In the
District of Columbia
Court of Appeals

GERMAN KHAN, *et al.*,

Appellants,

v.

ORBIS BUSINESS INTELLIGENCE LIMITED *et al.*,

Appellees.

ON APPEAL FROM CASE NO. 2018 CA 002667 B IN THE DISTRICT OF COLUMBIA SUPERIOR COURT, CIVIL DIVISION, THE HONORABLE ANTHONY C. EPSTEIN, JUDGE PRESIDING

BRIEF OF APPELLEES

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Rule 26.1 Disclosure Statement:	Orbis Intelligence Limited's parent company is Orbis Business International Limited. No publicly held corporation owns 10% or more of the stock of either company.

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JURISDICTIONAL STATEMENT

This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF THE ISSUES

1. Whether the Superior Court correctly awarded fees under the D.C. Anti-SLAPP Act (or "the Act") after Defendants succeeded on their special motion to dismiss.

2. Whether the Superior Court correctly rejected Plaintiffs' argument that the Act's fee award provision is unconstitutional.

3. Whether the Superior Court correctly adhered to D.C. precedent in enforcing the Act and rejecting Plaintiffs' late argument that the Act is void under D.C. Code § 11-946.

STATEMENT OF FACTS

This case, which was filed in April 2018 and dismissed just four months later, has taken a very long path to arrive at the "speedy end" mandated by the D.C. Anti-SLAPP Act and this Court's binding precedent. App'x at 10; *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1227 (D.C. 2016). In August 2018, on Defendants' successful special motion to dismiss under § 16-5502 of the D.C. Anti-SLAPP Act, the Superior Court correctly determined the lawsuit to be a SLAPP and issued a well-reasoned order dismissing the case. App'x at 32. Plaintiffs immediately appealed. App'x at 4. On June 18, 2020, this Court affirmed the Superior Court's identification of the case as a SLAPP and attendant dismissal. App'x at 58. Plaintiffs then sought review of the United States Supreme Court through a petition for writ of certiorari.

The Supreme Court denied that petition on January 11, 2021, cementing the Superior Court's affirmed, just, and correct dismissal of the claims two and a half years prior.

But the case is still not over. Admonished by the Superior Court to reach agreement on a fee award to avoid burdening the Court with further briefing and the imposition of so-called fees on fees (*i.e.*, the amount Defendants would have to expend in pursuit of the statutory fee award), Plaintiffs proceeded to contest a fee award in any amount. Over Plaintiffs' opposition, the Superior Court granted Defendants' motion for a fee award according to § 16-5504 of the Act and well-settled D.C. law. App'x at 283. Plaintiffs then noticed an appeal of that award, which is the instant case. App'x at 7. Because the Superior Court's judgment on the first fee motion did not include the fees incurred in litigating the fees motion, Defendants moved separately to recover "fees on fees" – and Plaintiffs once again opposed an award in any amount. The Superior Court awarded the fees on fees.[1] App'x at 311. Plaintiffs noticed another appeal, which has been consolidated into this case.

SUMMARY OF THE ARGUMENT

Pursuant to the D.C. Anti-SLAPP Act and the law of this District, the Superior Court correctly awarded Defendants the fees that they have incurred as a result of

[1] Defendants were awarded $440,538.58 in attorneys' fees and an additional $29,807.50 for the fees incurred in litigating the first fee award. Plaintiffs did not contest the reasonableness of those amounts.

prevailing on their special motion to dismiss this SLAPP. First, successful litigants are presumptively entitled to a fee award (and fees on fees) under the D.C. Anti-SLAPP Act, unless the Court, in its discretion, finds that "special circumstances" apply that would render an award unjust. The Superior Court did not abuse its discretion in finding no such "special circumstances" here. Plaintiffs' *ex post facto* reliance on extrajudicial materials cannot command a different result. Second, the Superior Court correctly held that the D.C. Anti-SLAPP Act is constitutional, as it and its fee-shifting provision have been consistently enforced by this Court. Third, the Superior Court correctly held that Plaintiffs' late wholesale attack on the validity of the D.C. Anti-SLAPP Act was waived, and in any event, without merit because D.C. Code § 11-946 does not prohibit the Court from enforcing the D.C. Anti-SLAPP Act, including its fee shifting provision.

