DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No. 07-CV-000159

SOLERS, INC.
Appellant
v.

JOHN DOE
Appellee

and

SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION
Intervenor-Appellee.

APPELLANT'S REPLY BRIEF

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October 29, 2007

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I. SUMMARY OF REPLY ARGUMENT

To obtain affirmance of the Superior Court's dismissal order, Intervernor Appellee Software and Information Industry Association ("SIIA") must convince this Court that the well-settled principles governing judicial review of the sufficiency of a complaint do not apply in this case. Despite a lack of supporting cases from the District of Columbia, SIIA argues that different standards apply because the communications at issue are protected from disclosure by the First Amendment.

Before SIIA can demonstrate that its version of the law is correct, it must clear several hurdles. SIIA first must demonstrate that Defendant John Doe has a valid First Amendment right to engage in the speech at issue in this case. If it can establish a valid First Amendment interest, it next must demonstrate that Doe may under the circumstances be allowed to prove that the qualified constitutional privilege protects these particular communications. If it can show the qualified privilege may be applicable, it next must prove that Doe's First Amendment interest and his ability to prove the qualified privilege are so compelling that Solers must be required to prove its case, with evidence, before any discovery has been taken.

SIIA can satisfy none of these requirements. First, although SIIA's argument assumes that Doe's speech is protected from disclosure by the First Amendment, SIIA makes no meaningful attempt to address the seminal case by this Court on this topic. In *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996), this Court set forth the principles that make clear that Doe's defamatory statements to SIIA, let alone his alleged "right" to publish them anonymously, are not protected by the First Amendment. SIIA's failure to meaningfully address *Ayala* is a tacit acknowledgement that District of Columbia law does not support the conclusion that Doe's anonymity may be preserved because he engaged in protected speech.

Second, even if Doe's defamatory statements could qualify as constitutionally-protected speech, District of Columbia law is clear that Doe may not use the qualified privilege as a shield against liability. The qualified privilege afforded by the First Amendment may only be invoked by a party who has acted in good faith. If the defendant acted with malice, the qualified privilege does not apply as a matter of law. The amended complaint specifically alleges malice by Doe. Taking Solers' allegations as true, as is required for purposes of this review, the amended complaint thus makes unambiguously clear that the qualified privilege will have no bearing on the legal and factual issues in this case.

Solers bases its arguments about the speech at issue and about the applicability of the qualified privilege on cases decided by this Court that state the governing law in the District of Columbia. SIIA ignores these cases and assumes that the issues they raise do not exist. Only by doing this is SIIA able to reach its principal argument: that, because Doe's speech is protected by the First Amendment -- which it is not, because of this Court's holding in *Ayala* -- and, because Doe may therefore be able to invoke the qualified privilege -- which he may not, because he published his statements in bad faith -- then, the Court should require Solers to prove its case at the pleadings stage, because a small number of courts in other jurisdictions have imposed such a requirement, albeit in altogether different circumstances.

The civil procedures described by SIIA bear no resemblance to the procedural rules that govern civil actions in Superior Court. The procedure advocated by SIIA would allow an individual who has maliciously committed defamation in a purely private context to escape any kind of judicial scrutiny. Well-settled jurisprudence, both procedural and substantive, rejects this result. Accordingly, for the reasons discussed in Solers' initial brief and in this reply, the Superior Court's order of dismissal should be reversed.

II. ARGUMENT

A. De Novo Is The Proper Standard Of Review.

The parties disagree as to the proper standard of review for this appeal. Because this appeal is taken from the Superior Court's order dated February 12, 2007, which dismissed Solers' amended complaint for failure to state a claim upon which relief can be granted, Solers argues that *de novo* is the proper standard. *See* Solers Br. at 6-7. SIIA does not acknowledge the order of dismissal in its discussion of the applicable standard; instead, SIIA discusses only the order dated August 16, 2006 ("August 16 Order"), which nominally quashed Solers' subpoena to SIIA. *See* SIIA Br. at 12-13. On this basis, SIIA argues that the standard of review should be abuse of discretion.

