SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

CENTER FOR ADVANCED DEFENSE STUDIES,	:	
	:	**Civil Action No. 2014 CA 002273 B**
Plaintiff,	:	**Judge Thomas J. Motley**
	:	**Civ. II – Cal. 5**
v.	:	
KAALBYE SHIPPING INTERNATIONAL, *et al*.,	:	
Defendants.	:	

ORDER GRANTING PLAINTIFF/COUNTER-DEFENDANT'S
SPECIAL MOTION TO DISMISS

I. Introduction

This case arises out of a report titled "The Odessa Network: Mapping Facilitators of Russian and Ukrainian Arms Transfers" ("Report"). Plaintiff/Counter-Defendant Center for Advanced Defense Studies ("C4ADS") claims that it published the Report, in the exercise of its First Amendment rights, to cast light on the transportation of Russian-made arms to conflict areas of the world, a topic of significant importance to the public. Defendant/Counter-Plaintiff Kaalbye Shipping International ("Kaalbye"), a Ukraine-based shipping company, has filed a defamation claim against C4ADS, contending that false statements and implications in the Report damaged its reputation. In the instant Special Motion to Dismiss, C4ADS requests that this Court dismiss Kaalbye's defamation claims because the claims are an attempt to chill C4ADS' First Amendment right of advocacy on issues of public interest. C4ADS argues that "[t]he threat of protracted and expensive litigation has a real potential for chilling journalistic criticism and comment on public figures and public affairs." *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 592 (D.C. 2003) (internal quotation and citations omitted). After examining the law of the District of Columbia and conducting evidentiary hearings, this Court concludes that

Kaalbye's claims for defamation must be dismissed because C4ADS' report furthers the right of advocacy on an issue of public concern and defendant has failed to demonstrate that it is likely to succeed on the merits of its defamation claims.

A. Factual Background

In September of 2013,[1] C4ADS published its eighty-two-page Report, focusing on the prevalence of Russian-made arms in certain conflict areas of the world, such as Syria. Report at 11. In its Report, C4ADS, a nonprofit research organization,[2] examines a network of shipping companies centered in Odessa, Ukraine, that may be responsible for transporting weapons to those conflict areas. *Id*. Although some arms shipments are visible to the public, the Report operates on the assumption that those publicly-known shipments represent only the "tip of the iceberg." *Id*. The stated goal of the Report is to "empower global policymakers" by providing better information about the rest of that iceberg. *Id*. To that end, the Report documents a number of arms shipments from Russian and Ukrainian ports to various parts of the world. *See id*. at 12-30. In doing so, C4ADS also seeks to explore the utility of "open-source data," such as ship-based transponder data recorded in publicly-available Automatic Information System ("AIS") logs. *Id*. at 11. The Report focuses on a group of shipping and logistics companies[3] that it terms the "Odessa Network." Kaalbye is one of several organizations identified prominently in the Report.

[1] C4ADS published two versions of the Report, one on September 8, 2013, and then an amended version on September 19, 2013. This Court will cite only to the more recently published version. At the January 22, 2015, hearing, the parties agreed that the difference in the two versions of the report did not make a material difference in the issues to be determined in the instant motion to dismiss.

[2] C4ADS, in the year that it published the Report, operated on an annual budget of $675,000. *See* 2/9/15 Hr'g Tr. at 42:14-42:18.

[3] The Report uses the term "logistics companies" to mean companies that are involved in shipping and delivery, including companies that coordinate shipping, pack goods for shipping, unload shipping containers, etc.

B. Procedural History

On April 10, 2014, C4ADS filed a complaint, amended May 12, 2014, seeking an anti-suit injunction against Kaalbye, which would enjoin Kaalbye from making any claims of defamation against C4ADS relating to the Report.[4] In response to C4ADS' complaint, on June 4, 2014, Kaalbye filed its Answer with Counter Claim, setting out a claim for defamation against C4ADS for its publication of the Report.

On July 18, 2014, C4ADS filed a Special Motion to Dismiss, requesting dismissal of Kaalbye's counterclaim for defamation pursuant to the District of Columbia Anti-SLAPP Act of 2010 ("SLAPP Act"), D.C. Code § 16-5501, *et seq*. (2014). (The acronym "SLAPP" stands for "Strategic Lawsuit Against Public Policy.") On August 7, 2014, Kaalbye filed its Opposition, and on August 11, 2014, C4ADS filed its Reply. On August 26, September 2, October 1, and December 17, 2014, this Court heard oral arguments concerning the nature of this case, the proper interpretation of the SLAPP statute, and the necessity of an evidentiary hearing. Evidentiary hearings on the Special Motion to Dismiss were held on January 20, January 21, January 22, and February 9, 2015. On March 2, 2015, this Court heard oral arguments on issues raised at the evidentiary hearings.

In support of its Special Motion to Dismiss, C4ADS argues that Kaalbye cannot meet its burden under the SLAPP statute to show that its claim is likely to succeed on the merits, and therefore, Kaalbye's defamation claim should be dismissed. Specifically, C4ADS contends that Kaalbye is not likely to be able to show that the Report was published with "actual malice," a necessary element of a defamation claim made by a "public figure."

[4] In addition to seeking an anti-suit injunction, the Amended Complaint sets out claims for defamation and tortious interference with a contract by Kaalbye, Global Strategic Communications Group ("GSCG"), and Peter Hannaford. C4ADS also seeks punitive damages. CSCG and Peter Hannaford have been present at a number of the hearings relating to the Special Motion to Dismiss; however, the Special Motion to Dismiss does not apply to their claims.

In response, Kaalbye argues that the SLAPP statute only requires that a court test the sufficiency of the complaint under a *Twombly*/*Iqbal* standard.[5] Kaalbye contends that, at most, a court should review the motion under a summary judgment standard, pursuant to Super. Ct. R. Civ. P. 56. Alternatively, even if the court reviews the motion under a standard similar to the one used to decide motions for preliminary injunction under Super. Ct. R. Civ. P. 65, Kaalbye contends that it is still likely to succeed on the merits of its claim, and the Special Motion to Dismiss should be denied. Kaalbye submits that it is not a public figure for purposes of its defamation claim and therefore has no burden to prove actual malice. In the alternative, Kaalbye argues that even if this Court determines that it is a public figure, it can demonstrate by clear and convincing evidence that C4ADS acted with actual malice when it published its Report.

For the reasons stated in open court,[6] as well as the reasons stated herein, this Court concludes that (1) the SLAPP Act – once the moving party has shown that it is covered by the statute – requires the nonmoving party to demonstrate that its claim is likely to succeed on the merits after being provided an opportunity to present evidence to the court at an expedited hearing; (2) Kaalbye is a public figure for purposes of its defamation counterclaim and must prove malice by clear and convincing evidence; and (3) based on the evidence presented, Kaalbye is unlikely to succeed on the merits of its counterclaim. Therefore, this Court dismisses Kaalbye's counterclaim with prejudice.

II. The Anti-SLAPP Act of 2010

The DC Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq*. (2014), grants defendants engaged in protected actions immunity from suit; that is, it "explicitly protects the right not to stand trial." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1039 (D.C. 2014); *see also Farah v.*

[5] *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[6] Hearings relating to this motion were held on August 26, 2014, September 2, 2014, October 1, 2014, December 17, 2014, January 20, 2015, January 21, 2015, January 22, 2015, February 9, 2015, and March 2, 2015.

Esquire Magazine, *Inc*., 863 F. Supp. 2d 29, 36 (D.D.C. 2012) ("The D.C. Anti-SLAPP Act intentionally follows the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaged in protected actions." (internal quotations and citation omitted)). The SLAPP Act's immunity is triggered by the filing of 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 movant shows that the claim arises from such an act, "then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits." D.C. Code § 16-5502(b).