STATEMENT OF STANDARD OF REVIEW

Under established D.C. law, this Court reviews a Superior Court's decision to grant a fee award under an abuse of discretion standard. *See Malik Corp. v. Tenacity Grp., LLC*, 961 A.2d 1057, 1060 (D.C. 2008) ("We review the trial court's award of attorneys' fees for abuse of discretion, with the caveat that the trial court's decision will only be set aside after a 'very strong showing' of abuse of discretion."); *see also Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016) (*Doe II*) ("a successful movant under § 16-5503 is entitled to reasonable attorney's fees in the ordinary course — *i.e.*,

presumptively — unless special circumstances in the case make a fee award unjust"). In certain places in their brief, Plaintiffs concede this standard. *See* Br. at 15 (noting that the Court of Appeals held in *Doe II* that fee awards under the D.C. Anti-SLAPP Act are discretionary); Br. at 22, n. 6 ("the Act provides for a discretionary award of fees"); Br. at 37 ("Whether to award the fees a party has incurred in filing a motion for attorneys' fees is discretionary.").

However, Plaintiffs nevertheless advocate for a *de novo* review standard that has no application in this appeal. Here, the issue is not whether the Superior Court had the authority to award fees, as the D.C. Anti-SLAPP Act plainly provides for such an award. D.C. Code § 16-5504 ("The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees."). To get around the abuse-of-discretion standard for the Superior Court's discretionary decision, Plaintiffs frame their appeal as a wholesale attack on the constitutionality and validity of the Anti-SLAPP statute. But this Court should see the appeal for what it is: a straightforward assessment of whether the Superior Court abused its discretion in rejecting Plaintiffs' unusual "special circumstances" pitch and awarding attorneys' fees to the prevailing Defendants pursuant to the D.C. Anti-SLAPP Act.

As set forth below, the constitutional and legal questions Plaintiffs raise have already been answered by this Court. Thus, the Court need only consider whether

the Superior Court abused its discretion in finding no special circumstances to overcome the presumption in favor of a fee award. *See Pasternack v. McCullough*, 65 Cal. App. 5th 1050, 1055 n.4, 280 Cal. Rptr. 3d 538, 542 n.4 (2021) (declining to review anti-SLAPP fee award under *de novo* standard because "[t]he legal question posited by Pasternack has been answered by the California Supreme Court and the Courts of Appeal. Given this authority, we need only consider whether the trial court abused its discretion").

ARGUMENT

I. The Superior Court Correctly Awarded Fees to Defendants.

The Superior Court dismissed the underlying lawsuit against Defendants as a SLAPP, and this Court affirmed that decision. It is the law of this District that a successful movant under the D.C. Anti-SLAPP Act "is entitled to reasonable attorney's fees in the ordinary course — *i.e.*, presumptively — unless special circumstances in the case make a fee award unjust." *Doe II*, 133 A.3d at 571. Pursuant to the D.C. Anti-SLAPP Act, Judge Epstein awarded Defendants their fees.

As the Superior Court stated before Plaintiffs opposed Defendants' fee award motion, District law also entitles Defendants to the fees incurred in pursuing the initial fees motion, which flow from the award of fees under the Act. *See Gen. Fed'n of Women's Clubs v. Iron Gate Inn, Inc.*, 537 A.2d 1123, 1129 (D.C. 1988) ("The law is well established that, when fees are available to the prevailing party, that party

may also be awarded fees on fees, *i.e.*, the reasonable expenses incurred in the recovery of its original costs and fees."); *see also Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (noting that "time spent litigating the fee request is itself compensable"); *Khan v. Orbis Bus. Intelligence. Ltd.*, No. 2018-CA-002667-B, p. 1 (D.C. Super. Ct. Feb. 2, 2021) (informing the parties that "the Court expects [them] to reach agreement on defendants' reasonable costs of litigation" and citing "well-established" law allowing for recovery of fees on fees) (App'x at 100). Despite the Superior Court's encouragement to reach a consensus on fee reimbursement and despite the clear law favoring a fee award, Plaintiffs opposed an award in any amount, forcing Defendants to incur additional attorneys' fees in litigating the fee award issue. The Superior Court duly granted Defendants' "fees on fees" motion as well. As the prevailing party in an anti-SLAPP case, Defendants are entitled to recoup their fees and fees on fees from Plaintiffs.