In other passages in its brief, SIIA suggests that a "clearly erroneous" standard might be applicable, because the decision on appeal was based on "factual findings" by the Superior Court. *See, e.g.*, SIIA Br. at 1 ("[t]his appeal calls upon the Court to affirm the trial court's factual finding . . ."); SIIA Br. at 11 ("the trial court's factual findings . . . are not subject to review because Solers does not challenge them"). SIIA distorts the record when it suggests that the Superior Court reached its conclusions after receiving evidence and making factual findings. The Court never informed the parties that it required evidentiary submissions, and nothing in the lower court's orders suggest that they are based on findings of fact.[1] If the Superior Court intended at the pleadings stage to make legal decisions on the basis of evidence, Solers should

[1] Solers' initial brief discusses a number of statements in the August 16 Order that constitute factual conclusions. These factual assertions demonstrate the Superior Court's erroneous legal analysis, but they hardly indicate that the Superior Court made findings of fact based on evidence.

certainly have been informed of this intention and given an opportunity to make an appropriate record. However, the record contains no indication that the Superior Court ever formed such an intention.

There is no reasonable dispute that this appeal involves review of an order dismissing an amended complaint for failure to state a claim upon which relief can be granted. According to the authorities cited by Solers in the initial brief, *de novo* is the proper standard of review.

B. SIIA Does Not Dispute That The Amended Complaint Sufficiently Alleges The Elements Of Defamation.

Because this appeal arises from an order of dismissal under Rule 12(b)(6), this Court's review should focus on the allegations in the amended complaint. If the amended complaint states proper claims, the plaintiff should be permitted to proceed with discovery.

Solers respectfully submits that these are the only procedural principles properly applicable to this appeal. By not challenging Solers' arguments based on the allegations in the amended complaint, SIIA implicitly concedes that Solers is entitled to the relevant discovery if Solers is correct that this case is governed by the principles generally applicable to Rule 12(b)(6).

In its initial brief, Solers set forth the elements of defamation under District of Columbia law and explained how the allegations in the amended complaint sufficiently allege each such element. *See* Solers Br. at 8-10. Solers also explained that it filed an amended complaint for the specific purpose of including language that has been recognized as sufficiently stating a claim of defamation injury by a corporate plaintiff. *See id.* at 11. In its opposition brief, SIIA does not dispute either Solers' statement of the elements of defamation or Solers' argument that such

elements were sufficiently alleged in the amended complaint.[2] *See* SIIA Br. at 17 (arguing that Solers should be required to do "more than establish that the discovery merely would be relevant to its claim, or that the complaint could survive a motion to dismiss").

If Solers is correct that this appeal involves a *de novo* review of the sufficiency of a complaint under generally applicable standards, then SIIA's failure to rebut the foregoing arguments is alone sufficient to warrant reversal of the Superior Court's dismissal order. SIIA does not argue that Solers' claims are not properly stated under the standards applicable to 12(b)(6) motions, nor does SIIA argue that Solers' discovery is not reasonably relevant to its claims. For the reasons discussed below, SIIA's argument in favor of a new standard for reviewing the sufficiency of a complaint has no basis in sound legal principles. Accordingly, SIIA's implicit admission that Solers has sufficiently stated its claims is alone sufficient to warrant reversal.

C. SIIA's Arguments About The First Amendment Are Unavailing Because The Speech At Issue Is Not Entitled To Constitutional Protection.