As an initial matter, the parties agree that the publication of the Report is an act in furtherance of the right of advocacy on issues of public interest.[7] Thus, C4ADS has met the first requirement of obtaining relief under the SLAPP Act, shifting the burden to Kaalbye. The Special Motion to Dismiss must be granted unless Kaalbye demonstrates that its claims are likely to succeed on the merits.

The parties disagree, however, on the effect of the words "likely to succeed on the merits." Kaalbye urges this Court to follow the lead of California, whose courts interpret California's corresponding statute to require a claimant to "satisfy a standard comparable to that used on a motion for judgment as a matter of law." *Price v*. *Stossel*, 620 F.3d 992, 1000 (9th Cir. 2010). The California standard requires a claimant to "demonstrate that the complaint is legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id*. In support of its argument, Kaalbye relies on three trial court opinions in the District of Columbia that have adopted the California standard for use with special motions to dismiss under the D.C. Anti-SLAPP Act. *See Boley v*. *Atl*.

[7] At the December 17, 2014, hearing, this Court asked Kaalbye's counsel whether C4ADS' prima facie burden under the SLAPP Act was at issue, noting "[c]learly they have met that part." 12/17/14 Hr'g Tr. at 53:17-54:4. Counsel responded, "I'm not going to argue that, Your Honor." *Id*. at 54:5-54:6.

Monthly Group, 950 F. Supp. 2d 249, 257 (D.D.C. 2013); *Abbas v. Foreign Policy Group, LLC*, 975 F. Supp. 2d 1, 13 (D.D.C. 2013); *Mann v. Nat'l Rev., Inc.*, No. 12-CA-8263 B, 2013 D.C. Super. LEXIS 7 (D.C. Super. Ct. Jul. 19, 2013).

C4ADS argues that the statutory language requires courts to do more than determine whether the allegations in the plaintiff's complaint can support a prima facie case. The standard endorsed by C4ADS calls for courts to conduct an evidentiary hearing, which appears to be similar to a preliminary injunction hearing under Super. Ct. R. Civ. P. 65. In support of its position, C4ADS emphasizes the fact-intensive analysis undertaken by the Court of Appeals in *Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014).

This Court finds C4ADS' argument more persuasive. First, the words "likelihood of success" as used in the SLAPP Act are clear. The statute places a burden on Kaalbye to prove a likelihood of success on the merits, not that its claims pass muster under the standards of Super. Ct. R. Civ. P. 12(b)(6) or Super. Ct. R. Civ. P. 56.

Even if this Court were to conclude that the statutory language is unclear, the rules of statutory construction support C4ADS' position. Where the legislature employs a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *1618 Twenty-First St. Tenants' Ass'n, Inc. v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003) (internal quotations and citation omitted). The Act's language, "likely to succeed on the merits," closely mirrors the language of the preliminary injunction standard, which requires that a movant show a "substantial likelihood that he will prevail on the merits," *Zirkle v. District of Columbia*, 830 A.2d 1250, 1255 (D.C. 2003) (quoting *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976)). Considering this similarity, this

Court must presume that the D.C. Council, at the very least, relied on the body of law governing the standard of proof in motions for preliminary injunctions when it enacted the SLAPP Act.[8]

Second, the SLAPP Act reflects a legislative judgment by the D.C. Council to ensure that those engaged in public policy debates are not intimidated or prevented from doing so. *See D.C. Council, Comm. on Pub. Safety and the Judiciary, Report on Bill 18-893* ("Comm. Report") at 1 (Nov. 18, 2010); *Burke*, 91 A.3d at 1039 n.11. (noting similarly that, in the context of a motion to quash under the D.C. Anti-SLAPP Act, "the Council made a legislative judgment in choosing to broadly protect anonymous speech"). Construing the statute to merely replicate the defensive tools already available under Super. Ct. R. Civ. P. 12(b)(6) or Super. Ct. R. Civ. P. 56 would thwart the plain legislative purpose of the SLAPP Act.[9]

The D.C. Council's purpose, to grant broad protection to advocacy on issues of public interest, is apparent in the Act's legislative history. For example, the American Civil Liberties Union ("ACLU"), in its written testimony before the Council, made the following remarks, commenting on the importance of limiting discovery in Anti-SLAPP proceedings:

> A case may exist in which a plaintiff could prevail on such a [defamation] claim after discovery but cannot show a likelihood of

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[8] In *Mann v. Nat'l Rev., Inc.*, the trial court reached the opposite conclusion, adopting the California standard under the reasoning that "[t]he legislative history of the Anti-SLAPP Act, an almost identical act to the California act, indicates that the California act served as the model for the District of Columbia's Anti-SLAPP Act." No. 12-CA-8263 B, 2013 D.C. Super. LEXIS 7, at *15 (D.C. Super. Ct. Jul. 19, 2013). In this Court's view, the similarity of the two statutes in fact cuts the other way. The California statute uses the term "probability that the plaintiff will prevail on the claim" to define its standard of review. Cal. Code Civ. P. § 425.16(b)(1). Instead of adopting this language verbatim, the D.C. Council opted for the language "likely to succeed on the merits." This conspicuous difference in language is magnified by the other similarities of the two statutes.

[9] As one court observed, the SLAPP Act sets a higher standard than Rules 12 and 56:

> Simply put, the Act allows a defendant on a preliminary basis to deal a deathly blow to a plaintiff's claim on the merits based either on the pleadings or on matters outside the pleadings. There is no question that the special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant's benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff's claim and by setting a higher standard upon the plaintiff to avoid dismissal.

3M Co. v. Boulter, 842 F. Supp. 2d 85, 102 (D.D.C. 2012) (Wilkins, J.).

> success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPS.

Comm. Report at Attachment 2.[10] As the ACLU's testimony illustrates, the Act's discovery rules are designed to err on the side of protecting freedom of speech, at the expense of some meritorious claims. The summary-judgment-like standard urged by Kaalbye would promote suits of questionable merit (but that meet the minimum threshold of alleging a prima facie case) at the expense of defendants' First Amendment rights. Kaalbye's interpretation is contrary to the legislative intent of the D.C. Council.

Third, before the enactment of the SLAPP Act, the common law of the District of Columbia already called for a more liberal interpretation of the summary judgment inquiry in cases that implicate First Amendment concerns. In *Guilford Transportation Industries v. Wilner*, 760 A.2d 580 (D.C. 2003), Judge Frank E. Schwelb noted that summary judgment is an important means by which to protect those engaged in First Amendment activity from harassment by prolonged, expensive litigation. *Id*. at 592. The "obligation to protect the right of the citizen to free expression requires us to include these considerations in the summary judgment calculus." *Id*.; *see Martin Marietta Corp. v. Evening Star Newspaper Co*., 417 F. Supp. 947, 954 (D.D.C. 1976) ("The court has taken an especially hard look at the facts and attempted in all instances where plaintiff contends issues to exist to assess the genuineness of the conflict. The use of summary judgment to terminate litigation in this fashion prevents all but the strongest

[10] Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary, Sept. 17, 2010, at 6 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

libel cases from proceeding to trial.").[11] To employ a summary judgment standard in assessing the claim of a plaintiff faced with a special motion to dismiss, as Kaalbye urges this Court to do, would reduce the burden placed on such plaintiffs further than the common law standard employed before the enactment of the SLAPP Act. Such a ruling would be contrary to the legislative intent to create additional protection for litigants exercising their First Amendment rights.

For the foregoing reasons, this Court must dismiss Kaalbye's defamation claims unless Kaalbye can demonstrate that the claim is likely to succeed on the merits. Pursuant to the SLAPP Act, this Court has conducted evidentiary hearings and has determined that Kaalbye is not likely to succeed on the merits of its claims.

