri v. Spivok*, 44 A.3d 279, 286-87 (D.C. 2012)).

Construing the Complaint in the light most favorable to Plaintiffs and taking all facts alleged in the Complaint as true, Plaintiffs assert facts supporting a claim for tortious interference with a contract against Ms. Solomon. Plaintiffs allege the existence of a valid contract between Plaintiffs and Long & Foster and Ms. Solomon's knowledge of the contract. Compl. ¶ 71-72. Plaintiffs state Ms. Solomon intentionally interfered with that relationship by causing the failure of the performance of the contract – the Gordons pulled the home off the market. *Id*. at ¶ 77. Plaintiffs assert that Ms. Solomon's conduct – her filing of the petition – caused damages suffered by Plaintiffs. *Id*. at ¶ 75. Thus, Plaintiffs' claim of tortious interference of a contract against Ms. Solomon raises a right to relief above the speculative level and is specific enough to give her fair notice of the claim.

4. Count 4: Tortious interference with a contract against the Alliance

Plaintiffs allege, in the alternative, that the Alliance is liable for tortious interference with a contract between Plaintiffs and Long & Foster for the following reasons: The Alliance authorized Ms. Solomon to submit a petition for historic landmark designation to HPRB. Compl. ¶ 15, 34, 89. Plaintiffs and Long & Foster executed a contract in February 2015 in which Long & Foster agreed to help Plaintiffs sell their home. *Id*. at ¶ 90. The Alliance knew about the contract and intended to interfere with the contract by intending to prevent any sale of the Gordon home until the home was designated a historical landmark. *Id*. at ¶ 91-92. The Alliance successfully interfered with the contract because the possibility of a historic landmark designation scared off a *bona fide* buyer. *Id*. at ¶ 93. As a result of the filing of the petition, the Gordons were forced to pull the home off the market because potential buyers withdrew their interest when they learned of the pending historic landmark designation. *Id*. at ¶ 96. The Alliance's interference was the actual and proximate cause of losses suffered by Plaintiffs. *Id*. at ¶ 94.

As discussed above, to succeed on a tortious interference with a contract claim, a plaintiff must allege "(1) existence of a valid contract or other business relationship; (2) knowledge of the relationship; (3) intentional interference with that relationship by [the defendant]; and (4) resulting damages." *Newmyer*, 128 A.3d at 1039.

Construing the Complaint in the light most favorable to Plaintiffs and taking all facts alleged in the Complaint as true, Plaintiffs assert facts supporting a claim for tortious interference with a contract against the Alliance. Plaintiffs allege the existence of a valid contract between Plaintiffs and Long & Foster and the Alliance's knowledge of the contract. Compl. ¶ 90-91. Plaintiffs state the Alliance intentionally interfered with that relationship by

causing the failure of the performance of the contract – the Gordons pulled the home off the market. *Id*. at ¶ 96. Plaintiffs assert that the Alliance caused Plaintiffs to incur damages. *Id*. at ¶ 94. Thus, Plaintiffs' claim of tortious interference of a contract against the Alliance raises a right to relief above the speculative level and is specific enough to give the Alliance fair notice of the claim.

5. Counts 5, 6: Fraudulent misrepresentation to a third person and tortious interference with a contract against the Association

Plaintiffs allege, in the alternative, that the Association is liable for fraudulent misrepresentation to a third person and tortious interference with a contract. Compl. ¶ 98-105, 106-115. However, Plaintiffs bring both claims only "[i]f it can be demonstrated that the Alliance is not separate from the Association." *Id*. at ¶ 99, 106.

Defendants admit that the Association's corporate charter was revoked in September 2014; thus, it is dissolved as a corporate entity. Mot. at 20. Defendants also admit that the Alliance is separate from the now-defunct Association. *Id*. Because there is no dispute that the Alliance is separate from the Association,[2] it cannot be demonstrated that the Alliance is not separate from the Association. Thus, Plaintiffs fail to state claims for fraudulent misrepresentation to a third person and tortious interference with a contract against the Association. The Court dismisses Count 5 and 6 of Plaintiffs' Complaint.

B. *Noerr-Pennington* doctrine

As part of their Special Motion To Dismiss, Defendants assert that Plaintiffs' claims should be dismissed under the *Noerr-Pennington* doctrine.

