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From: (b)(6)
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Date: Fri, 16 Feb 2018 16:19:29 -0500
Attachments: Business.pdf (5.1 MB); Ingo.pdf (223.94 kB); en_prospectus.pdf (7.83 MB)

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Larkin Andrey

Galakhov Aleksey

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Podgornova Alla

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Khokhlov Valeriy

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Shareholders

List of shareholders holding more than 5% of allotted ordinary shares of Ingosstrakh OIJSC, as of May 04, 2015

№	Full name of a shareholder	Share of allotted ordinary shares Ingosstrakh OIJSC (%)
1	Limited liability company Granit, Moscow	16.29
2	Limited liability company Bekar-Service, Moscow	16.03
3	Limited liability company Investitsionnaya Initsiativa, Moscow	15.85
4	Limited liability company Novyi Kapital, Moscow	15.85
5	Limited liability company Soft-Karat, Moscow	15.68
6	Limited liability company Vega, Moscow	6.75
7	Oleg Deripaska	10.00

The certificate was made on the basis of the Register of Shareholders of Ingosstrakh OIJSC prepared by the Registrar of Ingosstrakh OIJSC – Mezhregionalnyi Registratorskiy Tsentr OJSC (FCSM License No 10-000-1-00274 of December 24, 2002).

https://2016.ingos.ru/en/company/shareholders/

Files to Move to JWICS Pt. 4

From: (b)(6), (b)(7)(C)
To: Secure Service Desk <secureservicedesk@treasury.gov>
Date: Fri, 23 Feb 2018 14:01:57 -0500
Attachments: AS.pdf (100.83 kB); Bloomberg Billionaires Index - AS.pdf (227.61 kB); Duma Bio.pdf (108.79 kB); (b)(5), (b)(6), (b)(7)(A), (b)(7)(C) pdf (67.27 kB); Gazprom Drilling.pdf (72.56 kB); NPV Engineering JSC.pdf (268.31 kB); (b)(5), (b)(7)(A) 76.88 kB); (b)(5), (b)(7)(A) pdf (93.64 kB); pdf (1.77 MB); (b)(5), (b)(7)(A) pdf (72.26 kB); (b)(5), (b)(7)(A) pdf (160.54 kB) (b)(5), (b)(7)(A) pdf (73.05 kB); (b)(5), (b)(7)(A) pdf (97.47 kB); SK - Forbes.pdf (102.96 kB); Bloomberg Billionaires Index - SK.pdf (760.61 kB); File 1.pdf (437.94 kB); pdf (130.84 kB); (b)(5), (b)(7)(A) pdf (126.19 kB); (b)(5), (b)(7)(A) pdf (189.14 kB)

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(b)(6), (b)(7)(C)
Sanctions Investigator
Office of Foreign Assets Control
UNCLASS: (b)(6), (b)(7)(C)
TSVOIP: (b)(6), (b)(7)(C)
SIPR: (b)(6), (b)(7)(C)
JWICS: (b)(6), (b)(7)(C)

Bates Nos. 2018-06-192: 001442 - 001484
Withheld in Full Pursuant to FOIA Exemptions (b)(6), (b)(7)(A) and (b)(7)(C)

Bates No. 2018-06-192: 001485
Pending Consultation with
Other Government Agency

Files to Move to JWICS

From: (b)(6), (b)(7)(C)

To: TFIN Service Desk <tfinservicedesk@treasury.gov>

Date: Mon, 19 Mar 2018 12:41:22 -0400

Attachments: 1-main.pdf (108.52 kB); 1509042.pdf (66.92 kB); 0001047469070060.pdf (3.82 MB); AP Exclusive.pdf (97.59 kB); d96aa8ac-a1f9-11dd-a32f-000077b07658.pdf (119.08 kB); From-V.pdf (91.08 kB); Gliklad-v-Deripaska-2017-NY-Slip-Op-50549U.pdf (228.37 kB); m4710_20070712_20310_en.pdf (119.71 kB); m7271_20140714_20310_3771107_EN.pdf (29.72 kB); print=1.pdf (366.62 kB); rothschild-v-associated-newspapers-ltd-judgment.pdf (320.02 kB); show_temp.pl.pdf (496.31 kB); show_temp-2.pdf (604.95 kB); show_temp-3.pdf (980.58 kB); ViewDocument - IM.pdf (3.35 MB); ViewDocument.pdf (2.3 MB)

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JWICS: (b)(6), (b)(7)(C)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLEG V. DERIPASKA, Plaintiff, v. THE ASSOCIATED PRESS, Defendant.	Case No. 1:17-cv-913-ESH

MEMORANDUM IN OPPOSITION TO DEFENDANT'S SPECIAL MOTION TO DISMISS THE COMPLAINT PURSUANT TO THE D.C. ANTI-SLAPP ACT

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Rules

Pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5502(a) ("Anti-SLAPP Act" or "Act"), Defendant Associated Press ("AP") filed a Special Motion to Dismiss the Complaint in this action with prejudice [Dkt. 7]. Plaintiff Oleg V. Deripaska ("Deripaska") respectfully requests that the Court deny Defendant's Special Motion to Dismiss.[1] In support of its Opposition to Defendant's Special Motion to Dismiss, Plaintiff submits the following memorandum of points and authorities.

INTRODUCTION

This Court lacks authority under settled D.C. Circuit law to entertain Defendant's Special Motion to Dismiss. In *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015), the D.C. Circuit explicitly held that the D.C. Anti-SLAPP Act may not be applied by a federal court sitting in diversity jurisdiction, as it is in this case. *Abbas* has not been overruled, and thus remains binding on this Court. The AP asks this Court to hold, based upon a footnote in a recent case decided by the D.C. Court of Appeals, *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016), that *Abbas* has been rendered obsolete. But the AP's readings of both *Abbas* and *Mann* are indefensible. And if the AP's interpretation of *either* case is wrong, the Special Motion must be rejected as a matter of law.

The AP's Special Motion is brought under the D.C. Anti-SLAPP Act, which was enacted in 2010 in an effort to deter "lawsuits filed by one side of a political or public policy debate

[1] Defendant has reserved the right to file a motion seeking an award of the costs of litigation pursuant to D.C. Code § 16-5504(a). Plaintiff asserts that even if this court finds that the Anti-SLAPP Act applies in federal diversity cases, it would be inequitable to impose fees and costs under the Act as doing so would require retroactive application of a statute in violation of D.C. law. *Cf. Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012), *aff'd on other grounds*, 720 F.3d 932 (D.C. Cir. 2013) (finding defendants "created a Catch-22 for themselves: either the statute is partially substantive (or has substantive consequences) and is therefore not retroactive under D.C. law or it is purely procedural and inapplicable in federal court under *Erie*").

aimed to punish or prevent the expression of opposing points of view." *Abbas*, 783 F.3d at 1332 (quoting Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, at 1 (Nov. 18, 2010)). In order to discourage the litigation of defamation claims, the Act adopts numerous procedural limitations that make it more difficult to take a suit to trial. Under the Act, a defendant "may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). If the defendant "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," the suit must be dismissed unless the plaintiff is able to "demonstrate[] that the claim is likely to succeed on the merits." *Id.* § 16-5502(b). "[U]pon the filing of a special motion to dismiss, discovery" is stayed except for limited purposes. *Id.* § 16-5502(c).

The federal government has declined to adopt analogous rules of procedure in defamation cases.[2] Thus, when a plaintiff files a defamation suit in federal District Court and alleges a defamation cause of action under D.C. law, the question arises whether the procedures of the D.C. Anti-SLAPP Act should apply rather than the Federal Rules of Civil Procedure where those two sets of rules are in conflict. The answer to that question is emphatically "no."