III. Defamation and Public Figures

A. The Law

To make out a claim for defamation in the District of Columbia, a plaintiff must prove, by a preponderance of the evidence:

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

Oparaugo v. Watts, 884 A.2d 63, 76 (D.C. 2005) (quoting *Crowley v. North Am. Telecomms. Ass'n*, 691 A.2d 1169, 1173 n.2 (D.C. 1997)). A plaintiff who is a "public figure" bears the additional burden of demonstrating that the defendant acted with "actual malice" by clear and

[11] In addition, the common law provided for certain protections for anonymous speech similar to those set out in the SLAPP Act. *See Solers, Inc. v. Doe*, 977 A.2d 941, 955 (D.C. 2009) (holding that, in order to subpoena the identity of a speaker engaged in First-Amendment-protected internet speech, after making suitable efforts to notify the defendant and affording the defendant a chance to respond, "[t]he plaintiff next is required to proffer evidence to show that it has a viable claim of defamation").

convincing evidence. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Moss v. Stockard*, 580 A.2d 1011, 1029 (D.C. 1990). To show actual malice, a plaintiff must prove that the defendant published the defamatory statement with "knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001) (quoting *New York Times Co.*, 376 U.S. at 279-80). Thus, at trial a public figure defamation plaintiff must show:

> (1) that the defendant published a false statement about the plaintiff;
> (2) that the statement was defamatory;
> (3) that the plaintiff suffered actual injury as a result; and
> (4) by clear and convincing evidence, that the defendant published the statement either knowing that the statement was false, or with reckless disregard of whether it was false or not.

STANDARDIZED CIVIL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 17.03 (2014 Rev. Ed.).[12]

Whether a plaintiff is a public figure is a question of law for the court. *Moss*, 580 A.2d at 1029. Our Court of Appeals recognizes two types of public figures: general-purpose public figures and limited-purpose public figures. *Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014). General-purpose public figures are those with positions of "pervasive power and influence," and must prove actual malice in claims of defamation on any topic. *Id.* (quoting *Moss*, 580 A.2d at 1030).[13] "'[L]imited-purpose public figures,' that is, individuals 'who assume roles 'in the forefront of particular public controversies in order to influence the resolution of the

[12] These elements, meant for the jury, do not include the issue of privilege, which is a question of law for the court. *See Payne v. Clark*, 25 A.3d 918, 925 (D.C. 2011) ("Whether a statement is privileged is a question of law.").

[13] The additional burden placed on public officials "stems from (1) the public's strong interest in robust and unfettered debate concerning issues related to governmental affairs, and (2) the fact that public officials, with superior access to the media, usually are better able than ordinary individuals to affect the outcome of these issues and to counteract the effects of negative publicity." *Moss*, 580 A.2d at 1029.

issues involved,' . . . are deemed public figures only for purposes of the controversy in which they are influential." *Id*.

The determination of whether a plaintiff is a limited-purpose public figure is a difficult, fact-intensive inquiry. *Burke*, 91 A.3d at 1041. The Court of Appeals has adopted a three-part inquiry, referred to as the "*Waldbaum* framework," after the decision *Waldbaum v*. *Fairchild Publi'ns*, 627 F.2d 1287 (D.C. Cir. 1980). *See Burke*, 91 A.3d at 1041-42. Under the first two prongs of the *Waldbaum* framework, which concern the existence of a public controversy, the court must determine first, "whether the controversy to which the defamation relates was the subject of public discussion *prior* to the defamation;" and second, "whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution." *Id*. at 1041-42 (citations and internal quotations omitted) (emphasis in original). Under the third prong of the inquiry, the court must determine whether "[t]he plaintiff . . . achieved a special prominence in the debate," either by "purposely trying to influence the outcome or could realistically have been expected, because of [her] position in the controversy, to have an impact on its resolution." *Id*. at 1041-42 (citations and internal quotations omitted). "Ultimately, the touchstone remains whether the individual has assumed some role of special prominence in the affairs of society that invites attention and comment." *Moss*, 580 A.2d at 61 (quoting *Tavoulareas v*. *Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987)).

B. Parties' Contentions

C4ADS argues that Kaalbye is a limited-purpose public figure by nature of its prominence in the controversial area of arms-shipping, which is the topic of C4ADS' allegedly defamatory Report. In response, Kaalbye argues that it is not a public figure of any kind;

Kaalbye is a private business and it has no interest in influencing any public controversy or debate and has made no attempts to do so.

C. Analysis

After reviewing the criteria set forth above, this Court concludes that Kaalbye is a limited-purpose public figure in connection with its participation in the international arms market and as a company that transports military cargo to conflict areas of the world.

With respect to the first two prongs of the *Waldbaum* inquiry, the controversy to which the alleged defamation relates is one of obvious and longstanding importance to the public. The international shipment of arms has been a topic of controversy since before the inception of this country. To citizens of the United States, the regulation of the international arms market has clear importance in national politics and in shaping foreign policy. Outside of this country, and particularly in those places to which arms are being shipped, the tracking and regulation of arms distribution may bear even greater importance. Accordingly, this Court concludes that the first two prongs of the *Waldbaum* framework are satisfied in the instant case. The international arms market, its operation and its regulation, is a subject of public controversy. The specific focus of the Report – the shipment of arms to conflict areas of the world, including Venezuela, Angola, and Syria – is one of intense public concern. The answer to these two prongs is so self-evident that Kaalbye does not contest the conclusion that the first two criteria are satisfied. 9/2/14 Hr'g Tr. at 4:20-5:6.[14]

[14] At the September 2, 2014, hearing, counsel for Kaalbye conceded:

> I think we all agree that *Waldbaum v. Fairchild* establishes the standard to be applied. I think the Court correctly assessed what the issue of public concern is: There are sales of arms to conflict areas, and is that a good thing or a bad thing, essentially? I don't think anyone is questioning that the first or third elements of that test, which are "What is the public controversy which you define . . . ?" and the third element is, "Was the publication germane to the controversy?" We didn't argue that last week either. I think an article about transportation of arms is germane to that controversy: Is it a good or a bad thing to move arms to

On the other hand, Kaalbye does contest the third prong of the *Waldbaum* framework, arguing vigorously that C4ADS cannot demonstrate that Kaalbye has attained "special prominence" in this controversy. In defense of its role as a private figure, Kaalbye emphasizes the distinction between a "voluntary" and an "involuntary" public figure. A voluntary public figure is one that has "voluntarily inject[ed] [it]self into the public debate," whereas an involuntary public figure is one that "plays a central, if unintentional, role in a public controversy and becomes 'well known to the public in this one very limited context.'" *Moss*, 580 A.2d at 1031 n.35 (quoting *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 741-42 (D.C Cir. 1985)). The Supreme Court has "admonished that 'the instances of truly involuntary public figures must be exceedingly rare.'" *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). Kaalbye argues that it has not voluntarily injected itself into the public debate and that it should not be grouped into the "exceedingly rare" category of involuntary public figures.

Contrary to Kaalbye's contention, this Court finds that Kaalbye's role in the public controversy was voluntary. Kaalbye's involvement in the controversy at issue – the international transportation of arms to conflict areas of the world – was the result of deliberate, voluntary action. Kaalbye voluntarily and openly participated in the international arms-shipping market for a period of years prior to the publication of the Report in September of 2013. Kaalbye has admitted that, in 2012, it transported military cargo to Syria[15] and that it has previously shipped

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> conflict areas? The key part of the analysis here is: What is the plaintiff's role in that public controversy? Waldbaum says a party must thrust themselves to the forefront of a controversy so they can become a factor in the resolution of it.

9/2/14 Hr'g Tr. at 4:20-5:6. Although Kaalbye's counsel states the elements of the *Waldbaum* analysis differently here from the way our Court of Appeals has framed them, *see Burke*, 91 A.3d at 1041-42, his point was clear: Kaalbye does not take issue with the sufficiency of the public controversy. Instead, Kaalbye focuses on whether it voluntarily thrust itself into the debate.