a. No "Special Circumstances" Exist to Make the Award Unjust

Plaintiffs lost on Defendants' special motion to dismiss—a loss that a unanimous panel of this Court affirmed in a thorough opinion. *See Khan v. Orbis Bus. Intelligence. Ltd.*, No. 2018-CA-002667-B, p. 22 (D.C. Super. Ct. Aug. 20, 2018) (finding Plaintiffs "have not offered evidence that their claims are likely to succeed on the merits") (App'x at 53); *Khan v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 499 (D.C. 2020) (affirming dismissal of case and finding appellants'

arguments "unpersuasive") (App'x at 60). The arguments and extrajudicial materials Plaintiffs offer to avoid fee-shifting fall short of the high showing D.C. law requires to render a fee award "unjust."[2] *Doe II*, 133 A.3d at 571.

As Judge Epstein held, this defamation case was brought by three Russian oligarch billionaire Plaintiffs who should have known they would be at least limited public figures, subject to the heightened actual malice standard that is constitutionally mandated in U.S. courts. *See Khan v. Orbis Bus. Intelligence. Ltd.*, No. 2018-CA-002667-B, p. 7 (D.C. Super. Ct. Apr. 2, 2021) (App'x at 289) (noting that "when plaintiffs filed this case, it was, at a minimum, predictable that the Court would require them to provide actual malice"). As noted by the Superior Court, two of the three plaintiffs had previously been determined to be limited public figures under the law of this District in a prior unsuccessful defamation action they brought in a District court. *See OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 47 (D.D.C. 2005) ("Aven and Fridman are players on the world stage; hence, they are limited public figures not only in Russia, but in the United States as well."). In that case, Plaintiffs were warned that they "no doubt have the wherewithal to respond to erroneous publications through persuasion rather than litigation" and "[t]he First Amendment demands that they pursue that path." *Id*. at 57.

[2] This Court has never found special circumstances that would warrant denying fees to a successful anti-SLAPP defendant, and this case should not be the exception.

On this record and given the affirmed dismissal of Plaintiffs' failed defamation claims, the Superior Court awarded fees to the successful moving Defendants, holding that granting the special motion to dismiss "was not a particularly close call." *See Khan,* No. 2018-CA-002667-B, p. 7 (App'x at 289). The Court "exercise[d] its discretion to conclude that the circumstances cited by plaintiffs are not sufficient to overcome the presumption that defendants are entitled to reasonable litigation costs for their successful motion to dismiss[.]" *Id.* at pp. 6-7 (App'x at pp. 288-89).[3]

In finding no special circumstances to warrant disturbing the fee award presumption, Judge Epstein correctly adhered to *Doe II*, where this Court reversed the trial court's determination that fee awards under the Act were available only for cases filed "'with [the] intent to inflict costly litigation fees, bring a frivolous suit, or . . . stifle speech.'" *Doe II*, 133 A.3d at 573. There, this Court found reversible error in the trial court's denial of fees based on the trial court's view that the claim

[3] In another case, the Superior Court identified factors that could potentially amount to "special circumstances" under the Anti-SLAPP Act. *See Toufanian v. Shukes*, No. 2020 SC3 000003 (D.C. Super. Ct. Feb. 28, 2020). There, an unsuccessful plaintiff was proceeding pro se and had voluntarily dismissed his suit before the special motion was decided. *Id.* at 5. Those circumstances stand in stark contrast to the imminently well-funded sophisticated Plaintiffs here that have pursued this SLAPP all the way to the U.S. Supreme Court and have opposed a fee award in any amount, despite the urging of the Superior Court to resolve the issue, leading to the instant appeal.

was non-frivolous, plausible, genuinely asserted, and not "'a classic SLAPP suit.'" *Doe II*, 133 A.3d at 572–73 (quoting trial court).