In *Abbas*, the D.C. Circuit analyzed the ways in which the D.C. Anti-SLAPP Act's Special Motion to Dismiss conflicts with the ordinary procedures established under Rules 12 and 56 of the Federal Rules of Civil Procedure, and concluded on the basis of those conflicts that the Act is inapplicable in federal court. 783 F.3d at 1332. The court relied upon the *Erie* doctrine, which holds that a "federal court exercising diversity jurisdiction should not apply a state law or

[2] From time to time, similar legislation has been introduced in Congress, but it has never been enacted. *See, e.g.,* SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. Although the Act was introduced in the House, no further action was taken.

rule if (1) a Federal Rule of Civil Procedure 'answer[s] the same question' as the state law or rule and (2) the Federal Rule does not violate the Rules Enabling Act." *Abbas*, 783 F.3d at 1333 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010)). The *Abbas* court found that the D.C. Anti-SLAPP Act answers the same question as *both* Fed. R. Civ. P. 12 and 56—specifically, the Anti-SLAPP Act's requirement that a plaintiff demonstrate "a likelihood of success on the merits in order to avoid pre-trial dismissal" cannot be reconciled with Rule 12(b)(6), under which a "plaintiff can overcome a motion to dismiss by simply alleging facts sufficient to state a claim that is plausible on its face," and where a complaint may proceed "even if it strikes a savvy judge that actual proof of the facts alleged is improbable." 783 F.3d at 1334 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In sum, "unlike the D.C. Anti–SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal," and as a result, "we may not apply the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Id.* at 1334.

Defendant's motion boils down to the demonstrably incorrect proposition that *Abbas*'s entire holding was based upon an interpretation of the Anti-SLAPP Act's "likelihood of success" standard, which according to Defendant was "squarely rejected" by the D.C. Court of Appeals ("COA") in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016). [Dkt. 7, at 8]. That is wrong for at least two reasons. First, Defendant fixates on the *Mann* court's comparison of the Anti-SLAPP Act's dismissal standard with the federal summary judgment standard embodied in Rule 56, but pretends as though *Abbas* never found the D.C. Act also to be incompatible with Rule 12, which it did. Second, Defendant claims that *Abbas* rested on the purportedly mistaken premise that the Anti-SLAPP Act's protections are procedural, but that

claim ignores that the Anti-SLAPP Act includes *both* procedural and substantive elements. And it is the procedural requirements—such as forcing a plaintiff to marshal evidence showing a likelihood of success before discovery has taken place—that cause the Act to conflict with the Federal Rules.

Even if this Court were to find that Defendants have the better reading of *Mann,* it would still lack the authority to apply the D.C. Anti-SLAPP Act because *Abbas* is binding precedent and may only be overruled, if at all, by the D.C. Circuit. Defendant attempts to claim that "when the D.C. COA has spoken clearly and unmistakably to the current state of D.C. law, its views must govern," [Dkt. 7, at 8], but *Mann* is neither clear nor unmistakable. In any event, the actual holding in *Abbas* did not turn on the construction of state law. *Erie*, unlike substantive areas of state law, is a federal doctrine that is governed by federal law. To be sure, the meaning of state law may be relevant or even dispositive to a particular *Erie* question, but it clearly was not dispositive here. All of the precedents on which Defendant relies are inapposite—indeed, the Special Motion fails to cite a single case in which a federal District Court has on its own declared a circuit court's *Erie* determination to be overruled by intervening state court precedent.

Even if this court were to find that the Anti-SLAPP Act should apply in federal court, Defendant's Special Motion to Dismiss under the Act should be denied pending discovery. In any event, Plaintiff's claim is likely to succeed on the merits.

BACKGROUND

The relevant factual and procedural history of this matter are addressed in Plaintiff's simultaneously filed Memorandum in Opposition to the Associated Press' Motion to Dismiss, which is incorporated herein by reference.

ARGUMENT

I. THIS COURT IS BOUND BY THE D.C. CIRCUIT'S DECISION IN *ABBAS*

The D.C. Circuit has squarely held that the procedures adopted by the D.C. Anti-SLAPP Act conflict with the procedures established by Rules 12 and 56 of the Federal Rules of Civil Procedure, and therefore that the D.C. Anti-SLAPP Act is inapplicable in federal diversity litigation. *Abbas*, 783 F.3d 1328, at 1333-36. This Court is required to follow D.C. Circuit precedent until it is overruled by either the D.C. Circuit or the Supreme Court. *United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). As the D.C. Circuit has stated:

> We welcome and consider carefully the candid views of our colleagues on the district court, including their criticism of circuit law. But just as we "leave to [the Supreme Court] the prerogative of overruling its . . . decisions," *district judges*, like panels of this court, *are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it*. That a district judge disagrees with circuit precedent does not relieve him of this obligation whether or not the precedent has been embraced by our sister circuits.

Id. (emphasis added) (citations omitted) (criticizing district court decision for contradicting circuit precedent and affirming on other grounds); *see also McGary v. Crowley*, Civil Action No. 13-1267 (RDM), 2017 WL 3129722, at *5 (D.D.C. July 20, 2017) ("'If a precedent of' an appellate court 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions,' the lower court 'should follow the case which directly controls, leaving to [the appellate court] the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989))). The central holding of *Abbas* as applied to motions to dismiss has not been undermined, let alone overruled, and Defendant's contrary arguments are frivolous.

A. *Abbas* Unequivocally Bars Application of the D.C. Anti-SLAPP Act in Federal Diversity Jurisdiction Cases

In *Abbas*, the D.C. Circuit considered whether federal courts sitting in diversity jurisdiction may apply the Anti-SLAPP Act, and held under the *Erie* doctrine[3] that federal courts may not apply a state procedural framework that is so plainly at odds with the Federal Rules of Civil Procedure. 783 F.3d at 1336 ("Federal Rules 12 and 56 answer the same question as the Anti-SLAPP Act's special motion to dismiss provision," and therefore, the Federal Rules must "govern in diversity cases in federal court"). *Abbas* relied on the Supreme Court's most recent interpretation of the *Erie* doctrine in *Shady Grove*, which held that a state law that "attempts to answer the same question" as a federal procedural rule cannot "apply in diversity suits unless [the federal rule is] ultra vires." *Shady Grove*, 559 U.S. 399.[4] Applying *Shady Grove*, the *Abbas* court found that several provisions of the Anti-SLAPP Act "attempt[] to answer the same question" as Federal Rules 12 and 56.

> [T]he D.C. Anti-SLAPP Act establishes the circumstances under which a court must dismiss a plaintiff's claim before trial—namely, when the court concludes that the plaintiff does not have a likelihood of success on the merits. But the Federal Rules of Civil Procedure 12 and 56 'answer the same question' about the circumstances under which a court must dismiss a case before trial. And those Federal Rules answer that question differently: They do not require a plaintiff to show a likelihood of success on the merits.

783 F.3d at 1333–34. The court further stated that "[t]he D.C. Anti-SLAPP Act, in other words, conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." 783 F.3d at 1334. In contrast to the Act, "the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal." 783 F.3d at 1334.

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[3] The *Erie* doctrine requires federal courts sitting in diversity jurisdiction to apply state substantive laws, but the Federal Rules of Civil Procedure. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

[4] Although the AP does not raise this issue in their Motion, it is plain that neither Rule 12 nor Rule 56 is ultra vires. 783 F.3d at 1337.

The D.C. Circuit expressly considered but rejected Abbas's argument that the Anti-SLAPP Act's Special Motion imposes the same standard for deciding whether a case may proceed to trial as does the federal standard at summary judgment under Fed. R. Civ. P. 56. 783 F.3d at 1334. Abbas argued that because the Anti-SLAPP Act is "just another way of describing the federal test for summary judgment," the only effect of the Act is to "layer[ ] a right to attorney's fees in this category of cases on top of the existing federal procedural scheme." *Id.* The *Abbas* court responded as follows:

> Had the D.C. Council simply wanted to permit courts to award attorney's fees to prevailing defendants in these kinds of defamation cases, it easily could have done so. But the D.C. Council instead enacted a new provision that answers the same question about the circumstances under which a court must grant pre-trial judgment to defendants. Moreover, the D.C. Court of Appeals has never interpreted the D.C. Anti–SLAPP Act's likelihood of success standard to simply mirror the standards imposed by Federal Rules 12 and 56. Put simply, the D.C. Anti–SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules 12 and 56.