Rather than compare Solers' allegations against the elements of the relevant torts, SIIA bases its argument on the alleged existence of a "qualified privilege" that supposedly justifies its refusal to disclose Doe's identity and communications. The qualified privilege, however, may only apply if the speech in question is subject to constitutional protection by the First Amendment. Therefore, before evaluating SIIA's arguments about the alleged qualified privilege, the Court should first determine whether the speech in question is truly protected by the First Amendment. Because this appeal involves review of the sufficiency of a complaint, the

[2] SIIA also does not dispute the authorities cited by Solers that recognize that a complaint should not be dismissed simply because the Court doubts that the plaintiff will prevail, or because the plaintiff has not produced evidence. *See* Solers Br. at 7-8.

Court should resolve the question of whether the speech is protected by the Constitution by reference to the allegations in the amended complaint.

As alleged by Solers and admitted by SIIA, Doe responded to a solicitation posted on SIIA's website seeking information about alleged software privacy. *See* Solers Br. at 3-4, ¶¶ 2-5. In exchange for any such information leading to recovery of licensing fees by SIIA and its members, SIIA promised monetary rewards of as much as $50,000. *Id.* Intending to injure Solers, Doe downloaded a form from SIIA's website, wrote malicious and defamatory statements falsely accusing Solers of copyright infringement, and sent the form to SIIA. *Id.* SIIA then sent a letter to Solers threatening legal action based on its "evidence" unless Solers willingly paid a multiple of the alleged licensing fees to SIIA and its members.[3] *Id.* at 4-5, ¶¶ 6-9.

As this Court made clear in *Ayala*, the First Amendment does not protect this kind of purely private defamation. As discussed in Solers' initial brief, *Ayala* involved defamatory statements about a pilot's alleged marijuana use to two recipients: (1) the Federal Aviation Administration; and (2) the pilot's employer. In *Ayala*, this Court distinguished between defamatory statements to a governmental agency and those made to a private employer. *See* Solers Br. at 16, citing *Ayala*, 679 A. 2d. at 1065. The governmental communications were sufficiently public to warrant constitutional protection, but the communications to the employer did not justify such protection because they did not involve "the ordering of government and society at large." *Id.*

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[3] Subsequent communications revealed that SIIA sought recovery of licensing fees for the benefit of Microsoft and another enormous software company, Symantec. *Id.* at 5, ¶ 11. Doe's defamatory communications were thus published in the context of a solicitation by a private trade association for information to help Microsoft and Symantec recover licensing revenue.

Before reaching SIIA's arguments about the qualified privilege, the Court must determine whether Doe's defamatory statements about Solers are substantially similar to the *Ayala* defendant's statements to the FAA, or to the *Ayala* defendant's statements to the plaintiff's employer. If Doe's statements about Solers are substantially similar to the *Ayala* defendant's statements to the plaintiff's employer, then they are not protected by the First Amendment. To support its argument that Doe's statements are analogous to the Ayala defendant's statements to the FAA, SIIA devotes many pages to the scourge of software piracy and the critical role played by SIIA in discouraging such illegal conduct. This argument is materially identical to the one made by the *Ayala* defendant, who said that marijuana use by pilots is inherently a matter of public concern, and therefore the private statements to the employer also constituted protected speech. The Court rejected this argument, and it should reject the argument again. As articulated by SIIA, Doe's speech about software piracy would accomplish no more than protection of Microsoft's right to receive licensing fees.[4] This does not rise to the level of "the ordering of government and society at large," and therefore, in the context of a defamation claim, it is not protected by the First Amendment. Accordingly, under *Ayala*, the First Amendment has no bearing on the issues in this appeal.[5]

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[4] As acknowledged by amicus curiae, the Business Software Alliance ("BSA"), neither SIIA nor BSA is vested with police powers to enforce federal copyright law. *See* BSA Br. at 9, 12. Rather, SIIA and BSA exist to advance the private pecuniary interests of their members by threatening and suing individuals and companies whom they believe have infringed members' copyrights.

[5] SIIA incorrectly states that "Solers conceded below that the privilege applied[.]" *See* SIIA Br. at 19 n.9. The transcript page cited by SIIA involves a discussion of the 12(b)(6) standard, not the "heightened standard" argued by SIIA. Moreover, the lower court's statement that "Solers does not argue that this is the incorrect standard to apply" is contradicted by the memoranda filed by Solers in the Superior Court.