[15] Kaalbye appears to take issue with the precise nature of the cargo that was shipped to the Syrian Defense Ministry in 2012 aboard the Ocean Voyager. Initially, counsel for Kaalbye conceded that the shipment had contained "arms." After the close of the evidentiary hearings, however, counsel informed this Court that he had been mistaken. He explained that, in fact, "the only information that I have or the company has" is that the cargo was "mixed-use or

arms to other conflict areas, including Angola (aboard the MV Anastasia). Kaalbye, an international shipping company, is not a private individual swept into the public eye through no deliberate action of its own. It knowingly entered into and continues to participate in the controversial business of transporting arms to conflict areas of the world, a fact that Kaalbye does not dispute. In availing itself of such a controversial market in an effort to profit, Kaalbye also bears the burden of becoming a part of the public debate.[16]

In concluding that Kaalbye voluntarily thrust itself into a public controversy, this Court finds the analysis in *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976), instructive. In *Martin Marietta Corp.*, the court considered a defamation claim relating to an article published about the plaintiff's controversial business practices. *Id.* at 949. In short, the plaintiff, a defense contractor, was alleged by the defendant to have held a "stag party" for a soon-to-be-married Air Force official. *Id.* at 950. The court concluded that the plaintiff was a voluntary limited-purpose public figure:

> [P]laintiff was not forced to enter this controversy, but jumped in with both feet. Plaintiff has many interests other than the defense industry, but chooses to compete for defense contracts. It also chooses to entertain persons connected with the military. These wholly voluntary acts place plaintiff in the center of the controversy explored in the [allegedly defamatory] article and the series of which it was a part.

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dual-use cargo," meaning that the cargo might have had both military and civilian purposes. 3/2/15 Hr'g Tr. at 71:25-72:11. Counsel stated that "[t]he company indicated it was mixed-use cargo, which means part of it was likely military; part of it was probably – or dangerous. Miss Seleginskaya, you remember, explained the difference between 'dangerous' and 'not dangerous.' It's explosives. So they call it 'dangerous.' And they characterized that as 'military' or 'arms.'" *Id.* at 72:19-73:4. Counsel also noted that this "generally means some of it was arms and some of it was other stuff: Jeep parts or something like that." *Id.* at 73:19-73:21.

[16] This Court notes that this is a burden Kaalbye seems more than able to bear – that is, Kaalbye appears to possess the resources and connections necessary to defend itself from false or inaccurate reports. Kaalbye was founded by Igor Urbansky, the former Deputy Minister of Transport of Ukraine, and thus does not appear to lack sufficient governmental connections. In addition, after the Washington Post published an article on September 7, 2013, summarizing some of the findings in the Report, Kaalbye was able to successfully petition for a correction. On February 6, 2014, the Washington Post issued a correction to the September 7 article, noting that it had been provided with additional tracking data by Kaalbye that appeared to conflict with the Report's conclusions. Kaalbye also took out an advertisement in the Washington Post on May 1, 2014, emphasizing the Washington Post's correction and stating its side of the dispute.

Id. at 958. Similarly, here, Kaalbye has voluntarily placed itself at the center of an ongoing topic of public controversy – the shipping of arms to conflict areas of the world. Kaalbye has many other shipping interests besides arms transportation, yet it chooses to engage in that highly controversial area of business. Kaalbye's role in this controversy cannot be considered involuntary. When it made the corporate decision to transport arms to conflict areas, it understood that its shipping practices could be subject to controversy and condemnation in the arena of public discourse.

Alternatively, even if this Court accepted Kaalbye's argument that it never voluntarily injected itself into the any public controversy, this Court would nevertheless conclude that Kaalbye is an *involuntary* public figure. In *Dameron v*. *Washington Magazine*, 779 F.2d 736 (D.C. Cir. 1985), the United States Court of Appeals for the D.C. Circuit concluded that an air-traffic controller was an involuntary, limited-purpose public figure with respect to his role in a widely-publicized airplane crash. As the court noted, "[i]njection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will." *Id*. at 741. In its public figure analysis, the court distinguished *Time, Inc*. *v*. *Firestone*, 424 U.S. 448 (1976), in which the Supreme Court declined to find the plaintiff an involuntary public figure on the basis of her much-publicized divorce trial. *See Dameron*, 779 F.2d at 742. The Circuit Court noted that "newsworthiness" or "voyeuristic interest" do not alone make an issue a public controversy. *Id*. On the other hand, the significant loss of life caused by a public carrier, prompting a public investigation and series of hearings, caused the air-traffic controller, "like it or not, [to be] embroiled in a public controversy." *Id*.

Although *Dameron* is not binding on this Court, its reasoning is persuasive. Like the air-traffic controller, Kaalbye finds itself, "like it or not," at the heart of a public controversy. In

2008, Kaalbye became the subject of media scrutiny for its involvement in the "Faina incident," in which Somali pirates hijacked a ship (the "MV Faina") transporting arms. It was widely reported that Kaalbye was the operator of the Faina, *see* First Amended Complaint at Exh. 5, 8-10, 13-14, including by Vice Admiral William E. Gortney of the U.S. Navy during a hearing before the House Armed Services Committee on Counter-Piracy Operations in the U.S. Central Command Area of Operations.[17] Kaalbye maintains that it never operated the MV Faina, and that these reports are wholly false. However, the Faina scandal serves to illustrate the larger point. By being a known player in the arms-shipping community, Kaalbye found itself at the center of an ongoing public controversy – the prudence and ethics of international transportation of arms – years prior to C4ADS' publication of the 2013 Report. This is not an issue brought into the spotlight by mere "voyeuristic interest," but rather is an important public controversy that draws attention from the general public and from the United States government. Thus, because of the compelling nature of the public controversy at issue and Kaalbye's prior involvement therein, this Court would conclude that Kaalbye is an involuntary public figure for purposes of its involvement in the shipment of international arms.

Therefore, because Kaalbye is a limited-purpose public figure under either analysis, in order to prevail in its defamation claim against C4ADS, it must prove by clear and convincing evidence that C4ADS acted with actual malice when it published the allegedly defamatory statements. *See Moss*, 580 A.2d at 1029.[18]

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[17] This Court notes that the Faina incident was described in C4ADS' Report and initially formed the basis for one of Kaalbye's defamation claims, as set out in its Answer with Counterclaim. However, in narrowing issues for purposes of the Special Motion to Dismiss, Kaalbye has dropped that alleged instance of defamation (and certain others) from its counterclaim. *See* 1/9/15 Kaalbye Specification of Defamatory Statements; 1/22/15 Hr'g Tr. at 469:10-470:16.

[18] Even if this Court did not find Kaalbye to be a limited-purpose public figure, Kaalbye's status as a corporate plaintiff bringing a defamation action against a mass media defendant would arguably require it to show actual malice by clear and convincing evidence. *See Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 954-56 (D.D.C. 1976). Although such a rationale may not apply to all corporations, under the circumstance of

IV. Likelihood of Success on the Merits

Kaalbye contends that it is likely to succeed on the merits of its defamation claim, based on the following four allegedly false statements or implications contained in the Report: (1) that certain Kaalbye vessels may have turned off their AIS transponders during the Spring of 2013; (2) that Kaalbye facilitated the sale of cruise missiles to China and Iran; (3) that the MV Anastasia was "intercepted" and weapons were "uncovered;" and (4) that the armed guards pictured in the lobby of the building in which Kaalbye's offices are located were "Kaalbye guards."

C4ADS contends that Kaalbye has failed to present any evidence of damages and none of the above statements were made with actual malice. For the reasons stated on the record as well as those articulated below, this Court finds that Kaalbye is unlikely to succeed on the merits of each of its four remaining defamation claims.