Id. at 1335. In a footnote following this passage, the D.C. Circuit left open the possibility that if "a State anti-SLAPP act *did in fact exactly mirror Federal Rules 12 and 56*," an "interesting issue *could* arise" that "*could* matter for attorney's fees and the like." *Id.* at 1335 n.3 (emphasis added). But the court concluded that it did not need to "address that hypothetical here because, as we have explained, the D.C. Anti–SLAPP Act's dismissal standard does not exactly mirror Federal Rules 12 and 56." *Id.*

The rule announced in *Abbas* is binding on this Court until it is overruled by the Supreme Court or D.C. Circuit sitting *en banc*. *See Torres*, 115 F.3d at 1036; *McGary*, 2017 WL 3129722, at *5. Neither of those courts have reversed course on *Abbas*. That should end the matter.

B. The D.C. Court of Appeals' Decision in *Mann* Does Not Permit This Court to Overrule *Abbas*

Defendant's only argument for why this Court may ignore a binding precedent of the D.C. Circuit is based upon an inaccurate and incomplete reading of a footnote in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016). The full version of that footnote (minus citations) reads as follows:

> The D.C. Circuit has described the Anti–SLAPP Act's "likely to succeed" standard as "an additional hurdle a plaintiff must jump over to get to trial," and opined (without elaboration) that the standard "is different from and more difficult" than for summary judgment under Federal Rule 56. For the reasons we note in the text, we agree with *Abbas* that the special motion to dismiss is different from summary judgment in that it imposes the burden on plaintiffs and requires the court to consider the legal sufficiency of the evidence presented before discovery is completed. As concerns the standard to be employed by the court in deciding whether to grant the motion, however, the question is substantively the same: whether the evidence suffices to permit a jury to find for the plaintiff.
>
> *Abbas* also stated that the special motion to dismiss created by D.C. Code § 16–5502 does not apply in federal court because it answers the same question as the Federal Rules of Civil Procedure—when a court must dismiss a case before trial—in a different way. Implicit in *Abbas* is that the special motion to dismiss is only procedural in nature rendering it inapplicable in federal court sitting in diversity. Other federal appellate courts have come to a different conclusion and applied similar state Anti–SLAPP procedures.
>
> *The applicability of the Anti–SLAPP statute in federal court is not for this court to determine. 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. This court's interpretation of the standard applicable to the special motion to dismiss under District of Columbia law will no doubt factor into future analysis of the dicta in *Abbas* concerning the applicability of the Anti–SLAPP Act in litigation brought in federal courts.

Mann, 150 A.3d at 1238 n.32 (emphasis added).

The passage quoted above, and that passage alone, is the full basis on which Defendant claims this Court may disregard *Abbas*. But that footnote's breezy discussion of *Abbas* is not a permissible basis on which to flout binding Circuit law.

1. *Mann* Did Not "Clearly and Unmistakably Render[] Inaccurate" the D.C. Circuit's Holding in *Abbas*

The *Mann* court's statement that "[t]he applicability of the Anti-SLAPP statute in federal court is not for this court to determine," 150 A.3d at 1238 n.32, should end this Court's inquiry. That statement demonstrates that the D.C. Court of Appeals has declined to speak "clearly and unmistakably" to the relevant holding in *Abbas*—namely, whether the Anti-SLAPP Act may be applied in a federal diversity case—and Defendant's own precedent requires that an intervening change to state law must reveal a prior federal precedent to be inaccurate in a way that is both clear and unmistakable to warrant disregard for that precedent. *See Easaw v. Newport*, Civil Action No. 17-00028 (BAH), 2017 WL 2062851, at *10 (D.D.C. May 12, 2017) ("[W]hen a decision by the D.C. COA clearly and unmistakably renders inaccurate a prior decision by the D.C. Circuit interpreting D.C. law, this Court should apply the D.C. COA's more recent expression of the law.").

Beyond *Mann*'s qualifying language, the substance of the footnote in *Mann* does not "clearly and unmistakably" show the D.C. Circuit's holding in *Abbas* to be inaccurate. The *Abbas* court held that the Anti-SLAPP Act contained important procedural innovations that could not be reconciled with both Fed. R. Civ. P. 12 and 56. Among the court's pronouncements in support of this position are the following statements:

- "Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pre-trial judgment to defendants in cases in federal court. A federal court must apply those Federal Rules instead of the D.C. Anti-SLAPP Act's special motion to dismiss provision." *Abbas*, 783 F.3d at 1333.

- "For the category of cases that it covers, the D.C. Anti-SLAPP Act establishes the circumstances under which a court must dismiss a plaintiff's claim before trial—namely, when the court concludes that the plaintiff does not have a likelihood of success on the merits. But Federal Rules of Civil Procedure 12 and 56 'answer the same question' about the circumstances under which a court must dismiss a case before trial. And those Federal Rules answer that question differently: They

> do not require a *plaintiff* to show a likelihood of success on the merits." *Id.* at 1334 (emphasis added).

- "The D.C. Anti-SLAPP Act, in other words, conflicts with the Federal Rules by setting up an additional hurdle a plaintiff must jump over to get to trial." *Id.*

- "Put simply, the D.C. Anti-SLAPP Act's likelihood of success standard is different from and more difficult for plaintiffs to meet than the standards imposed by Federal Rules *12 and 56*." *Abbas*, 783 F.3d at 1335 (emphasis added).

Separate and apart from its own qualifying language, *Mann* does not clearly and unmistakably render *Abbas* inaccurate for at least two additional reasons.

a. *Mann* Does Not Dispute That a Special Motion to Dismiss under the Anti-SLAPP Act Conflicts with Fed. R. Civ. P. 12

Mann does not dispute that the Anti-SLAPP Act is procedurally irreconcilable with Fed. R. Civ. P. 12; it simply asserts that the standard by which a judge must evaluate an Anti-SLAPP motion "mirror[s] the standards imposed by Federal Rule 56." 150 A.3d at 1238 n.32. Defendant quotes *Abbas* for the proposition that "it would be '[a]n interesting issue . . . if a State anti-SLAPP act did in fact exactly mirror' *the federal procedural standards*," [Dkt. 7, at 2 (emphasis added)], while misleadingly representing that *Mann* held just that. But *Mann* made no reference to Rule 12 whatsoever, in footnote 32 or anywhere else.

The *Mann* court itself acknowledged that the Anti-SLAPP Act's standard was incongruent with the procedures applicable to a motion to dismiss filed under Rule 12. *See Mann*, 150 A.3d at 1221 n.2 ("[T]he showing required to defeat an Anti-SLAPP special motion to dismiss is more demanding than is required to overcome a Rule 12(b)(6) motion to dismiss."). Moreover, the *Mann* court recognized that the Anti-SLAPP Act requires burden shifting that is impermissible under Rule 12:

> The Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection. This is a reversal of

> the allocation of burdens for dismissal of a complaint under [Rule] 12(b)(6),[5] which requires the moving party to show that the complaint's allegations, even if proven, would not state a claim as a matter of law.