D. Even If Applicable, The Qualified Privilege Cannot Justify The Order Of Dismissal.

As discussed in Solers' initial brief, the District of Columbia has well-settled case law setting forth what a defendant must prove to assert a qualified constitutional privilege as an affirmative defense to defamation liability. A defendant must prove three elements to establish the qualified privilege: (1) that the allegedly defamatory statements were made in good faith; (2) that the defendant has an interest in the subject matter or a duty to communicate; and (3) that the defendant communicates to a party with a corresponding interest or duty. *See* Solers Br. at 20, citing *Columbia First Bank v. Ferguson,* 665 A.2d, 650, 655 (D.C. 1995) (other citations omitted).

Based on Solers' allegations in the amended complaint, which must be accepted as true for purposes of this review, it is clear that Doe cannot satisfy the requirements of the qualified privilege. Most obviously, Doe cannot prove that he published his statements in good faith; on the contrary, Solers specifically alleges that Doe communicated with SIIA for the malicious purpose of injuring Solers. Moreover, nothing in either Solers' amended complaint or in SIIA's submissions on behalf of Doe would support the conclusion that Doe had an interest or duty in connection with the subject matter of the defamatory communications. Thus, accepting Solers' allegations as true, the conclusion that Doe cannot establish the qualified privilege is inescapable.

Despite basing its principal argument on the qualified privilege, SIIA makes no effort to discuss the elements of the qualified privilege under District of Columbia law. SIIA instead makes an unexplained distinction between the First Amendment as applied "to anonymous

communications on the Internet," and "the First Amendment as a defense to liability."[6] *See* SIIA Br. at 20. Upon examining this supposed distinction, it becomes obvious why SIIA does not try to explain it.

SIIA's proffered distinction would create two standards applicable to the qualified privilege. To prove the qualified privilege as a defense to liability, a defendant would have to prove the elements set forth *Columbia First Bank.* However, if the Court accepts SIIA's argument, a John Doe defendant who wants to permanently avoid a process server does not need to make any showing at all. So long as Doe seeks to preserve the sanctity of his "anonymous communications on the Internet," the burden is on the plaintiff to produce evidence -- before the claims are at issue, before any discovery has occurred -- that is sufficient to create a jury issue on each element of the underlying claims.

No District of Columbia case supports the distinction proffered by SIIA, and neither legal authorities nor logic can support this strained argument. If SIIA is correct, then a defendant who cannot defeat liability by proving the qualified privilege may nevertheless escape liability by claiming that he is entitled to remain anonymous because of the qualified privilege.

It is difficult to imagine a more perfectly illogical procedural device. Under the basic principles of notice pleading, a claim is sufficiently alleged if it adequately puts the defendant on notice of the claim asserted. SIIA does not argue that Solers has failed to adequately state its claims, nor does SIIA argue that Doe can prove that he is entitled to the qualified privilege as set

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[6] SIIA argues, again without citation to District of Columbia authority, that "First Amendment privilege that exists is destroyed once the identity is revealed." *See* SIIA Br at 16. This argument is contradicted by the numerous District of Columbia cases that allow a defendant to employ the qualified privilege as an affirmative defense. *See* Solers Br. at 21-22 (citing cases).

forth under District of Columbia law. SIIA nevertheless argues that Doe is beyond service of process because his right to remain anonymous is protected by the same qualified privilege that he cannot prove.

SIIA does not explain why the First Amendment should allow a defendant such as Doe to commit malicious defamation without having to submit to the jurisdiction of the courts. The reason for SIIA's silence on this issue is that the First Amendment provides no safe harbor for the kinds of communication at issue in this case. SIIA's argument about the qualified privilege is unsupported by District of Columbia law and should be rejected.