A. Damages

To prove defamation, a plaintiff must demonstrate that "either the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Oparaugo*, 884 A.2d at 76. In its Counterclaim, Kaalbye alleges that it suffered "financial damage to its reputation as a result of the false statements made by C4ADS, in an amount to be proved at trial." 6/4/14 Answer with Counterclaim at ¶¶ 215, 221, 228, 234, 240, 248, 254. At the evidentiary hearing, Kaalbye elaborated on the allegations of its Counterclaim, contending that it suffered harm in the form of lost shipping customers and lost banking relationships, specifically with Beremberg Bank and Citadele Bank. As proof of damages, Kaalbye submits the testimony of Olga Seleginskaya, the head of Kaalbye Shipping

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the instant case, this Court concludes that Kaalbye would have to show actual malice even if it were not a limited-purpose public figure.

Ukraine's legal department and Kaalbye's corporate designee in this proceeding, and two letters documenting the termination of its banking relationships. In response, C4ADS argues that the evidence adduced at the evidentiary hearing is insufficient to carry Kaalbye's burden on the issue of damages.

As a preliminary matter, although this issue is unsettled in this jurisdiction, this Court concludes that this is not a case in which the alleged defamation is actionable as a matter of law or where damages may be presumed. In the D.C. Circuit, corporate plaintiffs have been limited in their recovery to "actual damages in the form of lost profits," because a corporation "*has no personal reputation* and may be libeled only by imputation about its financial soundness or business ethics." *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976) (internal citation and quotation marks omitted) (emphasis in original); *see also Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1156 (D.C. Cir. 1985). On the other hand, a comment to Section 561(a) of the Restatement (Second) of Torts indicates that "a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it." RESTATEMENT (SECOND) OF TORTS § 561, cmt. b (1977). As our Court of Appeals has noted, "[i]t is not clear that our jurisdiction has adopted this portion of the Restatement." *Software & Info. Indus. Ass'n v. Solers, Inc. ("Solers II")*, No. 10-CV-1523, 2012 D.C. App. LEXIS 734, at *8 n.2 (D.C. Jan. 12, 2012).

Because a corporation has no intrinsic interest in its personal reputation, and because "a corporate libel action is not 'a basic of our constitutional system,' and need not force the First Amendment to yield as far as it would in a private libel action," *Martin Marietta Corp.*, 417 F. Supp. at 955, this Court is inclined to rely on the rule that has been applied by the D.C. Circuit. In order to sustain its claim for defamation, Kaalbye must show actual harm; damages may not

be presumed. *See Solers, Inc. v. Doe ("Solers I")*, 977 A.2d 941, 958 (D.C. 2009) (noting that, in the context of a motion to quash a subpoena to disclose the defendant's identity, a corporate plaintiff that had presented no evidence of actual damages "must do more than simply plead his case" to survive the summary-judgment-like standard); *see also Solers II*, 2012 D.C. App. LEXIS 734, at *8-9 ("Solers has not shown lost profits, lost customers, or even a general impairment of its reputation. By attempting to proceed on a theory of presumed damages, Solers has presented nothing more than the same unsupported allegations we found insufficient in *Solers I*.").

Kaalbye, rather than proceed on a theory of presumed damages, claims that it has presented evidence of actual harm caused by the loss of shipping customers and interference with its banking relationships.[19] Kaalbye's proof of damages is flawed in the following two ways.

1. Monetary Loss

First, Kaalbye has failed to submit sufficient evidence of actual monetary loss. With respect to its allegedly lost customers, Kaalbye has offered only one witness, Ms. Seleginskaya. Ms. Seleginskaya testified that the company's chartering manager, Szrgiy Dudnik, had received numerous calls from customers complaining about the allegations in the Report. On behalf of Kaalbye, Ms. Seleginskaya refused to reveal the details of those calls, even when questioned by this Court. She explained that "the client base is very confidential, and we wouldn't like to disclose any of them in the public record." 1/22/15 Hr'g Tr. 432:24-433:1. Ms. Seleginskaya testified that she "insisted on such report to be provided to the Court, but due to confidentiality matters, this person, he did not want to provide such information because this is a rather delicate thing, and we would not want to distress our relations with anybody involved." 1/22/15 Hr'g Tr.

[19] At the March 2, 2015 hearing, counsel for Kaalbye did not contest that Kaalbye would be required to prove actual monetary loss in order to succeed on the merits of its defamation claim.

433:8-433:13. In order to proceed with its lawsuit, Kaalbye is under an obligation to present evidence that would, at the least, support its prima facie case. Apparently, Kaalbye has made the corporate decision not to produce evidence of its allegedly lost customers – not even a single name. This decision was made after this Court gave Kaalbye explicit notice that such evidence would be necessary to proceed to trial.[20]

Recognizing Kaalbye's lack of proof of actual loss, counsel for Kaalbye argues that the pertinent records will be obtained during discovery. This argument is meritless, especially in light of the fact that the evidence in question is within Kaalbye's own possession. Kaalbye cannot escape its burden of proof under the SLAPP Act by simply choosing to keep its evidence confidential. The burden to prove that it is likely to succeed on the merits of its claim rests with Kaalbye, and by refusing to submit evidence of damages, Kaalbye has failed to carry that burden.

Similarly, with respect to the allegedly lost banking relationships, Kaalbye has not submitted any evidence that it suffered any pecuniary loss as a result. Kaalbye argued that a jury could infer from the fact that Kaalbye had to change banks that it incurred at least nominal costs. In submitting such a theory to the jury, Kaalbye would be inviting the jury to stray into the realm of speculation and conjecture. Indeed, a jury might just as easily speculate that a profitable business changing banks would actually lead to substantial savings. Thus, Kaalbye may be even better situated now than before. Without evidence of its alleged losses, a jury would not be

[20] After Ms. Seleginskaya testified on January 22, 2015, that she had been unable to obtain any documentation of the customer complaints or lost business because of confidentiality concerns, this Court notified Ms. Seleginskaya that to sustain a claim for defamation, Kaalbye must submit evidence of its lost business, notwithstanding any confidentiality concerns. *See* 1/22/15 Hr'g Tr. at 513:22-514:14. Following that notice, this Court asked Ms. Seleginskaya directly, "[d]id you lose customers as a result of the information contained in the article?" *Id*. at 514:13-514:15. Ms. Seleginskaya responded, "[w]e can research this further, but except for the banks, I do not possess such information." *Id*. at 514:16-514:17. When asked if Kaalbye had lost any "business" as a result of the article, Ms. Seleginskaya answered, "[a]gain, that was part of confidentiality concerns of our company, and they simply did not provide me this information." *Id*. at 515:15-515:19. On February 9, 2015, Ms. Seleginskaya had an additional opportunity to testify, but submitted no further information on the identity of Kaalbye's lost customers, the details of their communications with Kaalbye, or the actual monetary losses attributable to any lost business.

permitted to engage in such uninformed speculation. On this record, Kaalbye is unlikely to prove that it suffered actual harm from the banking terminations.

2. Causation of Damages

Second, Kaalbye's proof of damages is deficient as to the issue of causation. Nothing in the record demonstrates that Kaalbye's allegedly lost customers occurred as a result of any allegedly defamatory statements in the Report. In support of this element, Kaalbye relies exclusively on the testimony of Ms. Seleginskaya, who stated that Mr. Dudnik reported to her that certain unnamed customers had complained about the Report. 1/22/15 Hr'g Tr. at 430:15-433:13. Ms. Seleginskaya's testimony on this issue is hearsay. Kaalbye has not presented a written record or report of these conversations, has not presented testimony of anyone who was actually a party to the alleged conversations, and has not even presented the name of any allegedly complaining customer. Ms. Seleginskaya testified that, when she asked Mr. Dudnik to document the customer complaints, he refused to do so "[b]ecause the client base is very confidential, and we wouldn't like to disclose any of them in the public record." *Id*. at 432:17-133:1.