150 A.3d at 1237 (citation omitted). Thus, the *Mann* court's reasoning actually confirms, rather than undermines, the accuracy of the *Abbas* court's conclusion regarding the procedural conflict between Rule 12 and the Anti-SLAPP Act. *See Abbas*, 783 F.3d at 1333-35.[6]

b. The *Mann* Court's Holding Regarding Rule 56's Summary Judgment Standard Also Does not Render *Abbas* Inaccurate

The fact that, under *Mann*, the court's standard for resolving an Anti-SLAPP Act Special Motion to Dismiss is identical to the standard for resolving a Rule 56 motion does not mean that the procedures under both regimes are in all respects identical, let alone compatible. The Anti-SLAPP Act imposes more procedural requirements on a plaintiff subject to a Special Motion than those that would apply to a plaintiff subject to a motion for summary judgment under Rule 56. Those additional requirements render the two rules procedurally incompatible. *Cf. Shady Grove*, 559 U.S. at 401 ("Rule 23 permits all class actions that meet its requirements, and a State

[5] Although the court refers to Superior Court Rule of Civil Procedure 12(b)(6), the relevant portions of this rule are identical to its federal counterpart.

[6] The Seventh Circuit has affirmed a lower court decision holding that an Anti-SLAPP Act was inapplicable by reason of its conflict with Federal Rule 12. *See Intercon Sols, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1046 (N.D. Ill. 2013), *aff'd on other grounds* 791 F.3d 729 (7th Cir. 2015) (finding that the Anti-SLAPP Act's mandatory requirement that a court "adjudicate claims on the merits and consider materials outside the pleadings without tying the motion to the summary judgment rule" created a conflict with Rule 12(d)'s permissive grant of "discretion in determining whether to convert a Rule 12 motion to a motion for summary judgment" that was fatal to the Act's application in federal court). That court's arguments are applicable in the instant case given that the D.C. Anti-SLAPP Act uses the same mandatory language and requires plaintiff to demonstrate that the claim is likely to succeed, which presumably requires submission of evidence outside the pleadings. *See* D.C. Code § 16-5502(b) ("If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion *shall* be granted.") (emphasis added).

cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements.").

The *Mann* court acknowledged that a special motion to dismiss is distinguishable from a motion for summary judgment in that it shifts the burden from defendant (the moving party), in the context of summary judgment, to plaintiff (the non-moving party). *Mann*, 150 A.3d at 1238 n.32 ("[W]e agree with *Abbas* that the special motion to dismiss is different from summary judgment in that it imposes the burden on plaintiffs.").

> The Act also places the initial burden on the claimant to present legally sufficient evidence substantiating the merits without placing a corresponding evidentiary demand on the defendant who invokes the Act's protection. . . . This is a reversal of the allocation of burdens for . . . summary judgment under [Rule] 56,[7] which requires the moving party to wait until discovery has been completed and then shoulder the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts.

Mann, 150 A.3d at 1237.

"This burden shifting framework . . . 'functions somewhat like a Rule 56 summary judgment motion' but without the summary judgment lens of viewing 'the record in the light most favorable to the non-moving party and grant[ing] all reasonable inferences in favor of the non-moving party.'" *Turkowitz v. Town of Provincetown*, Civil Action No. 10-10634-NMG, 2010 WL 5583119, at *2 (D. Mass, Dec. 1, 2010) (holding that where "state law implicates [the Federal Rules], to wit, Rules 12(b)(6) and 56, classification of the statute as procedural rather than substantive 'is generally a straightforward exercise.' . . . Rule 12(b)(6) or Rule 56 therefore provide the appropriate mechanism to challenge the tort claims in this proceeding.") (citation omitted); *see also Unity Healthcare, Inc. v. Cty of Hennepin*, 308 F.R.D. 537, 541 (D. Minn.

[7] Although the court refers to Superior Court Rules of Civil Procedure 56, the relevant portions of this rule are identical to its Federal Rule of Civil Procedure counterpart, and therefore the statement still applies.

2015) (finding an Anti-SLAPP law conflicted with Rule 56 because under Rule 56, "all inferences must be drawn in favor of the nonmoving party"); *Intercon*, 969 F. Supp. 2d at 1047 (finding an insurmountable conflict between Rule 56 and an Anti-SLAPP Act based on a heightened standard of proof imposed on the plaintiff). The Anti-SLAPP Act's failure to require that all inferences be made in favor of the non-moving party introduces a direct conflict with Rule 56, and nothing in *Mann* purports to alter or correct that allocation of burdens under D.C. law.

Further, *Mann* also conceded that "the filing of a special motion to dismiss stays the claimant's right to seek discovery 'until the motion has been disposed of,' with a limited exception that *favors the defendant*." *Mann*, 150 A.3d at 1237 (emphasis added). That provision "authorizes final disposition of a claim in a truncated proceeding, usually without the benefit of discovery, to avoid the toll that meritless litigation imposes on a defendant who has made a prima facie showing that the claim arises from advocacy on issues of public interest." *Id.* at 1235 (citation omitted). Accordingly, the *Mann* court "agree[d] with *Abbas* that the special motion to dismiss is different from summary judgment in that it imposes the burden on plaintiffs and requires the court to consider the legal sufficiency of the evidence presented before discovery is completed." *Id.* at 1238 n.32.

As a Minnesota federal district court recently recognized in construing that state's analogous Anti-SLAPP Act, "Rule 56 collides head-on with Minnesota's anti-SLAPP law" because the anti-SLAPP law and Rule 56 allow for different amounts of discovery "before the Court determines whether to dismiss Plaintiffs' properly pleaded claims before trial." *Unity Healthcare*, 308 F.R.D. at 541.

> Rule 56 allows a party to move for summary judgment on claims, and a court must grant the motion if the movant shows there is no genuine dispute as to any

> material fact and the movant is entitled to judgment as a matter of law. But, summary judgment [must] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. By contrast, upon the filing of an anti-SLAPP motion under Minnesota's law, discovery must be suspended pending the final disposition of the motion, including any appeal; provided that the court may, on motion and after a hearing and for good cause shown, order that specified and limited discovery be conducted.

Id. (citations and quotations omitted). The Minnesota court explained that "[t]he restrictive standard for discovery under the anti-SLAPP law is oil to the water of Rule 56's more permissive standard. Rule 56 makes discovery the norm and 'ensures that adequate discovery will occur before summary judgment is considered.'" *Id.* (quoting *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)). Furthermore, "[t]he anti-SLAPP law makes discovery the exception and forces a 'court to test the plaintiff's evidence before the plaintiff has completed discovery.'" *Id.* (quoting *Wornick*, 264 F.3d at 846).

Notwithstanding the similarities of the standard applied to both a special motion to dismiss and summary judgment, the special motion to dismiss imposes additional burdens upon a plaintiff that he would not face under Rule 56. *Mann* therefore does not "clearly and unmistakably render[] inaccurate" the D.C. Circuit's holding in *Abbas*, and even applying *Easaw*, *Abbas*'s holding that the D.C. Anti-SLAPP Act is inapplicable in federal court remains binding precedent in this Court.

2. *Easaw* is Inapplicable to a Federal Court's Determination of What Constitutes Procedural Rather Than Substantive Law Under the *Erie* Doctrine

Defendant relies almost exclusively on the D.C. Court of Appeals' decision in *Easaw v. Newport*, Civil Action No. 17-00028 (BAH), 2017 WL 2062851, (D.D.C. May 12, 2017) for the proposition that "in a diversity case, this Court must apply the current substantive law of the District of Columbia, which the D.C. Circuit is no more qualified than this Court to ascertain."