E. Properly Construed, SIIA's Cases Do Not Support A Qualified Privilege That Justifies Non-Disclosure.

The linchpin of SIIA's argument is that this Court's review is not circumscribed by the allegations in the amended complaint, as it would if this were a typical appellate review of a trial court's dismissal for failure to state a claim. Rather, because of Doe's alleged interest in remaining anonymous, SIIA argues that Solers must be held to a "heightened standard" that requires the introduction of evidence to substantiate Solers' claims. For the reasons discussed above and in Solers' initial brief, Solers respectfully submits that the Court should not even reach this argument.

Even if this Court were to reach SIIA's argument about a "heightened standard," however, it would be clear that this would not be a proper case for application of such a standard. SIIA cites no District of Columbia cases in alleged support of a heightened standard, and the circumstances of this case strongly suggest that this would not be the appropriate case for this Court to establish new rules in this area.

SIIA primarily relies on three cases as support for its arguments. *Dendrite International, Inc. v. Doe*, 775 A. 2d. 756 (N.J. Super. App. Div. 2001); *Best Western Int'l, Inc. v. Doe*, 2006

WL 2091695 (D. Ariz. 2006); *Highfields Capital Mgmt. L.P v. Doe*, 385 F. Supp. 2d. 969 (N.D. Cal. 2005) Because all of these cases involve bona fide First Amendment issues, they are all factually distinguishable from the case on appeal and therefore of no persuasive value.

In *Dendrite*, a public corporation brought a defamation action against numerous John Doe defendants for messages posted on an Internet bulletin board accusing Dendrite and its president of altering accounting methods to overstate revenue and other corporate misconduct. 775 A.2d at 760-61. Dendrite sought an order to show cause why it should not be granted leave to conduct limited discovery for the purposes of ascertaining all of the John Does' identities.[7] *Id.* In *Best Western,* the plaintiff filed a defamation and breach of contract action against numerous John Doe defendants who had posted disparaging comments about the company anonymously on public internet message boards.[8] 2006 WL 2091695 at *1. *Highfields* also involved statements on a public internet message board, this one created for the express purpose of allowing

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[7] The *Dendrite* court specifically stated that such issues can only be "analyzed on a case-by-case basis," guided by "a meaningful analysis and a proper balancing of the equities and rights at issue." *Id.* at 761. The lower court in *Dendrite* applied this concept carefully by allowing discovery as to certain Doe defendants but not others. *Id.* at 763-64. As to Doe No. 3, "[d]espite the fact that Plaintiff is entitled to every reasonable inference of fact," the plaintiff's complaint did not state a defamation claim under New Jersey law. *Id.* at 769. For all of the reasons discussed in Solers' briefs, however, Solers has stated a defamation claim under District of Columbia law. Accordingly, the *Dendrite* analysis yields a favorable result for Solers, especially given the case's recognition that a plaintiff should be "entitled to every reasonable inference."

[8] The *Best Western* court specifically acknowledged, "In deciding which standard to apply, the court must consider the significance of the First Amendment rights at issue[.]" *Id.* at *4. In *Best Western,* where the Doe defendants' conduct was "purely expressive," a heightened standard was appropriate. Id. Here, however, Doe's conduct was not purely expressive; it was malicious and tortious. Accordingly, the analysis in *Best Western* does not justify the use of a "heightened standard" in this case.

expression of anonymous opinions about the affairs of Silicon Graphics, Inc, a public company.[9] 385 F. Supp. 2d. at 978-79.

The factual distinctions between these cases and the case on appeal are manifest. Most critically, the speech at issue in each of these cases involved communications in a public forum about the affairs of a public company. As such, unlike the private defamation published by Doe in this case, the relevant communications were appropriately considered First Amendment speech. In terminology that might be used by District of Columbia courts, because the speech at issue in these cases implicated the First Amendment, the speaker may well have been able to overcome defamation liability by proving the qualified privilege. This possibility in effect led these particular courts to closely examine the speech in question to determine whether the plaintiff had a valid interest in learning the identity of the anonymous speaker. In these particular cases, the court concluded that the speech was not sufficiently illegal to justify nullifying the defendant's First Amendment right to communicate anonymously. All of the cases, however, acknowledge that different circumstances would justify a different result.