The *Noerr-Pennington* doctrine, rooted in the Petition Clause of the First Amendment, protects "an attempt to persuade the legislature or the executive to take particular action with

[2] Plaintiffs do not address Counts 5 or 6 in their Opposition.

respect to a law." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1123 (D.C. Cir. 2009) (quoting *Eastern Railroad Presidents Conference v. Noerr Moto Freight, Inc.*, 365 U.S. 127, 135 (1961)); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Although the *Noerr-Pennington* doctrine originated in the context of antitrust litigation, the D.C. Circuit "has extended *Noerr-Pennington* immunity from its original antitrust context to common law torts, including intentional interference with contract and abuse of process." *E. Sav. Bank, FSB v. Papageorge*, 31 F. Supp. 3d 1, 19 (D.D.C. 2014) (citing *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 156 (D.D.C. 2008)). However, the *Noerr-Pennington* doctrine "does not protect deliberately false or misleading statements." *Philip Morris*, 566 F.3d at 1123.

Plaintiffs allege that Ms. Solomon knew that her representations to HPRB were false and that the Alliance knew the representations made in its name to HPRB were false. Compl. ¶ 4, 5. Plaintiffs claim that Ms. Solomon and the Alliance acted with malice in filing the petition with HPRB. *Id*. at ¶ 6. Construing the Complaint in the light most favorable to Plaintiffs and taking all facts alleged in the Complaint as true, Plaintiffs' allegations that the statements of Ms. Solomon and the Alliance were deliberately false are "enough to raise a right to relief above the speculative level." *Tingling-Clemmons*, 133 A.3d at 245. Thus, Plaintiffs' assertions that the statements of Ms. Solomon and the Alliance were deliberately false defeat Defendants' *Noerr-Pennington* defense at this stage of the litigation.

C. Constitutionality of D.C. Code § 16-5501 *et seq.*

In their Opposition filed on November 18, 2016, Plaintiffs allege that D.C. Code § 16-5501 *et seq.* is unconstitutional under the U.S. Constitution as a violation of their Seventh Amendment right to a jury trial and First Amendment right to petition. On December 22, 2016,

the D.C. Court of Appeals decided *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016).

In Plaintiffs' Supplemental Brief, Plaintiffs state they no longer wish to pursue their Seventh Amendment facial challenge to D.C. Code § 16-5501 *et seq.* in light of *Mann*. However, Plaintiffs maintain their as-applied challenges to D.C. Code § 16-5501 *et seq.* on grounds of the Seventh Amendment right to a jury trial and First Amendment right to petition.

1. Seventh Amendment right to a jury trial

Plaintiffs argue that D.C. Code § 16-5501 *et seq.* violates their right to a jury trial under the Seventh Amendment.

The District of Columbia Court of Appeals specifically addressed the question of whether D.C. Code § 16-5501 *et seq.* violated the Seventh Amendment in *Mann*, 150 A.3d at 1239. The *Mann* Court resolved the petitioner's challenge to D.C. Code § 16-5501 *et seq.* by clarifying the "likely to succeed on the merits" standard:

> [T]o remove doubt that the Anti-SLAPP statute respects the right to a jury trial, the standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail as a *matter of law*, that is, after allowing for the weighing of evidence and permissible inferences by the jury.

Id. at 1236. The Court of Appeals wrote that, "by deferring to the jury's reasonable decision-making, the constitutional right of a plaintiff who has presented evidence that could persuade a jury to find in her favor is respected" under D.C. Code § 16-5501 *et seq.* *Id*. at 1239.

Plaintiffs concede that *Mann* cures any potential facial Seventh Amendment deficiencies of the D.C. Anti-SLAPP Act. Pl. Supp. Brief at 1-2 ("The *CEI* court disposed of the Gordons' Seventh Amendment facial challenge to D.C. Code § 16-5502 by imposing a saving construction

on the statute . . . ."); Pl. Reply at 5 ("The Court of Appeals rendered the [Seventh Amendment] dispute moot . . . ."). Even so, Plaintiffs maintain that the D.C. Anti-SLAPP Act violates the Seventh Amendment as-applied. Pl. Supp. Brief at 1-2.