[Dkt. 7, at 8 (quoting *Easaw*, 2017 WL 2062851, at *9)]. But *Easaw* is inapposite to the *Erie* context. And, at minimum, *part* of the legal question decided in *Abbas* was whether the Anti-SLAPP statute is substantive or procedural in nature, and that question is clearly within the purview of federal—not state—courts.[8]

Initially, *Easaw* was an employment discrimination case in which plaintiff "allege[d] that defendants committed tortious interference with her employment," and the D.C. Circuit was faced with prior D.C. Circuit precedent regarding the basis of a tortious interference claim that conflicted with a subsequent D.C. COA precedent. *Easaw v. Newport*, Civil Action No. 17-00028 (BAH), 2017 WL 2062851, at *7 (D.D.C. 2017). The D.C. Circuit had previously "held that it is 'reasonably clear . . . that the general rule in the District of Columbia is that an at-will employment agreement cannot form the basis of a claim of tortious interference with contractual relations.'" *Easaw*, 2017 WL 2062851, at *8 (citing *Metz v. BAE Sys. Tech. Sols. & Servs., Inc.*, 774 F.3d 18 (D.C. Cir. 2014)). The D.C. Circuit's holding in *Metz* "recognized that the 'result' of a prior D.C. [COA] decision is 'inconsistent' with this rule, [but] explained that 'no D.C. Case *holds* to the contrary.'" *Id* (citations omitted). However, a year after *Metz*, the D.C. COA directly contradicted the D.C. Circuit, "holding that an at-will employee *could* sustain a tortious

[8] The Supreme Court has held that even where a state statute "pursues only substantive policies," it may still be found to conflict with Federal Rules such that it may not be applied in diversity cases in federal courts. *Shady Grove*, 559 U.S. at 405. Moreover, the D.C. COA's reference in *Mann* to "substantive rights" does not clearly and unmistakably establish that the statute is substantive, as several courts interpreting the statute—including the COA—have construed the Anti-SLAPP Act as procedural. See *Abbas*, 783 F.3d at 1335 ("The D.C. Anti-SLAPP Act, to use the words of the D.C. Court of Appeals, establishes a new 'procedural mechanism' for dismissing certain cases before trial."); *ABLV Bank v. Ctr. for Advanced Def. Studies Inc.*, Civil Action No. 1:14-cv-1118, 2015 WL 12517012, at *3 (E.D. Va. Apr. 21, 2015) (The "Act is . . . codified in the section of the D.C. code titled 'Judiciary and Judicial Procedure.'"); *Doe No. 1 v. Burke*, 91 A.3d 1031, 1036 (D.C. 2014) ("[T]he statute creates a 'special motion to dismiss,' a *procedural mechanism* that allows a named defendant to quickly and equitably end a meritless suit." (emphasis added)).

interference claim because an 'at-will employment relationship of the kind' considered 'is a valid and subsisting business relationship for the purposes of a tortious interference claim.'" *Easaw*, 2017 WL 2062851, at *8. Thus, the "threshold inquiry" in *Easaw* was "whether [this court was] bound by the D.C. Circuit's interpretation of D.C. law or, alternatively, whether it must follow a subsequent and conflicting decision by the D.C. COA." *Id.* Recognizing that federal appellate judges "may have 'no such personal acquaintance with the law of the state[,]'" the court held that "when the D.C. COA has *spoken clearly and unmistakably to the current state of D.C. law*, its views must govern." *Easaw*, 2017 WL 2062851, at *9 & n.8 (emphasis added).

In this case, by contrast, the prior D.C. Circuit precedent (*Abbas*) did not turn on a misunderstanding of "the current state of D.C. law," but rather, that question was merely part of a subsidiary discussion in support of the court's holding. As the discussion *supra* demonstrates, even accepting the *Mann* court's description of the Anti-SLAPP Act without reservation fails to answer most of the underlying rationale for the *Abbas* court's conclusion that the Act is incompatible with Rules 12 and 56.

The question whether a state procedural rule may be applied in federal court is not itself a question of state law. Even the classification of a state rule as procedural rather than substantive involves an application of federal law. *See Burke v. Air Serv Int'l, Inc.*, 685 F.3d 1102, 1107-08 (D.C. Cir. 2012); *see also Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 152 (2d Cir. 2013) ("Whether a particular state rule of decision is 'substantive' under *Erie* is a question of *federal* law." (citations omitted)); *see also Mann*, 150 A.3d at 1238 n.32 ("The applicability of the Anti-SLAPP statute in federal court is not for this court to determine.").

> Except at the extremes, the terms "substance" and "procedure" precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn. In the context of our *Erie* jurisprudence, that purpose is to establish (*within the limits of*

> *applicable federal law, including the prescribed Rules of Federal Procedure*) substantial *uniformity of predictable outcome* between cases tried in a federal court and cases tried in the courts of the State in which the federal court sits.

Sun Oil Co. v. Wortman, 486 U.S. 717, 726-27 (1988) (emphasis added) (citations omitted). A court making an *Erie* determination must therefore consider both the "limits of applicable federal law" and the Federal Rules, *id.*, "which the D.C. [COA] is no more qualified than this Court to ascertain." *Easaw*, 2017 WL 2062851, at *9.

"Congress, unlike [the states], has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove*, 559 U.S. at 400. The District of Columbia has decided it is important to enact legislation that allows cases covered by the Anti-SLAPP Act to be quickly dismissed. If Congress agrees, it may enact a comparable statute; but up and until that point, Anti-SLAPP Act special motions to dismiss should not be considered in federal court, and a D.C. COA decision implying the contrary may not be followed in this Court.

C. The Weight of Federal Court Precedent Supports the Rule in *Abbas*

Defendant disingenuously suggests that the weight of authority suggests that federal courts may apply state Anti-SLAPP acts when sitting in diversity. [Dkt. 7, at 1-2 & nn. 1-2]. To be sure, several federal circuits have applied Anti-SLAPP Acts in diversity cases proceeding in federal court, but most of these cases did not consider whether the Anti-SLAPP statutes were applicable in federal court under the *Erie* doctrine.[9] The cases that did consider the issue found

[9] *See Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 148 (2d Cir. 2013) (finding Anti-SLAPP Act applied based on *Klaxon* choice-of-law principles without addressing whether Anti-SLAPP Act conflicted with Federal Rules 12 and 56); *Chandok v. Klessig*, 632 F.3d 803, 817-19 (2d Cir. 2011) (applying Anti-SLAPP Act without considering *Erie* issue); *Hilton v. Hallmark Cards*, 599 F.3d 894, 901-02 (9th Cir. 2010) (same); *Price v. Stossel*, 620 F.3d 992, 1000 (9th

that the Federal Rules were not so broad as to "answer the same question" as the relevant Anti-SLAPP Acts,[10] which is of course directly in conflict with the D.C. Circuit's holding in *Abbas*, 783 F.3d at 1336, and with the holdings in other circuits as well.[11] In sum, while the cases on which Defendant relies may be relevant for the D.C. Circuit sitting *en banc*, or for the Supreme Court if and when it considers a properly-presented petition for writ of certiorari, they are irrelevant to the decision before this Court.

Defendant's reliance on 9th Circuit precedent is particularly curious given the subsequent case law that has undermined it.[12] In *Travelers Casualty Insurance Co. v. Hirsh*, 831 F.3d 1179, 1180 (9th Cir. 2016), a three-judge panel denied a special motion to strike under the California anti-SLAPP statute. In so doing, two of the three judges sitting on the panel concurred, stating that the Ninth Circuit case law according federal-court defendants the procedural advantages of California's Anti-SLAPP law "is wrong: These interloping state procedures have no place in federal court." *Id.* at 1182 (Kozinski, C.J., concurring). Then-Chief Judge Kozinski cited the D.C. Circuit for "recogniz[ing] this problem for what it is." *Id.* at 1183 ("Now we've got a circuit split, and we're standing on the wrong side.") He noted:

Cir. 2010) (same); *Henry v. Lake Charles Am. Press, LLC*, 566 F.3d 164, 170 (5th Cir. 2009) (same).

[10] *See Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010) ("To use the language of *Shady Grove*, Rules 12 and 56 do not 'attempt[] to answer the same question,' nor do they 'address the same subject,' as [the Anti-SLAPP Act]."); *Gardner v. Martino*, 563 F.3d 981, 990-91 (9th Cir. 2009) (predating *Shady Grove*).