Other courts have addressed different circumstances and had no difficulty reaching the conclusion that a defendant's desire to remain anonymous must yield to the plaintiff's superior interest in learning the defendant's identity. *See*, e.g., *UMG Recordings, Inc. v. Does 1-4*, 2006 WL 1343597 (N.D. Cal. April 19, 2006) (allowing discovery upon showing of good cause, specifically the need for identifying information to proceed with service of process); *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 568 (S.D.N.Y. 2004) (rejecting argument

9 The *Highfields* court concluded that the relevant comments by Doe were "clearly sardonic opinion or parody, not to be taken seriously by anyone," and therefore not defamatory. *Id.* at 979.

by Doe "that plaintiffs have not made a 'sufficient factual showing'"); *In re Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372 (2000) (allowing the plaintiff to obtain discovery of identifying information so long as the plaintiff has a good faith basis for asserting its claim and the discovery is reasonably necessary to advance that claim), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001); *Klehr Harrison Harvey Branzburg & Ellers LLP v. JPA Development Inc.*, 2006 WL 37020 (Pa. Com. Pl. January 4, 2006); (because "the ordinary processes and burdens governing discovery and pre-trial motions" are adequate to the task of balancing all relevant interests, a plaintiff may proceed with discovery so long as the complaint satisfies Rule 12(b)(6)).

Like other cases cited by Solers in its initial brief, these cases all support the conclusion that Solers' subpoena should be enforced. On the contrary, SIIA's cases involve the expression of opinions in a public forum, not the malicious publication of defamatory statements in a purely private context. Accordingly advocated by SIIA.

F. <u>BSA's Argument That SIIA's, Anti-Piracy Activities Are Protected By First Amendment Associational Rights Is Unpersuasive And Not Appropriately Considered On Appeal</u>

In its amicus curiae brief, BSA argues that compelling the disclosure of Doe's identity in this case implicates SIIA's associational rights under the First Amendment. *See* Amicus Br. at 6-7. Specifically, BSA suggests that SIIA's anti-piracy program is protected by the First Amendment right of association. *Id.* at 6-7, 9.

BSA's argument regarding the First Amendment right to associate should not be considered because it is being raised for the first time on appeal. This court has previously stated that issues or arguments raised for the first time on appeal will not be considered:

> [i]t is a basic rule in our jurisprudential system that issues, points, and theories not advanced in the trial court will not be considered on appeal except in exceptional situations where a clear miscarriage of justice would result otherwise.

Southall v. United States, 716 A.2d 183, 189 (D.C. 1998) (citing *D.D. v. M.T., 550* A.2d 37, 48 (D.C. 1988)); *see also*, *Veney v. United States*, 681 A.2d 428, 435 n.10 (D.C. 1996) (*en banc*). Throughout this case SIIA has consistently asserted the First Amendment right to free speech as the sole constitutional grounds for precluding discovery of Doe's identity. The right to association has never previously been asserted in this case as an alternative basis for protecting Doe's anonymity. Therefore, the Court should decline to consider BSA's new argument based on First Amendment associational rights.

In any event, BSA's argument is unpersuasive as it relies on a line of cases involving very different circumstances from those in the present case. The cases cited by BSA all involved organizations in which members associated for the purpose of political expression. At issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) were the associational rights of the NAACP, an organization formed solely for the purpose of political and ideological expression and advocacy. The organization involved in *United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987) was the Government Accountability Project ("GAP"), a nonprofit organization formed to advocate on behalf of whistleblowers on safety-related issues at nuclear power projects. These organizations differ drastically from the SIIA. SIIA is not an organization that was formed to advance the interests of historically disenfranchised citizens or promote public safety in the nuclear power industry. SIIA is an organization that exists to advance the private monetary interests of software corporations such as Microsoft.