However, Plaintiffs do not state why their case is distinguishable from *Mann*. Plaintiffs do not provide specific reasons why D.C. Code § 16-5501 *et seq.* it infringes *their* Seventh Amendment rights. Plaintiffs merely make conclusory statements, without any support, in alleging that D.C. Code § 16-5501 *et seq.* violates their Seventh Amendment rights. Pl. Reply at 1-2 ("The Court of Appeals did not address the interaction between D.C. Code § 16-5501 and the facts of this case . . . .").

Because the *Mann* Court found that D.C. Code § 16-5501 *et seq.* does not violate the Seventh Amendment and Plaintiffs provide no reason why the Court of Appeals' determination does not apply here, Plaintiffs' as-applied Seventh Amendment challenge to D.C. Code § 16-5501 *et seq.* fails.

2. First Amendment right to petition

Plaintiffs allege D.C. Code § 16-5501 *et seq.* is unconstitutional under the First Amendment right to petition. Oppos. at 9-11. Plaintiffs claim that the right to petition includes the right to bring suit and that D.C. Code § 16-5501 *et seq.* burdens that right by requiring plaintiffs to clear a minimal threshold early in litigation. *Id*.

D.C. Code § 16-5501 *et seq.* does not bar plaintiffs from bringing suit. It merely requires that a plaintiff demonstrate that the claim is "likely to succeed on the merits" if a defendant makes a prima facie showing that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The D.C. Council enacted this burden-shifting scheme in order to protect defendants' speech rights. *See Doe v. Burke*, 133

A.3d 569, 571 (D.C. 2016) (quoting *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014)) ("The Anti-SLAPP Act . . . was enacted by the D.C. Council to 'protect the targets of . . . suits' intended 'as a weapon to chill or silence speech.'"); *Mann*, 150 A.3d at 1226 ("[T]he D.C. Anti-SLAPP Act was designed to protect targets of such meritless lawsuits by creating substantive rights with regard to a defendant's ability to fend off a SLAPP.").

Courts have found that the First Amendment right to petition is not violated if a plaintiff is able to bring a suit in court and that additional burdens early in litigation are proper in consideration of defendants' speech rights.

Although the *Mann* Court did not squarely address a First Amendment right to petition challenge, it explained that the D.C. Anti-SLAPP Act properly accounts for the rights of plaintiffs and defendants:

> [T]he D.C. Anti-SLAPP Act . . . takes due account of the constitutional interests of the defendant who can make a prima facie claim to First Amendment protection *and* of the constitutional interests of the plaintiff who proffers sufficient evidence that the First Amendment protections can be satisfied at trial; it is not a sledgehammer meant to get rid of any claim against a defendant able to make a prima facie case that the claim arises from activity covered by the Act.

Id. at 1239. The California Court of Appeal found that California's anti-SLAPP statute, Calif. Code Civ. Proc. § 425.16, did not violate the First Amendment right to petition because the "anti-SLAPP statute did not prevent [the plaintiff] from bringing a meritorious claim." *Bernardo v. Planned Parenthood Federation of America*, 115 Cal. App. 4th 322, 357-58 (2004). Similarly, a First Amendment right to petition challenge failed in the U.S. District Court for the District of Columbia because the law at issue did not restrict the plaintiff's ability to file a petition. *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Roberts*, 180 F. Supp. 3d 46, 63 (D.D.C. 2015).

Federal courts have determined that requiring plaintiffs to prove their cases early in litigation is appropriate to protect defendants' speech rights. *See Farah v. Esquire Magazine*, 736 F.3d 528, 534 (D.D.C. 2013) (quoting *Wash. Post. Co. v. Keogh*, 365 F.2 965, 968 (D.C. Cir. 1966)) ("[S]ummary proceedings are essential in the First Amendment area because if a suit entails 'long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails."); *Coles v. Washington Free Weekly*, 881 F. Supp. 26, 30 (D.D.C. 1995) ("Given the threat to the first amendment posed by nonmeritorious defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted.").

Plaintiffs' First Amendment right to petition has not been violated because Plaintiffs have not been barred from bringing their claims against Defendants. *See Bernardo*, 115 Cal. App. 4th at 357-58; *Roberts*, 180 F. Supp. 3d at 63. Further, Plaintiffs' First Amendment right to petition is not infringed by the burden-shifting requirements of the D.C. Anti-SLAPP Act. *See Mann*, 150 A.3d at 1239. Thus, Plaintiffs' as-applied challenge to D.C. Code § 16-5501 *et seq.* under the First Amendment right to petition fails.