[11] See *Royalty Network, Inc. v. Harris*, 756 F.3d 1351 (11th Cir. 2014) (finding Anti-SLAPP verification requirement to be inapplicable because it conflicts with Federal Rule 11).

[12] *See Liberty Synergistics*, 718 F.3d at 145 (relying on *Batzel v. Smith*, 333 F.3d 1018, 1025–26 (9th Cir. 2003) and *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 971-73 (9th Cir. 1999), for the proposition that "anti-SLAPP motions may be maintained in diversity cases where California provides the law of decision"); *Hilton*, 599 F.3d at 901–02 (relying on *Batzel*); *Godin*, 629 F.3d at 81 (relying on *Newsham*); *Price*, 620 F.3d at 999 (same); *Gardner*, 563 F.3d at 991 (same); *Henry*, 566 F.3d at 169 (same).

> California's anti-SLAPP law directly conflicts with Federal Rule 12, which provides a one-size-fits-all test for evaluating claims at the pleading stage. . . . Using California's standard in federal court means that some plaintiffs with plausible claims will have their cases dismissed before they've had a chance to gather supporting evidence. It's obvious that the two standards conflict.

Id. at 1183–84. Judge Gould concurred with then-Chief Judge Kozinski, and receded from his previous vote in *Batzel*, on which other circuits finding Anti-SLAPP Acts may apply in federal courts relied:

> I am now persuaded by Judge Kozinski's reasoning, as well as that of the D.C. Circuit in [*Abbas*], that an anti-SLAPP motion has no proper place in federal court in light of the Federal Rules of Civil Procedure . . . . Having recognized that there was error in the position that I previously joined [in *Batzel*], I recede from it.

Id. at 1186 (Gould, J., concurring) (citation omitted).

In circuits that have not yet decided the question directly, at least three other district courts have held that state Anti-SLAPP Acts do not apply where federal courts sit in diversity for the explicit reason that they conflict with the Federal Rules of Civil Procedure.[13] Defendant's contention that that the Anti-SLAPP Act may be applied in federal diversity cases is therefore not just contrary to D.C. Circuit precedent—it is unsupported by the weight of authorities in other circuits as well.

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[13] *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, No. 15-CV-0547-MV-LAM, 2016 WL 8254920, at *3 (D.N.M. Feb. 17, 2016) ("Federal courts have no business applying exotic state procedural rules which, of necessity, disrupt the comprehensive scheme embodied in the Federal Rules, our jurisdictional statutes and Supreme Court interpretations thereof." (citations and quotations omitted)); *Unity Healthcare, Inc. v. Cty of Hennepin*, 308 F.R.D 537, 544 (D. Minn. 2015) ("[T]he motion to dismiss procedures laid out in Minnesota's anti-SLAPP statute . . . irreconcilably conflict[] with Rules 12 and 56 of the Federal Rules of Civil Procedure."); *Intercon Sols, Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026 (N.D. Ill. 2013), *aff'd on other grounds* 791 F.3d 729 (7th Cir. 2015) (holding Anti-SLAPP Act may not apply because it conflicts with the Federal Rules).

II. IN THE ALTERNATIVE, IF THIS COURT FINDS THE ANTI-SLAPP ACT SHOULD APPLY IN FEDERAL COURT, IT SHOULD ALLOW FOR DISCOVERY BEFORE REQUIRING PLAINTIFF TO RESPOND

The Anti-SLAPP Act itself provides that whenever "it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted." D.C. Code § 16-5502(c)(2). The *Mann* court itself admitted that this requirement—that a plaintiff must demonstrate that discovery is *likely to defeat* a motion to dismiss before being permitted to engage in such discovery—is inconsistent with the Federal Rules. *Mann*, 150 A.3d at 1237 (citing the Anti-SLAPP discovery requirement as mandating a "reversal of the allocation of burdens for . . . summary judgment under [Rule] 56, which requires the moving party to wait until discovery has been completed and then shoulder the initial burden of showing that there are no material facts genuinely in dispute and that the movant is entitled to judgment as a matter of law on the undisputed facts"). The AP has failed to explain how this Court could apply the Anti-SLAPP Act's discovery provision[14] at the motion-to-dismiss stage in a way that does not radically upend the procedural posture in which federal litigation ordinarily proceeds.

Assuming *arguendo* that the Anti-SLAPP Act discovery rule may be applied here, this Court should permit Plaintiff to take discovery before requiring a response to Defendant's Special Motion to Dismiss. "Although rule 56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the

[14] The Act further provides that "[s]uch an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." D.C. Code § 16-5502(c)(2) . The notion that a plaintiff must pay a defendant's expenses in order to respond to discovery that the Court itself has found "will enable the plaintiff to defeat" a motion that the Court has also found "will not be unduly burdensome" departs radically from the rules that govern discovery under the Federal Rules of Civil Procedure, and is further evidence that the Anti-SLAPP Act employs procedural devices that are inappropriate for federal courts sitting in diversity jurisdiction.

Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" *Wornick*, 264 F.3d at 846 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)).

Here, at minimum, this Court should permit discovery of two documents that are essential to the core of the Complaint's primary allegations. The AP based most of the claims in the article, as relevant to Plaintiff, on: (1) an alleged 2006 contract between Deripaska and Paul Manafort, and (2) a memo allegedly written by Manafort in 2005 proposing work that Manafort could perform to advance the interests of the Russian government. The challenged article expressly relied upon these documents, and claimed to possess them, but notably did not publish them. Plaintiff has alleged that Defendant mischaracterized, at minimum, the terms of the 2006 contract as being linked or related to the proposals outlined in the 2005 memo. If Plaintiff is correct, that mischaracterization would have been deliberate, and documents in Defendant's possession are therefore "highly probative to [plaintiff's] burden of showing falsity" under the Anti-SLAPP Act. *Wornick*, 264 F.3d at 846-47.

Discovery of these two documents would be likely to enable Plaintiff to defeat the AP's Special Motion because it would provide Plaintiff with evidence that the AP willfully mischaracterized critical documents that it possessed and described but declined to publish, which would demonstrate a likelihood of success on the merits of Plaintiff's defamation claim. *See, e.g., Zimmerman v. Al Jazeera Am., LLC*, No. 16-CV-0013 (KBJ), 2017 WL 1207416, at *16 (D.D.C. Mar. 31, 2017) (noting that "the reckless disregard standard for establishing actual malice can be satisfied where the defendant 'in fact entertained serious doubts as to the truth of his publication[,]' and, significantly for present purposes, a plaintiff can demonstrate this by

proffering evidence that indicates that the defendant had 'obvious reasons to doubt the veracity of the informant or the accuracy of his reports'" (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 732 (1968)). Further, there is no plausible argument that permitting discovery of these *two* documents, plainly in the AP's possession, would burden the AP in any way. Thus, because Plaintiff "has not had the opportunity to discover information that is essential to its opposition," *Wornick*, 264 F.3d at 846, this Court should require the AP to produce the contract and the memo before evaluating the merits of the Special Motion.