Despite this clear precedent, Plaintiffs reassert the same erroneous standards flatly rejected by this Court in *Doe II*. Plaintiffs ask this Court to consider their motives as genuine and to re-litigate the merits of their unsuccessful (and constitutionally infirm) defamation claim. Plaintiffs cite to no anti-SLAPP authority to support their position. None of the Plaintiffs' so-called "special circumstances" make the fee award unjust, much less warrant a reversal of the Superior Court's fee orders as an abuse of discretion.

First, as Judge Epstein correctly found, the post-dismissal outcome from the United Kingdom's High Court of Justice, Queen's Bench Division under the U.K.'s Data Protection Act of 1998 (the "U.K. Data Act Case"), does not change the affirmed success of Defendants' special motion to dismiss in this case, nor does it amount to a "special circumstance" to render the presumptive fee award "unjust" under D.C. law.[4] The U.K. Data Act Case was a separate lawsuit Plaintiffs brought against Defendants under a data privacy statute in a different country that does not adhere to the First Amendment or U.S. Constitution. Courts in this District are bound to follow the U.S. Constitution in this defamation case under District of

[4] The U.K. Data Act Case was decided on August 7, 2020, two years after the Superior Court's dismissal of this case and two months after this Court's affirmance of that decision.

Columbia law, and that is exactly what the Superior Court did in dismissing the case under the Act, and this Court did in affirming that decision. That a foreign court applying foreign statutory law later found limited liability under unconstitutional fault standards should not change the application of firmly established District of Columbia law in this case.[5]

The federal SPEECH Act underscores the impropriety of relying on the U.K. Data Act Case to change the outcome of a free speech case in this District under D.C. law and the U.S. Constitution. *See* SECURING THE PROTECTION OF OUR ENDURING AND ESTABLISHED CONSTITUTIONAL HERITAGE (SPEECH) ACT, Pub. L. No. 111-223, 124 Stat. 2380, 2381-82 (codified at 28 U.S.C. § 4102 (2010)) (forbidding any domestic court from enforcing a foreign judgment for defamation unless the foreign adjudication "provided at least as much protection for freedom of speech and press . . . as would be provided by the first amendment to the Constitution of the United States," or if the defendant "would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States."). Under the SPEECH Act, U.S. courts cannot enforce or give

[5] Plaintiffs' desired outcome – reversal of the successful Defendants' fee award – would turn the policies of the Anti-SLAPP Act on its head, rewarding Plaintiffs' litigiousness in pursuing not one, but multiple, actions in multiple forums based on Defendants' exercise of the same constitutionally protected free speech and public participation. *Mann*, 150 A.3d at 1239 (recognizing the Act's purpose of "deter[ing] meritless claims filed to harass the defendant for exercising First Amendment rights").

effect to a foreign judgment that was obtained under defamation laws without American constitutional free speech protections. This is especially true with respect to British jurisprudence, which has no First Amendment. *See Dow Jones & Co. v. Harrods*, 237 F. Supp. 2d 394, 421–22 (S.D.N.Y. 2002) (discussing the differences between British and American defamation law in a declaratory judgment action sought to halt a London defamation suit and holding, "the United States has a profound interest in fostering its broad concept of First Amendment freedoms, and safeguarding the freest exercise of those fundamental rights within the United States by all persons accorded the protection of American law"). Judge Epstein was right to decline Plaintiffs' request to ignore the Court's constitutional duties and embrace findings of an unamerican court under a novel application of complex foreign data privacy legislation.[6]

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[6] The U.K. Data Act Case was hardly the sweeping legal and moral victory that Plaintiffs present to this Court. Mr. Justice Warby found no liability under the Data Privacy Act for any of the statements in CIR 112 with the single exception of the assertion that Fridman and Aven "used Mr. Oleg Govorun as a 'driver' and 'bag carrier' to deliver large amounts of illicit cash" to then-Deputy Mayor Putin in the 1990s. App'x 183. As to the remainder of the content of CIR 112, the British court held:

> I have been persuaded that Mr. Steele took reasonable steps to ensure the accuracy of propositions (a), (b), (c), and (e) (favours, foreign policy advice, recent direct meeting and political bidding). None of these represents a grave allegation. Apart from the point about the meeting, these are all somewhat broad and generalised propositions. They are all credible on their face. The disclosures with which I am concerned

Second, the Superior Court abused no discretion in finding no unjust circumstances presented by the political and government reports submitted by Plaintiffs, who devote pages of their brief to highlighting excerpts from the 2019 Office of the Inspector General's "REVIEW OF FOUR FISA APPLICATIONS AND OTHER ASPECTS OF THE FBI'S CROSSFIRE HURRICANE INVESTIGATION" (the "IG Report") and a Senate Committee report.[7] *See* Br. at pp. 16-18. The Superior Court was not moved by the Plaintiffs' post-dismissal narrative, finding nothing there that would amount to "special circumstances" that could overcome the well-settled presumption in favor of a fee award. Judge Epstein correctly held that the Plaintiffs "did not, and still do not, have substantial evidence of actual malice" and "defendants' advocacy

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> are limited in number and scope. The purposes for which they were made were legitimate. . . . I accept that Mr. Steele knew and trusted his sources, and that he had reasonable grounds to trust them. It was reasonable for Mr. Steele to rely on the status and job of his sub-source and a history of proven reliability. It was not necessary for him to make detailed enquiries of his source about the reliability of his sub-source.

App'x at 227.

[7] Notably, these pages contain no legal citations, but smack of public relations spin. This Court rejected Plaintiffs' attempt to introduce the IG Report into this case when Plaintiffs' appeal of the underlying dismissal was pending. *Khan v. Orbis*, No. 18-CV-919, Order Denying Plaintiffs' Motion to Supplement the Record (June 18, 2020). As Defendants explained in their opposition to Plaintiffs' Motion to Supplement, none of the Plaintiffs is mentioned by name in the IG Report and the IG Report offers no criticism of the specific publication at issue here. *See* Response to Appellants' Motion for Leave to Supplement the Record (filed Feb. 4, 2020). Likewise, the cited Senate Committee report contains no statements addressing the report that was the subject of this unsuccessful action.

on issues of public interest is protected by the First Amendment[.]" *See Khan*, No. 2018-CA-002667-B, p. 7 (App'x at p. 289).

II. The D.C. Anti-SLAPP Act is Constitutional.

Having failed to show that Judge Epstein abused his discretion in failing to be persuaded by Plaintiffs' extrajudicial findings and publications, Plaintiffs seek to enlarge their argument (and change the standard of review) by making a constitutional challenge to the D.C. Anti-SLAPP Act—arguing that the Act's statutory fee-shifting somehow infringes on *their* First Amendment rights to petition the Courts with constitutionally invalid speech claims.[8] This argument fails *ab initio*. This Court has consistently enforced the Act, including the fee-shifting provision of § 16-5504(a). *See e.g.*, *Doe II*, 133 A.3d at 579*; Mann*, 150 A.3d at 1236 (first applying and upholding the constitutionality of D.C.'s Anti-SLAPP Act and affirming trial court's grant of special motion to dismiss); *Am. Studies Ass'n v. Bronner*, No. 19-CV-1222, 2021 D.C. App. LEXIS 279 (D.C. Sept. 30, 2021) (vacating denial of special motion to dismiss and thus approving the Act as recently as September 30, 2021). More specifically, this Court has upheld the Act's fee award provision and its application "without showing that the suit … was frivolous or

[8] There is a certain irony in Plaintiffs' argument bringing an affirmed SLAPP somehow violates their own First Amendment rights. *See Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) ("[A] SLAPP plaintiff's true objective is to use litigation as a weapon to chill or silence").

improperly motivated[.]" *Doe II*, 133 A.3d at 571; *contra* Br. at 27. The Superior Court followed the law in its well-reasoned holding that the Act does not impose an undue burden on Plaintiffs' First Amendment rights. *See Khan*, No. 2018-CA-002667-B, pp. 8-9 (App'x at p. 290-91) (holding that "factors specific to cases covered by the Anti-SLAPP Act justify the fee-shifting provision for defendants who prevail on special motions to dismiss" and noting that any deterrent effect this has on plaintiffs "is consistent with the Constitution").