Without any evidence of Kaalbye's allegedly lost customers, this Court is not in a position to determine whether Kaalbye's lost business is a result of the Report's allegedly defamatory content. For instance, if Kaalbye lost customers because of their objection to Kaalbye's participation in the transportation of arms to conflict areas of the world, that loss would not have been caused by any of the alleged defamatory statements in the Report. Therefore, this Court is without any basis to determine whether the allegedly lost business was causally connected to Kaalbye's defamation claims. Kaalbye's refusal to submit necessary evidence does not support its contention that it is likely to succeed on the merits of its claims.

Kaalbye has also failed to submit any proof that the alleged harm arising from its lost banking relationships was caused by the allegedly defamatory portions of the Report. The two termination letters, from Beremberg Bank and Citadele Bank, make no mention of C4ADS' Report, safety concerns, or any other reason for the termination of the companies' relationship. *See* Def. Exh. 21, 22; 1/22/15 Hr'g Tr. 437:2-18. Ms. Seleginskaya testified that she knew of no follow-up conversations with bank representatives that might indicate the terminations were caused by the Report. 1/22/15 Hr'g Tr. 437:16-21. The fact that these letters were sent shortly after the Report was published is insufficient to prove that the lost banking relationships were causally connected to the alleged defamatory statements rather than the Report's implication that Kaalbye may be shipping arms to Syria or other conflict areas.

Kaalbye's failure to introduce adequate evidence of damages is a sufficient reason in and of itself for this Court to conclude that Kaalbye is unlikely to succeed on the merits of its defamation claims. Nevertheless, this Court will examine each of Kaalbye's defamation claims individually.

B. AIS Transponders

Kaalbye claims that it was defamed by the Report's implication that Kaalbye voluntarily turned off its AIS beacons during the Spring of 2013,[21] thereby impugning its reputation for safe and legal operation at sea. Kaalbye's expert on electronic navigation systems used on ocean-going vessels, Mr. Paul Whyte, explained that AIS is an essential safety system. Turning that system off would arguably harm a shipping company's reputation for safe operation. In response, C4ADS contends that the allegedly false implication is not defamatory because it is not

[21] The Report analyzes an 18-month time period, spanning from 2012 to 2013. Kaalbye's defamation claim, however, focuses exclusively on the alleged implications during the Spring of 2013.

an affirmative statement of fact; rather, it is one of multiple hypothetical explanations for gaps in the data collected by C4ADS.

In its Report, C4ADS examines AIS data in an attempt to detect arms shipments to Syria between January 1, 2012, and June 30, 2013. C4ADS noted that some arms shippers have been known to turn off or "spoof" their AIS signals. Report at 67. By looking for gaps in AIS data, C4ADS hoped to "identif[y] shipment events that match[ed] patterns of ownership and behavior seen in past Russian weapons shipments." *Id*. Finding gaps in the AIS data of certain Kaalbye vessels during that time frame, C4ADS offered the following commentary:

> Many of Kaalbye's 2013 port calls at Oktyabrsk are followed by long periods with its ships missing from AIS coverage. These ships call in Oktyabrsk, are detected transiting through the Bosphorus into the Mediterranean by Turkish AIS receivers, and then go 'off the grid' for weeks or even months. This is not inherently criminal, as AIS coverage is imperfect; ships are often undetectable when on the high seas, far away from land-based AIS receivers, and many under-developed ports lack adequate AIS infrastructure. Yet these areas are relatively few. Virtually all of Europe, North and South America, Russia, China, Japan, Korea, Australia, and much of the Middle East and North Africa are covered by commercial AIS services. The fact that so many of Kaalbye's destinations after leaving Oktyabrsk are not detected on AIS means either that they are docking at areas with poor AIS coverage, or are deliberately turning off their transponders to avoid detection. Both of these conditions apply to Syria; AIS data is difficult to come by, and many of the known Russian and Iranian weapons shipments (such as Katsman and Chariot) have turned off or spoofed their AIS transponders when approaching Syria to avoid detection.

Report at 68 (footnote omitted). C4ADS went on to describe certain Kaalbye voyages as "highly suspicious," which it defined as voyages "where transit times and distances indicate major delays or diversions not sufficiently explainable by high seas transit (i.e., missing AIS records either outbound, inbound, or at destination ports)." *Id*.

Kaalbye contends that, even though the Report explicitly recognized alternative explanations for the AIS gaps, the Report implied that Kaalbye had turned off its AIS beacons at certain times during 2013. In support of its claim, Kaalbye has introduced the expert testimony of Mr. Paul Whyte, who relied on more complete tracking data than was contained in the Report, including both private and publicly available data.[22] Based on Mr. Whyte's expert analysis, Kaalbye argues that it is likely to prove at trial that the implication that it turned off its AIS transponders is false.

In analyzing this claim, this Court must first determine whether the Report contained a false statement. Even though affidavits made by Ms. Seleginskaya and Mr. Whyte submitted in support of Kaalbye's claims state that the Report falsely accused Kaalbye of turning off its AIS transponders, the affiants have since conceded that there is no such explicit statement in the Report. 1/21/15 Hr'g Tr. at 201:9-207:13; 1/22/15 Hr'g Tr. at 483:4-483:20.[23] Instead, Kaalbye argues that the Report has *implied* that it turned off its AIS beacons. In addition, Kaalbye argues that the Report *implied* that it operated its vessels in an unsafe manner.

Defamation by implication "requires careful exegesis to ensure that imagined slights do not become the basis for costly litigation." *Guilford Transp. Indus.*, 760 A.2d at 596. "[A] libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference." *Id.* (quoting *Chapin v. Knight-Ridder*, 992 F.2d 1087, 1092-93 (4th Cir. 1993)). Therefore, this Court must

[22] Kaalbye claims that the dataset relied on in the Report is incomplete, but at no point does Kaalbye contend that the data actually presented in the report are erroneous or false.

[23] According to the data presented by Mr. Whyte, Kaalbye vessels did not go "off the grid" to the extent that the Report observes. However, in the full context of the Report, the "off the grid" statement appears to relate to C4ADS' own, admittedly-limited dataset, not the full universe of tracking data, whether available to the public or not. Even if Kaalbye's vessels did not go off *every* grid for weeks or months, they did go off the *Report's* grid. In addition, even Mr. Whyte's data set shows some gaps in the AIS tracking of Kaalbye vessels during 2013. Thus, the statement that Kaalbye vessels "went off the grid" is not literally false.

determine (1) whether the authors intended for the reader to infer that Kaalbye in fact turned off its AIS transponders, (2) if so, whether that implication was false, and (3) if so, whether that false implication could have a defamatory meaning.

1. The Alleged Implication that Kaalbye Turned Off AIS Transponders

In its Report, C4ADS explicitly lays out the alternative explanations for the gaps in AIS coverage. Ships with AIS gaps are either "docking at areas with poor AIS coverage, or are deliberately turning off their transponders to avoid detection." Report at 68. Kaalbye argues that the context of this statement makes it clear that C4ADS intended to endorse the inference that Kaalbye vessels turned off their AIS transponders. By discounting the likelihood that Kaalbye vessels could have docked in areas of poor AIS coverage, Kaalbye contends, C4ADS is implying that Kaalbye's coverage gaps are due to deliberate deactivation of their AIS transponders. A close review of the Report does not support Kaalbye's contention. Although the Report states that it is possible that Kaalbye turned off its beacons in order to travel to Syria, it also recognizes that Syria itself is an area of poor AIS coverage. Thus, according to the article, a coverage gap may signify a trip to Syria even if the AIS transponder was not turned off. The Report does not state that Kaalbye vessels turned off their AIS transponders. The Report does not imply that Kaalbye vessels turned off their AIS transponders. The Report only states that AIS transponder tampering is one of the possible explanations for the data that C4ADS had compiled.