III. EVEN IF THE COURT APPLIES THE D.C. ANTI-SLAPP ACT SPECIAL MOTION TO DISMISS PROVISION, DEFENDANT'S MOTION SHOULD BE DENIED

The Special Motion to Dismiss Provision of the D.C. Anti-SLAPP Act is triggered only if the claim arises "from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). If the Act is triggered, and a defendant "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," then the burden shifts to Plaintiff to show he is "likely succeed on the merits." *Id.* § 16-5502(b). Even in the event that this court does find the Anti-SLAPP Act applies in federal court, and that further discovery or briefing is not warranted,[15] it should dismiss Defendant's motion because Plaintiff is likely to succeed on the merits. Plaintiff hereby incorporates by reference Sections I-IV of its Memorandum in Opposition to the Associated

[15] As Plaintiff is justified in relying upon circuit precedent holding that the D.C. Anti-SLAPP Act is inapplicable in federal court, Plaintiff respectfully requests that this court provide an additional opportunity to respond to Defendant's motion in the event that this court finds the Anti-SLAPP Act does apply. *See Torres*, 115 F.3d at 1036 ("But just as we 'leave to [the Supreme Court] the prerogative of overruling its . . . decisions, district judges, . . . are obligated to follow controlling circuit precedent until either we, sitting en banc, or the Supreme Court, overrule it."). Furthermore, as the discovery provisions of the Anti-SLAPP Act are in conflict with those of Rule 56, *see supra* Section II.C., Plaintiff requests an opportunity to take discovery before being required to submit its amended Opposition to Defendant's Special Motion to Dismiss.

Press's Motion to Dismiss, upon which he relies in order to establish the likely success of his claim.

CONCLUSION

This court should therefore decline to apply the D.C. Anti-SLAPP Act and dismiss Defendant's Special Motion to Dismiss. In the alternative, if this Court holds that the D.C. Anti-SLAPP Act does apply in federal court, Defendant's Motion should be deferred pending Plaintiff's request for discovery under the Act, denied because the Act is not triggered, or denied because Plaintiff's claim is likely to succeed on the merits.

Dated: August 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August 2017, I caused a true and correct copy of the foregoing Opposition to Defendant's Special Motion To Dismiss The Complaint Pursuant To The D.C. Anti-Slapp Act to be served via the Court's ECF system upon counsel for the Defendant.

/s/ Jonathan Sherman
Jonathan Sherman

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

OLEG V. DERIPASKA

Plaintiff,

v.

THE ASSOCIATED PRESS,

Defendant.

Case No. 1:17-cv-913-ESH

[PROPOSED] ORDER

Before this Court is the Plaintiff's Opposition to the Defendant's Special Motion to Dismiss the Complaint Pursuant to the D.C. Anti-SLAPP Act. Having reviewed the Defendant The Associated Press's Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act and the Plaintiff's Opposition, the Court DENIES Defendant's Motion.

IT IS SO ORDERED.

DATED: _____ By: _____

Hon. Ellen S. Huvelle
UNITED STATES DISTRICT JUDGE

Files to Move to JWICS

From: (b)(6), (b)(7)(C)
To: TFIN Service Desk <tfinservicedesk@treasury.gov>
Date: Mon, 19 Mar 2018 16:09:38 -0400
Attachments: ViewDocument - OD.pdf (118.04 kB); ViewDocument - OD2.pdf (3.58 MB)

Can I get these files moved to JWICS too please? Thank you!!

(b)(6), (b)(7)(C)
Sanctions Investigator
Office of Foreign Assets Control
UNCLASS: (b)(6), (b)(7)(C)
TSVOIP: (b)(6), (b)(7)(C)
SIPR: (b)(6), (b)(7)(C)
JWICS: (b)(6), (b)(7)(C)

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From: (b)(6), (b)(7)(C)
To: TFIN Service Desk <tfinservicedesk@treasury.gov>
Date: Tue, 20 Mar 2018 11:05:03 -0400
Attachments: show_temp - GM Deposition.pdf (2.57 MB); ViewDocument - WS Statement.pdf (847.35 kB); ViewDocument - OD Deposition.pdf (1.33 MB)

Can I get the attached files moved to JWICS please? Thank you.

(b)(6), (b)(7)(C)

Bates No. 2018-06-192: 001519
Pending Consultation with
Another Component of
Treasury and the
Department of State

RE: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

From: (b)(6)
To: (b)(6)
Date: Fri, 06 Apr 2018 08:56:32 -0400

Face palm

From: (b)(6)
Date: April 6, 2018 at 8:55:24 AM EDT
To: (b)(6)
Subject: RE: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

Hey guys,

I'm seeing confusion from people on twitter regarding Treasury's headline saying "Designates…" instead of sanctioned. People not knowing what designates mean, etc. Just thought I'd flag that in case it matters.

(b)(6)

From: (b)(6)
Sent: Friday, April 06, 2018 8:29 AM
To: _DL_OFAC Russia <_DL_OFACRussia@do.treas.gov>
Subject: Fwd: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

We're on.

From: Timothy Ash (BLUEBAY ASSET MANAGE) (b)(6)
Date: April 6, 2018 at 8:25:35 AM EDT
Subject: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

Wow...that's going to hurt..

Sent from Bloomberg Professional for iPhone

U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin
2018-04-06 12:15:33.75 GMT

By Kasia Klimasinska
(Bloomberg) -- U.S. Treasury Dept sanctions Russian individuals, officials, companies and state-owned firms, according to website.
* Individuals sanctioned include Oleg Deripaska, Suleyman Kerimov, Kirill Shamalov, Viktor Vekselberg
* Officials sanctioned include Andrey Akimov, Andrey Kostin, Alexey Miller

To contact the reporter on this story:
Kasia Klimasinska in Washington at kklimasinska@bloomberg.net
To contact the editor responsible for this story:
Derek Wallbank at dwallbank@bloomberg.net

Re: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

From: "Swindells, Felicia" (b)(6)
To: (b)(6)
Cc: (b)(6)
Date: Fri, 06 Apr 2018 09:10:15 -0400

Indeed. (b)(5)
(b)(5)

From: (b)(6)
Date: April 6, 2018 at 8:29:25 AM EDT
To: _DL_OFAC Russia <_DL_OFACRussia@do.treas.gov>
Subject: Fwd: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

We're on.

From: Timothy Ash (BLUEBAY ASSET MANAGE) (b)(6)
Date: April 6, 2018 at 8:25:35 AM EDT
Subject: (BFW) U.S. Sanctions Russians Including Deripaska, Kerimov, Kostin

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To contact the editor responsible for this story:
Derek Wallbank at dwallbank@bloomberg.net

FW: Deripaska share plunge acts as warning to Russian tycoons

From: (b)(6)
To: (b)(6)
Date: Tue, 10 Apr 2018 10:50:35 -0400

Official
UNCLASSIFIED

From: (b)(6)
Sent: Monday, April 09, 2018 5:28 PM
To: (b)(6)
Subject: Deripaska share plunge acts as warning to Russian tycoons

Another interesting article from the Financial Times, https://www.ft.com/content/49e3b7d4-39af-11e8-8b98-2f31af407cc8.

(b)(6)
(b)(6)
Treasury Section
U.S. Embassy – Riyadh
Desk Number: (b)(6)
State NIPR: (b)(6)
State SIPR:
Treasury Cell Phone: (b)(6)

Official
UNCLASSIFIED

Bates Nos. 2018-06-192: 001523 - 001525
Withheld in Full Pursuant to FOIA Exemption (b)(7)(E) with (b)(6) and (b)(7)(C) Applied in Part

Bates Nos. 2018-06-192:
001526 - 001532
Pending Consultation with
Other Components of Treasury

Bates Nos. 2018-06-192: 001533 - 001542
Pending Consultation with Another Component of Treasury

Bates Nos. 2018-06-192:
001543 - 001545
Pending Consultation with the
Department of State

Bates Nos. 2018-06-192:
001546 - 001558
Pending Consultation with
Other Components of Treasury

Arkady Rotenberg's partners hired US lobbyists

From: (b)(6)
To: (b)(6) (b)(6)
Cc: (b)(6)
Date: Thu, 19 Apr 2018 05:49:20 -0400

I thought all of you would appreciate the highlighted portions of this translated RBC article.

(b)(6)

10:35 / 19.04.2018

Arkady Rotenberg's partners hired US lobbyists

Co-owners of Sheremetyevo airport Alexander Ponomarenko and Alexander Skorobogatko hired a company to lobby their interests in the United States. Both businessmen are long-time partners of sanctions-targeted Arkady Rotenberg and his son Igor.