Ignoring (or running away from) this District's well-established authority on the D.C. Anti-SLAPP Act, Plaintiffs take a wide constitutional swing far beyond the reaches of the Act, positing that the Court's exercise of the statutory fee-shifting provision "unduly burdens" them for filing suit in the first place.[9] Under Plaintiffs' theory, ***any*** legislative fee-shifting provision would be an unconstitutional restraint on First Amendment liberties unless the statute requires proof of bad faith or frivolousness.[10] The Seventh Circuit has rejected a similar argument with respect to

[9] Plaintiffs' constitutional challenge is procedurally defective in that Plaintiffs have failed to adhere to Rule 5.1, which required them to provide notice to the Attorney General before challenging the constitutionality of a District of Columbia statute.

[10] That sweeping theory would preclude recovery of fees under the various iterations of the Civil Rights Act (authorizing courts to award attorneys' fees to any prevailing party), the Fair Labor Standards Act (requiring courts to award reasonable attorneys' fees to successful plaintiffs), the Fair Housing Act (allowing any prevailing party to apply for attorneys' fees and costs), the Age Discrimination in Employment Act of 1967 (requiring courts to award reasonable attorneys' fees to successful plaintiffs), the Equal Credit Opportunity Act (authorizing the award of fees in "any successful

a challenge to fees awarded to prevailing plaintiffs under the Sherman Act, noting "that the proposition that the first amendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis. Fee shifting requires the party that creates the costs to bear them." *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 373 (7th Cir. 1987). The court continued:

> This is no more a violation of the first amendment than is a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press. Similarly, whoever wants to read the *New York Times* must buy a copy. The exercise of rights may be costly, and the first amendment does not prevent the government from requiring a person to pay the costs incurred in exercising a right.

Id.; *see also Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 62-65, 124 Cal. Rptr. 2d 507, 515 (2002) (finding that "[f]ee shifting simply requires the party that creates the costs to bear them" and noting "our conclusion will not allow the anti-SLAPP statute itself to become a weapon to chill the exercise of protected petitioning activity by people with legitimate grievances. The anti-SLAPP remedy is not available where a probability exists that the plaintiff will prevail on the merits"). While the First Amendment protects the right to access the courts, it does

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action"), the Voting Rights Act of 1965 (authorizing courts to award attorneys' fees to any prevailing party), the Americans with Disabilities Act of 1990 (authorizing attorneys' fees and costs to "the prevailing party" within the court's discretion), and the Individuals with Disabilities Education Act (authorizing the discretionary award of attorneys' fees to "the prevailing party who is the parent of a child with a disability").

not prohibit authorizing fees against a losing party. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 537 (2002) ("nothing in our holding today should be read to question … the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff").

The D.C. Anti-SLAPP Act's fee shifting mechanism has been specifically analyzed and endorsed by this Court. In articulating the framework for awarding fees under the Anti-SLAPP Act, *Doe II* drew analogies to Civil Rights Act cases that award fees to prevailing plaintiffs, absent special circumstances, and (like the Anti-SLAPP Act) set a higher bar for fees awarded to prevailing defendants. *See Doe II*, 133 A.3d at 577 (likening the fee-shifting provision in the Anti-SLAPP Act to frameworks utilized in *Newman v. Piggie Park Enters.*, 390 U.S. 400 (1968) and *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978)). That the Civil Rights law cited by this Court readily shifts fees to successful *plaintiffs* rather than to *defendants* is a distinction without a difference. The D.C. Anti-SLAPP Act's fee-shifting provisions and D.C. law presumptively award fees to a successful *moving* party. D.C. Code § 16-5504. As *Doe II* recognized, a successful anti-SLAPP movant is more akin to the Civil Rights Act *plaintiff* than a defendant because a plaintiff in a Title VII suit is "vindicat[ing] 'a policy that Congress considered of the highest priority,'" (*Christiansburg Garment Co.*, 434 U.S. at 418-19), and a movant seeking to dismiss a SLAPP is vindicating a