The cases cited by BSA stand for the proposition that the First Amendment protects the rights of organizations to associate for the purpose of political expression and activities. They

cannot be interpreting as holding that the First Amendment somehow protects activities such as SIIA's program to reduce software piracy, let alone Doe's defamatory statements. BSA's alternative argument should therefore be rejected.

G. SIIA's Arguments Regarding Work Product, Personal Jurisdiction, And Alleged "Abandonment" Of The Tortious Interference Claim Are Baseless And Should Be Rejected.

SIIA offers additional reasons why it alleges that the Superior Court properly quashed Solers' subpoena to SIIA. None of SIIA's additional arguments has any merit.

1. The Relevant Information is Not Attorney Work Product.

SIIA argues that the online reporting form completed by Doe containing defamatory statements about Solers should not be produced because it is attorney work product prepared in anticipation of litigation. Attorney work product is by definition prepared by or under the direction of an attorney, but SIIA's description of the sequence of events makes clear that Doe downloaded a reporting form from SIIA's website, filled out the form, and sent it electronically to SIIA, where it was received by "two non-lawyers" supervised by SIIA's attorneys. SIIA did not direct Doe to submit the form, nor did SIIA have any way of knowing that Doe existed until his defamatory report was received electronically. Thus, unless Doe is an SIIA attorney or an employee acting under an SIIA attorney's supervision, Doe's defamatory statements about Solers cannot qualify as attorney work product. If SIIA's characterization of the work product doctrine were correct, then virtually any communication initiated to a lawyer, or even a lawyer's employees, would qualify as work product. No authority exists to support such a broad application of the work product doctrine.

It is puzzling that SIIA would want to assume responsibility for Doe's defamatory publications by calling them work product. If the defamatory publications are SIIA's work

product, prepared under the direction and supervision of SIIA's attorneys, then SIIA could very well be vicariously liable for Doe's torts. For purposes of this review, however, it is clear that SIIA has provided no basis to support the conclusion that Doe's defamatory communications were SIIA's work product. SIIA's alternative argument regarding the work product doctrine should therefore be rejected.

2. Doe is Subject to Personal Jurisdiction in the Superior Court.

SIIA next argues that the Supreme Court's dismissal order should be affirmed because Doe is not subject to personal jurisdiction in this Court. SIIA's argument is defective for several reasons. Most obviously, SIIA does not explain how any court could conclude that it lacks personal jurisdiction over an individual who has neither appeared in the case nor even been served with process.[10]

The amended complaint clearly alleges sufficient facts to support the conclusion that the Superior Court has personal jurisdiction over Doe. The amended complaint specifically alleges that Solers does business with government agencies in the District of Columbia and that Doe's transmission of defamatory falsehoods to SIIA in the District of Columbia caused injury to Solers in the District of Columbia. Under the District of Columbia's long-arm statute, D.C.

[10] SIIA argues that "the uncontested record conclusively demonstrated that John Doe did not enter into a contract with SIIA[.]" *See* SIIA Br. at 30. Solers has had no opportunity to take discovery on this self-serving assertion by SIIA, which in any event is irrelevant to the personal jurisdiction issue. By making this argument, SIIA again indicates a desire to subvert ordinary civil procedure by asking the Court to sanction a personal jurisdiction decision without any opportunity for Solers to discover the facts.

Code Ann. § 13-423(a)(3), these allegations are sufficient to state a *prima facie* case of personal jurisdiction over Doe.[11]

In *Sony*, certain Doe defendants argued that disclosure of identifying information should not be permitted because the plaintiff had not made a sufficient showing that the Doe defendants were subject to personal jurisdiction. 326 F. Supp. 2d at 567. The court rejected this argument as "premature." *Id.* Recognizing that a court has the power to order discovery regarding personal jurisdiction, and moreover that the identifying information would be necessary to evaluate the issue, the court denied a motion to quash. *Id.* at 567-68. For the same reasons, this Court should reject SIIA's personal jurisdiction argument.