In search of shield

Russian billionaires Alexander Skorobogatko and Alexander Ponomarenko hired professional lobbyists in the US, after they got into the so-called 'Kremlin list' of the US Treasury Department in January. The corresponding notice from lobbying firm *Qorvis MSLGROUP* appeared last week in a special base of the US Senate.

The services this company will provide to Russian businessmen are rather abstract: "Business interests [of Skorobogatko and Ponomarenko] and relations with the United States."

Skorobogatko and Ponomarenko did not respond to *RBC's* requests passed through the assets controlled by them. A spokesperson of *Qorvis MSLGROUP* also left *RBC's* request unanswered.

Businessmen turned to the lobbyists as physical persons, but the address field in the notification of *Qorvis MSLGROUP* indicates the location of *TPS Real Estate* company owned by holding *TPS Real Estate* , the beneficiary of which, apart from them, is Igor Rotenberg. He got on the US Treasury Sanctions List on April 6.

The ' *Kremlin list* ', which includes Skorobogatko and Ponomarenko, can be used for preparing sanctions against Russian oligarchs. April 6, the US imposed the first sanctions on those featured in this report - Oleg Deripaska, Viktor Vekselberg, Suleyman Kerimov, Andrey Skoch, Kirill Shamalov and Vladimir Bogdanov. Last week saw the United States announcing new sanctions against Russia. However, so far President Donald Trump has put them on the backburner.

Skorobogatko and Ponomarenko's interests will be lobbied by Matt Lauer, who in the early 2000s had experience in the Commission for Public Diplomacy under the US Department of State, and Grace Fenstermaker. The same *Qorvis MSLGROUP's* employees represent the interests of Yamal *LNG project* , controlled by *NOVATEK* .

"It is hard to say why the decision to attract lobbyists was made. It is absolutely impossible to protect oneself from sanctions by contacting any consultants," - said *RBC* partner of *Herbert Smith Freehills* , Alexey Panich. In his opinion, it is likely that the businessmen merely want to find out what OFAC sanction bureau is guided by when it blacklists names, or to consult on how to "reduce possible damage in case of getting on the sanctions list".

Sergey Glandin, an international lawyer studying the sanctions issue, also noted earlier that the idea with lobbying was "vain" and "even harmful." "If you read Art. 241 of CAATSA, it outlines the criteria for getting under sanctions in black and white - the size of wealth and the proximity to the regime of Vladimir Putin. There are quite smart people in OFAC, they carefully collect

information about a potential listee and, of course, will notice the desire to prove non-involvement in the ruling regime, - Glandin pointed out, - and it is useless to influence OFAC through lobbying anyway: "this is money wasted in vain."

Business in the crosshairs

Skorobogatko and Ponomarenko were not the first from the ' *Kremlin list* ' to try bringing American lobbyists. As *RBC* penned in March, the owner of *SPI Group* alcohol company, Yury Shefler, and the co-owner of technological *IPG Photonics* , Valentin Gapontsev, also appealed to American lobbying firms in order to understand how their business will be affected by inclusion in this list.

Shefler hired lobbying firm *Covington & Burling* , and Gapontsev's *IPG Photonics* corporation, based in Massachusetts, - lobbying firm *McLarty Inbound* .

However, the situation of Shefler and Gapontsev is a far cry from the one of Ponomarenko and Skorobogatko. The gist is that Shefler has not lived in Russia for a long time (since 2002) and nothing is known about his new business interests here. The reason for leaving the country was a criminal case against him - the businessman was accused of smuggling alcohol products, organizing a criminal community, and also illegally using the trademarks of *Stolichnaya* and *Moskovskaya* , the right to issuance of which belongs to Russia. His *SPI Group* oversees sales of *Stolichnaya* vodka in the largest markets - the US, Canada, Australia, Switzerland, the UK and other countries.

Gapontsev also ceased to live in Russia a long time ago, although he has not broken off contacts with it – in 2011 he was awarded the State Prize in the field of science and technology, he continues to hold a chair in the Department of Photonics at MIPT. However, this year Forbes magazine for the first time transferred Gapontsev from Russian billionaires to the US ones with an estimated fortune of $3 billion. "The American office of the magazine appealed to their counterparts from Forbes Russia with a proposal to take Gapontsev to the American part of the list, arguing that he has long lived in USA, is an American citizen, has an American business", - told a source of *Interfax* .

https://en.crimerussia.com/oligarchs/arkady-rotenberg-s-partners-hired-us-lobbyists/

Bates Nos. 2018-06-192: 001561 - 001563
Withheld in Full Pursuant to FOIA Exemption (b)(7)(E) with (b)(6) and (b)(7)(C) Applied in Part

If asked

From: andrea.gacki (b)(6)
To: "Gacki, Andrea" (b)(6)
Date: Sun, 22 Apr 2018 16:39:32 -0400

(b)(5)

IF ASKED -

From: (b)(6)
To: (b)(6)
Date: Sun, 22 Apr 2018 19:30:07 -0400

(b)(5)

Bates Nos. 2018-06-192:
001566 - 001568
Pending Consultation with the
Department of State

Deripaska quote

From: (b)(6)
To: (b)(6)
Date: Tue, 24 Apr 2018 06:59:20 -0400

Deripaska quote from FT: https://www.ft.com/content/d96aa8ac-a1f9-11dd-a32f-000077b07658 ("Close to the Wind: Russia's Oligarchs).

Official
UNCLASSIFIED

RE: Weekly

From: (b)(6)
To: (b)(6)
Date: Wed, 02 May 2018 15:00:54 -0400

Thanks, (b)(6). Your entry on the delisting piece looks fine to me.

From: (b)(6)
Sent: Wednesday, May 02, 2018 2:59 PM
To: (b)(6)
Subject: Weekly

(b)(6)

I have completed my weekly. Attaching so you can avoid double work. If you have a moment, could you also take a look at the entry in the delisting section on the Deripaska-related delisting requests and think if you have anything to add?

Thanks
(b)(6)

RE: Letter of Engagement regarding Deripaska

From: (b)(6)

To: (b)(6) (b)(6) (b)(6)

Date: Mon, 07 May 2018 19:45:02 -0400

Attachments: Deripaska letter of engagement.pdf (1.59 MB)

Letter of Engagement from Ferrari regarding Deripaska.

FW: RE: Letter of Engagement regarding Deripaska

From: (b)(6)

To: "Tuchband, Matthew" (b)(6)

Date: Tue, 08 May 2018 10:26:05 -0400

Attachments: Deripaska letter of engagement.pdf (1.59 MB)

FYI

From: (b)(6)
Sent: Monday, May 7, 2018 7:45 PM
To: (b)(6)
(b)(6)
Subject: RE: Letter of Engagement regarding Deripaska

Letter of Engagement from Ferrari regarding Deripaska.

Bates Nos. 2018-06-192: 001573 – 001582 Submitter Notice Process Initiated

Bates Nos. 2018-06-192:
001583 - 001597
Pending Consultation with the
Department of State

Re: In 2nd floor conf room

From: (b)(6)
To: (b)(6)
Date: Wed, 23 May 2018 15:09:19 -0400

I've made him do the deripaska calls, so I've expended all my capital there this month.

From: (b)(6)
Date: May 23, 2018 at 3:08:24 PM EDT
To: (b)(6)
Subject: Re: In 2nd floor conf room

You should have had Davin handle this call.

From: (b)(6)
Date: May 23, 2018 at 3:03:27 PM EDT
To: (b)(6)
Subject: In 2nd floor conf room

We are starting.

Bates Nos. 2018-06-192: 001599 - 001602
Pending Consultation with Another Component of Treasury

Bates No. 2018-06-192: 001603
Submitter Notice Process Initiated