Although Kaalbye contends that the Report implies that it turned off its AIS transponders, a close reading of the Report indicates that C4ADS only acknowledges that this explanation is a possibility. It does not state or imply that it is in fact the correct explanation. The Report suggests that a review of the limited publicly-available data leaves open the possibility that the gaps in coverage were the result of Kaalbye turning of its AIS transponders. To whatever extent

the Report reflects an opinion by C4ADS that Kaalbye vessels turning off their AIS transponders is the most likely explanation for the data presented in the Report, that opinion would not be actionable. *See Guilford Transp. Indus.*, 760 A.2d at 597 ("[I]f it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or a surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.") (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)).

2. Falsity

Even if the Report had unequivocally stated or implied that Kaalbye vessels had turned off their AIS transponders, Kaalbye would have difficulty proving at trial that such statements were actually false. Mr. Whyte, Kaalbye's own expert witness, admits that the coverage gaps in his tracking data could have been caused by Kaalbye vessels turning off their beacons. 1/20/15 Hr'g Tr. at 151:5-8.

3. Defamatory Meaning

Assuming that Kaalbye was able to prove that the Report's alleged implication was false, it is doubtful that it could satisfy the next element – that the statement or implication was defamatory. The defamation that Kaalbye perceives in this portion of the Report is the implication that its vessels operate unsafely. By alleging that Kaalbye vessels intentionally turn off their AIS transponders, Kaalbye argues, the Report has implicitly alleged that its vessels are unsafe. In support of this position, Kaalbye relies on the expert testimony of Mr. Whyte.[24] C4ADS responds to this argument in two ways. First, it notes that the focus of the Report is not maritime safety, and the Report neither states nor implies that turning off AIS transponders

[24] According to Mr. Whyte, AIS was designed "for the primary purpose of improving ship-to-ship situational awareness for collision avoidance, and management of controlled water space of busy international straits, harbors, and inland waterways." Whyte Decl. at ¶4. At the January 20, 2015, hearing, Mr. Whyte testified that the "main reason" for AIS is that "it allows you to make good decisions for anticollision," thus making it "an essential safety system on ocean-going vessels." 1/20/15 Hr'g Tr. at 83:17-83:25.

would be unsafe. Second, C4ADS notes that Kaalbye's own expert, Mr. Whyte, acknowledges that ships in certain circumstances may turn off their AIS transponders and remain in full compliance with safety regulations.

This Court concludes that C4ADS has the better argument. There is no defamatory implication relating to AIS or maritime safety contained in the Report. First, the Report neither states nor implies that Kaalbye is operating any of its vessels in an unsafe manner. It is doubtful that the objective reader would leave with the understanding that Kaalbye or other vessels were operating unsafely. Kaalbye's response, that individuals within the shipping industry (such as Mr. Whyte) would understand that turning off AIS transponders would constitute unsafe operation, is unavailing. *See Guilford Transp. Indus.*, 760 A.2d at 602 (finding, notwithstanding the opinion of an industry expert, "that the kinds of implications that the plaintiffs attribute to the column go well beyond the sense of the published words").

Second, there are innocent explanations for turning off AIS transponders that do not appear to be discounted or dismissed by the Report in any way. As Mr. Whyte testified, a vessel may turn off its transponders upon request by port authority or in areas where the vessel may be in danger of attack or becoming a target for piracy. 1/20/15 Hr'g Tr. at 60:13-60:20; Whyte Decl. at ¶7 ("AIS might be switched off for denial of information in high risk areas."). Thus, even if the Report could be read to imply that Kaalbye vessels had deliberately turned off their AIS transponders and traveled to Syria, it does not follow that they did so in violation of any safety standards or regulations. Without any suggestion that Kaalbye acted unsafely or illegally, there would be no actionable defamation. *See Guilford Transp. Indus.*, 760 A.2d at 600-02 (finding that the statement that the plaintiff had "bolted" from the negotiating table, which might be

interpreted by a select few as an allegation of a violation of the Railway Labor Act, was not defamatory because "no violation of the statute has been alleged or implied").

Even assuming the Report did contain the false implication that Kaalbye vessels intentionally turned off their AIS transponders, such an implication would not support a defamation claim. "[I]n determining the gist or sting of a newspaper article to assess whether it is actionable, a court must look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance." *Guilford Transp. Indus.*, 760 A.2d at 599 (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1161 (9th Cir. 1995)). When evaluating the defamatory nature of a publication, "the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984). The focus of the Report is the detection of international arms transportation. In the entirety of the eighty-two-page Report, C4ADS has noted, the word "safety" appears only once. The safety significance of turning off AIS transponders is an issue entirely outside the scope of the Report and cannot serve as the basis of a defamation claim.

This Court concludes that because there are no false and defamatory statements or implications in the Report relating to Kaalbye vessels turning off their AIS transponders, Kaalbye is unlikely to succeed on the merits of this claim at trial.

C. Cruise Missiles to Iran and China

Kaalbye also claims that it was defamed by the Report falsely associating it with corrupt officials in the illegal sale of cruise missiles to Iran and China. In the Report, C4ADS identifies Kaalbye as the "Ship Owner" and "Ship Operator/Broker" for a "[c]overt deal brokered by corrupt Ukrainian and Russian officials" to transport cruise missiles to Iran and China in 2000 or 2001. Report at 12. C4ADS later refers to the deal as the "2000 sale of Ukrainian X-55 missiles

to Iran and China by corrupt officials, which Kaalbye facilitated." *Id*. at 37. Kaalbye contends that it has never transported cruise missiles to Iran or China and that C4ADS' statements to the contrary are defamatory. In response, C4ADS contends that it reasonably relied on credible sources when drawing the conclusions set out in the Report and that, assuming its statements about Kaalbye's involvement in the cruise missile sale were false, those statements were made without actual malice.

First, as to the issue of falsity, there is still no definitive answer to the question of who transported the missiles. In support of its contention that the allegations in the Report are false, Kaalbye submits its own internal records. Although this Court is cognizant of the difficulties inherent in proving a negative, it also recognizes that internal documentation of an illegal arms shipment from 2000 or 2001 would be unlikely to exist. Nevertheless, the lack of documentation does provide some support for the proposition that Kaalbye did not transport the cruise missiles in question.[25] Kaalbye's evidence on this point is weak, but it is possible that a jury presented with this evidence could find that Kaalbye has proven the statement that Kaalbye shipped the cruise missiles to Iran and China false by a preponderance of the evidence.

Even if Kaalbye were able to prove falsity, it is doubtful that Kaalbye could prove that C4ADS published that statement with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." *Beeton*, 779 A.2d at 923 (quoting *New York Times Co*., 376 U.S. at 279-80). Because of its status as a limited-purpose public figure, Kaalbye must prove this element by clear and convincing evidence. *See supra* pp. 12-16.

Kaalbye contends that it is likely to succeed on the issue of actual malice at trial because the sources on which C4ADS relied are so untrustworthy that reliance on those articles alone

[25] This Court notes that C4ADS contends that this evidence becomes even more questionable in light of the fact that Kaalbye cannot even determine, from its own records, the precise nature of the cargo that it shipped to Syria in 2012. *See supra* note 15.

must have been in reckless disregard for the truth. Specifically, Kaalbye contends that Ukrainian and Russian media sources are inherently untrustworthy. Kaalbye also emphasizes that these articles cited no sources to support their allegations and were never republished in any western media outlets. In addition, the articles contradicted earlier reports that suggested the transport was done by air rather than sea and did not mention Kaalbye's involvement. Finally, Kaalbye notes that C4ADS omitted from the Report the fact that, although numerous individuals not associated with Kaalbye were implicated in the cruise missile transaction by the Ukrainian authorities, no one associated with Kaalbye was ever charged.