D. Special Motion To Dismiss under D.C. Code § 16-5502

Defendants assert in their Special Motion To Dismiss that Plaintiffs' claims should be dismissed under D.C. Code § 16-5502. The Court is required to hold an expedited hearing on a Special Motion To Dismiss. D.C. Code § 16-5502(d). Accordingly, the Court will set a hearing on Defendants' Special Motion To Dismiss to allow parties to argue the motion.

Plaintiffs seek targeted discovery prior to the hearing on the Special Motion To Dismiss. Oppos. at 21. Typically, "discovery proceedings on the claim shall be stayed until the motion has been disposed of." D.C. Code § 16-5502(c)(1). However, the Court *may* order that specified

discovery be conducted when "it appears likely that targeted 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).

Plaintiffs attached their proposed targeted discovery to their Opposition. The proposed targeted discovery includes: (1) Interrogatories asking Ms. Solomon and the Alliance to respond to at least 12 inquires; (2) Requests for documents asking Ms. Solomon and the Alliance to provide all documents supporting various contentions asserted by Plaintiffs; and (3) Requests for admissions asking Ms. Solomon and the Alliance to admit or deny a series of statements.

After assessing Plaintiffs' proposed targeted discovery, the Court denies Plaintiffs' request for targeted discovery. Plaintiffs' proposed targeted discovery would be "unduly burdensome" and defeat the spirit of the D.C. Anti-SLAPP Act. The D.C. Counsel enacted the D.C. Anti-SLAPP Act "to deter meritless claims filed to harass the defendant for exercising First Amendment rights," *Mann*, 150 A.3d at 1239, and to prevent SLAPP defendants from "dedicat[ing] a substantial[] amount of money, time, and legal resources" to suits filed "as a means to muzzle speech or efforts to petition the government on issues of public interest." *Boley v. Atl. Monthly Group*, 950 F. Supp. 2d 249, 255 (D.D.C. 2013) (quoting the Committee Report at 1 prepared in enacting the D.C. Anti-SLAPP Act of 2010). A critical aim of the D.C. Anti-SLAPP Act would be contradicted by mandating Ms. Solomon and the Alliance to dedicate the required "money, time, and legal resources" to respond to Plaintiffs' proposed targeted discovery.[3]

IV. CONCLUSION

[3] This decision only stands in the way of Plaintiffs' attempts to engage in discovery at this stage of the litigation. If Plaintiffs' claims survive Defendants' Special Motion To Dismiss, Plaintiffs will have the opportunity to proceed with discovery.

For the reasons stated above, it is **ORDERED** that Defendants' Special Motion To Dismiss Plaintiffs' Complaint is **GRANTED in part** and **DENIED in part**:

1. Defendants' Special Motion To Dismiss is **GRANTED** pursuant to Super. Ct. Civ. R. 12(b)(6) for Plaintiffs' claims under Count 5 for fraudulent misrepresentation to a third person against the Association and Count 6 for tortious interference with a contract against the Association.

   a. Plaintiffs' Counts 5 and 6 are **DISMISSED WITHOUT PREJUDICE.**

2. Defendants' Special Motion To Dismiss is **DENIED** pursuant to Super. Ct. Civ. R. 12(b)(6) for Plaintiffs' claims under Count 1 for fraudulent misrepresentation to a third person against Jane Solomon; Count 2 for tortious interference with a contract against Jane Solomon; Count 3 for fraudulent misrepresentation to a third person against the Alliance; and Count 4 for tortious interference with a contract against the Alliance.

3. Defendants' request for attorney's fees under D.C. Code § 16-5504 is **HELD IN ABEYANCE** until the Court rules on Defendants' Special Motion To Dismiss under D.C. Code § 16-5502.

4. Plaintiffs' request for targeted discovery under D.C. Code § 16-5502(c)(2) is **DENIED**.

5. The Parties **SHALL APPEAR** for a Scheduling Conference Hearing on May 19, 2017, at 11:30 a.m. in Courtroom A-47 before Judge Elizabeth Wingo.

SO ORDERED.

DATED: May 18, 2017

Steven M. Wellner
Associate Judge

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