constitutional right to "advocacy on issues of public interest." D.C. Code § 16-5501; *see also Doe II*, 133 A. 3d at 577 (explaining that "[w]hile it is too much to equate the successful movant under D.C. Code § 16-5503 with the prevailing Civil Rights Act plaintiff … the Council's concern to protect SLAPP targets engag[ed] in political or public policy debates, [] by special motions and related reimbursement for litigation costs strongly suggests its intent to define the court's discretion as to fee awards in the same way as do federal laws protecting basic rights") (cleaned up). Thus, Plaintiffs' attempt to challenge the Act's fee award by pointing to their posture as "plaintiffs" gets them nowhere. As Judge Epstein noted, Plaintiffs' position is unsupported by law, and "[a]ll the Anti-SLAPP Act requires for a plaintiff to avoid liability for a prevailing defendant's litigation costs is that the plaintiff offer evidence to support its claims or demonstrate that targeted discovery is likely to unearth such evidence."[11] *See Khan*, No. 2018-CA-002667-B, p. 8 (App'x at 290); *see also Mann*, 150 A.3d at 1239 (explaining that "the special motion to dismiss in the Anti-SLAPP Act must be interpreted as 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

[11] Indeed, respondent-plaintiffs who prevail on an Anti-SLAPP special motion can receive fees if an anti-SLAPP motion is "frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504(b). This higher standard is analogous to the standard set for prevailing respondent-defendants in *Christiansburg Garment Co.*, 434 U.S. at 418-19.

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").

III. The D.C. Anti-SLAPP Act Does Not Violate D.C. Code § 11-946.

Judge Epstein correctly rejected Plaintiffs' Hail Mary argument that the entire D.C. Anti-SLAPP Act—not just the fee award provision—is void and unenforceable. Despite this Court's unwavering precedent enforcing the Act and its fee shifting provisions, Plaintiffs introduce the notion at this last stage of proceedings that the D.C. Anti-SLAPP Act is not enforceable under D.C. Code § 11-946. Br. at 33. That argument is waived. Three years into this litigation is not the time, for the first time, to argue that the entire Act is invalid.[12] Plaintiffs take issue with Judge Epstein's finding of waiver, arguing on appeal that they did not waive the argument, but merely were "silent" on the issue. Br. at 36. That is what a waiver is. *See, e.g.*, *Fleming v. Carroll Pub. Co.*, 621 A.2d 829, 837 (D.C. 1993) ("Where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand.") (quoting *Nw. Ind. Tel. Co. v.*

[12] This same argument was raised in a late-filed and disallowed amicus brief in Plaintiffs' previous appeal in this matter, and appears to be Plaintiffs' inspiration for the new argument. *Khan v. Orbis*, No. 18-CV-919, Order denying amicus' motion to file its lodged brief (June 22, 2020) (denying proffered amicus brief arguing that the passage of the Anti-SLAPP Act violated the Home Rule Act); Brief of Amicus Curiae, Don Padou, in Support of Appellants and in Support of Reversal of the Order of the Trial Court, pp. 1-3 (filed December 20, 2019).

FCC, 872 F.2d 465, 470 (D.C. Cir. 1989)). Plaintiffs' reliance on an out of context and inapposite quote from *Thomas v. United States*, 914 A.2d 1, 19 (D.C. 2006), is unavailing. *Thomas* deals with the waiver of a *criminal* defendant's *Sixth Amendment* right to confrontation, not a civil litigant's waiver of an issue in litigation briefing.

Additionally, Plaintiffs should get no traction on their waived argument by attempting to link it to the U.S. Court of Appeals for the D.C. Circuit's recent *Tah* opinion. *See Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021) (cert petition filed July 28, 2021). At the time Plaintiffs opposed Defendants' special motion to dismiss, multiple federal courts had declined to apply the D.C. Anti-SLAPP Act on the same rationale recently reiterated and affirmed in *Tah*.[13] Thus, *Tah* did not change the landscape to create a new argument for Plaintiffs that was not available when they opposed, lost, appealed, and lost again on the Defendants' special motion.