In response, C4ADS contends that it had no reason to doubt the accuracy of the articles' content. C4ADS vetted the news sources that it relied on in its Report, finding that other articles from those sources had been republished or referenced by academic studies or American news outlets. *See* 2/9/15 Hr'g Tr. at 129:17-136:25. Mr. Farley Mesko, one of the Report's authors and C4ADS' Chief Operating Officer, testified that he was generally aware of potential problems with paid-for-journalism for Ukrainian sources, but from C4ADS' research, "we had no reason to suspect that either of the stories in question were paid-for-journalism." *Id*. at 146:8-9. In explaining C4ADS' reliance on these relatively unknown sources, Mr. Mesko pointed out that the more widely-circulated sources that did not mention Kaalbye's involvement in the incident "were all published in 2005, . . . before Kaalbye's role in the – alleged role in the transaction was revealed. That's why we used sources from 2006 and 2008 when we researched our report." *Id*. at 124:22-125:1. Similarly, Mr. Mesko explained that C4ADS had chosen to rely on the more recent articles rather than a think tank report that concluded the cruise missile shipment had been done by air. *See id*. at 116:16-119:13. Thus, C4ADS argues that Kaalbye will be unable to demonstrate actual malice by clear and convincing evidence.

Although these facts might support a finding that C4ADS has been negligent in its reliance on the two Ukrainian news sources, they do not demonstrate actual malice. Actual malice, in the constitutional context, requires the plaintiff to prove that the defendant "in fact entertained serious doubts as to the truth of [the] publication or . . . actually had a high degree of awareness of [its] probable falsity." *Beeton*, 779 A.2d at 924 (quoting *Sweeney v. Prisoners' Legal Servs. of New York*, 647 N.E.2d 101, 104 (N.Y. 1995)). Kaalbye must prove that C4ADS either knew that the reports were false or that it had a high degree of awareness of its probable falsity.

As noted above, there is still no consensus on the identity of the party responsible for the missile shipment in question. Kaalbye has identified no article that definitively disputes the conclusions reached by the Ukrainian sources, and its own internal records (assuming they demonstrate that Kaalbye did not ship the cruise missiles in question) surely cannot serve as proof that C4ADS knew the allegations in the news articles to be false or in fact entertained serious doubts about their truth or falsity at the time of the Report's publication. Kaalbye has failed to carry its burden to show that it is likely to succeed on the issue of actual malice with respect to the statements about the Iran and China missile shipments.

D. MV Anastasia

Kaalbye's third claim for defamation relates to an incident involving the MV Anastasia. The Report states that the MV Anastasia, a Kaalbye vessel, was "intercepted" in the Canary Islands, where port officials "uncovered" weapons and impounded the ship, which "was flying the Georgia flag, but in fact was registered in St. Vincent and Grenadines." Report at 13. Apparently, the captain of the MV Anastasia made an error in reporting the nature of his cargo to port officials, omitting the fact that his ship contained military cargo. 1/21/15 Hr'g Tr. at 338:4-

340:16. This mistake was discovered when port officials reviewed the cargo documentation, such as the bills of lading and dangerous goods certificate. From this, Kaalbye contends that arms were never actually concealed aboard the MV Anastasia because its records had always indicated its true cargo. Thus, Kaalbye argues that the words "intercepted" and "uncovered" are defamatory. Kaalbye also claims that it was defamed by the statement that the MV Anastasia was registered in a different country from the Georgian flag that it flew. In response, C4ADS argues that Kaalbye is unlikely to prove that the MV Anastasia was not intercepted and that arms were not uncovered. In addition, C4ADS contends that Kaalbye is unlikely to prove actual malice because C4ADS did not entertain any doubts about the accuracy of the media reports on which it relied.

First, this Court is doubtful that use of the words "intercepted" and "uncovered" could bear defamatory meaning, or be proven false, but in any case, Kaalbye has failed to carry its burden to show actual malice by clear and convincing evidence. As proof that C4ADS in fact entertained serious doubts about the truth of its statements, Kaalbye has identified only that court records would have been available to C4ADS had they searched. C4ADS' information, as cited in its Report, was gleaned from a CNBC article with no indication that its content may be false.

Second, with respect to the Georgia-flagging issue, Kaalbye has failed to carry its burden to show actual malice. Although Kaalbye has submitted evidence that the MV Anastasia was in fact registered in Georgia at the time it was detained, *see* Seleginskaya Decl. at ¶11, Exh. 3, it has presented no persuasive proof of actual malice. Mr. Mesko testified that, as the basis for the assertion that the MV Anastasia was unauthorized to fly the Georgian flag at that time, C4ADS relied on media reports. 2/8/15 Hr'g Tr. at 48:3-49:25. Kaalbye argues that, had C4ADS reached out to the Georgian ship registry, it would have discovered that the MV Anastasia was

properly registered. Failure to fact check a source that appears credible on its face does not show actual malice by clear and convincing evidence. This Court is not persuaded that Kaalbye will be likely to carry its burden of proof on this issue at trial.

E. Kaalbye Guards

Kaalbye's final claim of defamation, that the Report erroneously refers to armed guards depicted in a photograph of Kaalbye's office lobby as "Kaalbye Guards," is also unlikely to succeed on the merits. As the testimony of C4ADS' Farley Mesko indicates, the photograph featured in the Report was taken by him and an associate on a visit to Kaalbye's offices. The two sat in a coffee shop in the lobby and observed the guards, who stood by the stairway entrance. Ms. Seleginskaya testified that, in fact, these guards are not employed by Kaalbye, but are employed by the bank whose offices are also in the building. The guards accompany an armored car that visits the bank regularly.

This Court is not persuaded that Kaalbye will be likely to prove by clear and convincing evidence that such a misstatement was made with actual malice. Arguably, it is reasonable to infer that the armed guards stationed in the lobby of the building in which Kaalbye has its offices are (at least in part) employed by Kaalbye. There is certainly no evidence that Mr. Mesko or anyone at C4ADS had information that would cause serious doubt as to the accuracy of such an inference. Moreover, as Mr. Mesko explained on cross-examination, he did not approach the armed guards to investigate further because his experience as a foreign correspondent informed him of the dangers of taking such action without taking additional safety precautions. Even if C4ADS' inference about the employer of the lobby guards was mistaken, such an inference was no unreasonable under the circumstances. This Court concludes that Kaalbye is unlikely to

prove that the allegedly defamatory statement about "Kaalbye Guards" was made with actual malice.

V. Conclusion

This Court finds that Kaalbye is a limited-purpose public figure, for purposes of its participation in international arms shipment to conflict areas of the world. The statements in the C4ADS Report that concern Kaalbye are within the parameters of that limited purpose. Accordingly, to successfully make a claim for defamation against C4ADS, Kaalbye must prove actual malice by clear and convincing evidence. For the foregoing reasons, as well as those articulated in open court, this Court concludes that Kaalbye is unlikely to succeed on the merits of any of its defamation claims. First, across all of its claims, Kaalbye has failed to submit sufficient proof of actual harm, an element necessary to make out its prima facie case for defamation. In addition, Kaalbye's claim that it was defamed by the implication that its vessels turned off their AIS transponders is unlikely to succeed on the merits because there is no such defamatory implication in the Report. Finally, the remaining claims of defamation each fail because Kaalbye has not demonstrated that it is likely to succeed on the issue of actual malice by clear and convincing evidence.

Accordingly it is this 7th day of April, 2015, hereby:

ORDERED that the Special Motion to Dismiss is **GRANTED**; and it is

ORDERED that Kaalbye's counterclaim is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

Thomas J. Motley

THOMAS J. MOTLEY
Associate Judge

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