SIIA concludes by suggesting that the assertion of personal jurisdiction over Doe would not comport with due process. This is clearly wrong. Doe published defamatory falsehoods in the District of Columbia, and he did so through a program that specifically contemplates that disputes will be adjudicated in the District of Columbia.[12] Under these circumstances it is clear that it would be highly foreseeable to Doe that he/she might be haled into court in this jurisdiction. Like its First Amendment argument, SIIA's argument under the 14th Amendment should also be rejected.

3. Solers Never Abandoned Its Tortious Interference Claim.

SIIA argues that Solers "abandoned" its tortious interference claim by not making arguments about the claim in the Superior Court proceedings. *See* SIIA Br. at 24. n. 15 SIIA

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11 As the mere recipient of a subpoena, SIIA has no standing to argue that personal jurisdiction over Doe is lacking. Rule 45 allows a subpoena to be quashed on grounds of privilege or undue burden. The Court's personal jurisdiction over Doe bears on neither of these issues.

12 *See* App. 44, 199.

does not explain how a plaintiff can "abandon" a claim at the pleadings stage without seeking a dismissal under Rule 41. Indeed, Solers made clear its intention to pursue the interference claim by including it in the amended complaint. App. 204-05. Moreover, Solers argued to the Superior Court that SIIA's allegations about the interference claim were without basis and should be rejected. *See* App. 103.

As argued in Solers' initial brief, the allegations in the amended complaint specifically track the elements of tortious interference under District of Columbia law. *See* Solers Br. at 24, citing *Brown v. Carr*, 503 A.2d 1241 (D.C. 1986) and *Casco Marina Development, LLC v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77 (D.C. 2003). SIIA does not dispute this argument; it instead argues incorrectly that Solers abandoned the claim and further that Solers has not made a sufficient factual showing "to overcome the qualified First Amendment privilege [.]" *See* SIIA Br. at 24 n.15.

For all of the reasons discussed above, the qualified privilege under District of Columbia law does not impose heightened evidentiary requirements on Solers and cannot justify denying proper discovery that is reasonably calculated to lead to the discovery of admissible evidence supporting Solers' tortious interference claim. For this reason as well, the Superior Court committed error and should be reversed.

H. SIIA's Argument That Solers Should Be Denied From Pursuing Its Appeal Has Been Rejected Once And Should Be Rejected Again

SIIA's final argument is that Solers should be precluded from pursuing its appeal because it consented to the entry of the order of dismissal. SIIA already made this argument in a motion to dismiss this appeal. Without even requiring briefing from Solers, this Court denied SIIA's motion. SIIA did not seek reconsideration or any other review of SIIA's motion to dismiss.

Indeed, in its brief SIIA does not even acknowledge that this Court has already rejected its "preclusion" argument.

The transcript of the January 12 hearing in Superior Court demonstrates a candid exchange between the Court and counsel for Solers. It also demonstrates a clear intention by the Superior Court to enter a final order that would allow an appeal as of right. By dismissing Solers' amended complaint for failure to state a claim upon which relief can be granted, and by specifically stating that its order "is a final order for purposes of any possible appeal which the Plaintiff may choose to pursue," the Superior Court entered such an order. *See* App. 235.

III. CONCLUSION

For all of the foregoing reasons, Appellant Solers, Inc. respectfully prays that the Court of Appeals REVERSE the Superior Court's order of dismissal, and further that the Court of Appeals issue instructions to the Superior Court to enforce the subpoena served by Solers upon SIIA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Appellant Solers, Inc. was sent via regular mail on this 29th day of October, 2007 to:

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