Finally, to the extent it must be addressed, the D.C. Anti-SLAPP Act does not violate D.C. Code § 11-946 because it does not modify the Federal Rules. The Act creates *substantive* rights that protect victims of SLAPPs. In its first opportunity to interpret, apply and enforce the Act in 2016, this Court expressly held that it creates

[13] *See Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015); *Fairbanks v. Roller*, 314 F. Supp. 3d 85 (D.D.C. 2018); *Libre by Nexus v. BuzzFeed, Inc.*, 311 F. Supp. 3d 149 (D.D.C. 2018); *Deripaska v. Associated Press*, No. CV 17-00913 (ESH), 2017 WL 8896059 (D.D.C. Oct. 17, 2017); *3M Co. v. Boulter*, No. 11-cv-1527 (RLW), 2012 U.S. Dist. LEXIS 151231 (D.D.C. Oct. 22, 2012).

substantive rights. *Mann*, 150 A.3d at 1226 (holding that "the 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") (cleaned up, emphasis added)); *see also Khan*, 229 A.3d at 502 (holding in this very case that "the Anti-SLAPP Act created *substantive* rights which accelerate the often lengthy processes of civil litigation.") (emphasis added). The Act's legislative history eliminates any doubt regarding this issue. *See* The Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18-893[14] ("Comm. Report") at 1 (explaining that the Act "incorporat[es] *substantive* rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP") (emphasis added); *id*. at 4 (explaining that the Act "provides a defendant to a SLAPP with *substantive* rights") (emphasis added). The Committee Report also shows that the Act was drafted to ensure that the Council had not exceeded its authority. *Id*. at 7. The Council was mindful of its boundaries when enacting the Act, and "the 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).

[14] The Committee Report is available at https://lims.dccouncil.us/downloads/LIMS/23048/Committee_Report/B18-0893-CommitteeReport1.pdf.

Because the Act does not modify the Federal Rules of Civil Procedure, it did not need to be approved by this Court prior to being applied in the Superior Court. Notwithstanding the D.C. Circuit's approach in *Abbas Group*, 783 F.3d at 1334 and *Tah*, 991 F.3d at 238, *this Court* has determined that the Act "is not redundant relative to the rules of civil procedure." *Mann*, 150 A.3d at 1238. And even if a conflict existed, the Act would prevail because a Superior Court rule cannot "supersede an inconsistent provision of the District of Columbia Code." *Ford v. Chartone, Inc.*, 834 A.2d 875, 880 (D.C. 2003). Judge Epstein did not err in following the holding of *Mann* and recognizing the Act's substantive nature.

Plaintiffs' last-ditch attempt to undermine the validity of the D.C. Anti-SLAPP Act is an effort to insert doubt where none exists and should be soundly rejected. *Umana v. Swidler & Berlin, Chtd.*, 669 A.2d 717, 723-24 (D.C. 1995) ("Statutes should generally be construed to avoid any doubt as to their validity"). This Court has repeatedly enforced and upheld the D.C. Anti-SLAPP Act. *See supra* at pp. 13-14. Plaintiffs offer no reason why this Court should reverse itself and invalidate the entire Act now on Plaintiffs' appeal of a fee award.

CONCLUSION

For the reasons stated above, this Court should AFFIRM the Superior Court's decision to award Defendants their fees pursuant to the D.C. Anti-SLAPP Act.

Dated: October 8, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on October 8th, 2021 a copy of the foregoing Appellees' Brief was filed with the Court via the Appellate E-Filing System pursuant to this Court's Administrative Order 1-18 and served electronically to

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Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

- An individual's social-security number
- Taxpayer-identification number
- Driver's license or non-driver's' license identification card number
- Birth date
- The name of an individual known to be a minor
- Financial account numbers, except that a party or nonparty making the filing may include the following:

(1) the acronym "SS#" where the individual's social-security number would have been included;
(2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
(3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(4) the year of the individual's birth;
(5) the minor's initials; and
(6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kelley C. Barnaby
Signature

21-cv-283; 21-cv-440
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