

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.

BRIEF OF APPELLANT

Daniel J. Tobin, # 434058
Ballard Spahr Andrews & Ingersoll, LLP
4800 Montgomery Lane, 7th Floor
Bethesda, MD 20814-3401
(202) 664-6210/ (Fax) 664-6299

Attorneys for Appellant

August 10, 2007

DISTRICT OF COLUMBIA COURT OF APPEALS

SOLERS, INC.,)	
)	
)	
v.)	Appellant
)	
JOHN DOE)	
)	
and)	
)	
SOFTWARE & INFORMATION)	
INDUSTRY ASSOCIATION,)	
)	
)	Intervenor-Appellee.

Appeal No. 07-CV-000159

RULE 28(A)(2) CERTIFICATE

Appellant, Solers, Inc. (“Solers”), submits this certification pursuant to Rule 28(a)(2) of the Rules of the District of Columbia Court of Appeals.

A. Parties That Appeared Below

The plaintiff in the court below was Solers, Inc., a Virginia corporation with its principal place of business at: 1611 North Kent Street, Suite 700, Arlington, VA 22209. Plaintiff/Appellant has been represented by undersigned counsel since the inception of this matter.

The defendant in the case below was an individual unknown to Solers identified in the complaint and amended complaint as Defendant John Doe. Defendant Doe did not enter an appearance below, either individually or through counsel.

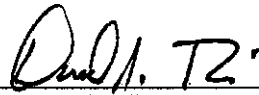
The Software and Information Industry Association (“SIIA”) was not a party to the case below but entered its appearance for the purpose of moving to quash a subpoena served by Solers. SIIA has been granted leave to participate in this appeal as an Intervenor-Appellee. SIIA has been represented since the inception of this matter by the following counsel:

Charles D. Tobin
Leo G. Rydzewski
Holland & Knight LLP
2099 Pennsylvania Ave., N.W., #100,
Washington, DC 20006
(202) 995-3000

B. Corporate Ownership

Appellant Solers, Inc., states that it has neither a parent corporation nor any subsidiary corporations. No publicly held company owns 10% or more of Solers' stock.

Respectfully submitted,



Daniel J. Tobin, # 434058
Ballard Spahr Andrews & Ingersoll, LLP
4800 Montgomery Lane, 7th Floor
Bethesda, MD 20814-3401
(301) 664-6210/Fax: (301)664-6299

August 10, 2007

Attorneys for Appellant

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
III. STATEMENT OF FACTS	3
IV. STANDARD OF REVIEW	6
V. ARGUMENT	7
A. The Amended Complaint Properly States A Defamation Claim Under District Of Columbia Law.	7
1. <u>Standards Applicable to Rule 12(b)(6)</u>	7
2. <u>Elements of Defamation Under District of Columbia Law</u>	8
B. The Superior Court Erred By Applying A Heightened Standard To Solers’ Amended Complaint And Subpoena.	11
C. No Privilege Protects SIIA’s Documents From Production To Solers.....	13
1. <u>The First Amendment Does Not Apply</u>	14
2. <u>A Hypothetical Qualified Privilege Cannot Justify Dismissal For Failure To State A Claim</u>	20
D. The Amended Complaint Sufficiently Alleges A Tortious Interference Claim.....	22
VI. CONCLUSION	24

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Bell Atlantic Corp. v. Twombly</i> , ___ U.S. ___, 127 S. Ct. 1955 (2007)	7
<i>Bose Corp. v. Consumers Union of United States, Inc.</i> , 466 U.S. 485 (1994)	21
<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	17
<i>Buckley v. American Constitutional Law Foundation, Inc.</i> , 525 U.S. 182 (1999)	15
<i>Columbia Insurance Co. v. Seescandy.com</i> , 185 F.R.D. 573 (N.D. Cal. 1999)	19
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	7
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974)	15
<i>Golden Palace, Inc. v. National Broadcasting Co., Inc.</i> , 386 F. Supp. 107 (D.D.C. 1974)	11
<i>In Re Grand Jury Subpoena</i> , 365 U.S. App. D.C. 13, 397 F.3d 964 (D.C. Cir. 2005)	17
<i>Highfields Capital Management L.P. v. Doe</i> , 395 F. Supp. 2d 969 (N.D. Cal. 2005)	19
<i>Lee v. U.S. Department of Justice</i> , 287 F. Supp. 2d 15 (D.D.C. 2003)	17, 18, 19
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	14, 15
<i>Sony Music Entertainment, Inc. v. Does 1-40</i> , 326 F. Supp. 2d 556 (S.D.N.Y. 2004)	18
<i>Southern Air Transport, Inc. v. American Broadcasting Co.</i> , 670 F. Supp. 38 (D.D.C. 1987)	11
<i>In Re Verizon Internet Services, Inc.</i> , 257 F. Supp. 2d 244 (D.D.C. 2003), <i>rev'd on other grounds, Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.</i> , 359 U.S. App. D.C. 85, 351 F.3d 1229 (D.C. Cir. 2003)	18

STATE CASES

<i>Ayala v. Washington</i> , 679 A.2d 1057 (D.C. 1996)	15, 16, 17, 19, 22
<i>Brown v. Carr</i> , 503 A.2d 1241 (D.C. 1986)	22, 24
<i>Carter v. Hahn</i> , 821 A.2d 890 (D.C. 2003)	9, 22
<i>Casco Marina Development, LLC v. District of Columbia Redevelopment Land Agency</i> , 834 A.2d 77 (D.C. 2003).....	7, 8, 12, 22, 24
<i>Columbia First Bank v. Ferguson</i> , 665 A.2d 650 (D.C. 1995)	8, 20, 21, 22
<i>Dendrite International, Inc. v. Doe</i> , 775 A.2d 756 (N.J. Super. App. Div. 2001)	19
<i>Duncan v. Nat'l Med. Ctr.</i> , 702 A.2d 207 (D.C. 1997)	8
<i>Ferguson v. United States</i> , 866 A.2d 54 (D.C. 2005).....	7
<i>Franco v. National Capital Revitalization Corp.</i> , 2007 D.C. App. LEXIS 398 (July 12, 2007)	7
<i>In Re J.D.C.</i> , 594 A.2d 70 (D.C. 1991)	7
<i>Kendrick v. Fox Television</i> , 659 A.2d 814 (D.C. 1995)	8, 9, 22
<i>Klahr v. District of Columbia</i> , 576 A.2d 718 (D.C. 1990)	7
<i>Moss v. Stockard</i> , , 580 A.2d 1011 (D.C. 1990).....	8, 20, 22
<i>Phillips v. Evening Star Newspaper Co.</i> , 424 A.2d 78 (D.C. 1980).....	9, 22
<i>In Re Public Defender Service</i> , 831 A.2d 890 (D.C. 2003).....	7
<i>Sarete, Inc. v. 1344 U Street Limited Partnership</i> , 871 A.2d 480 (D.C. 2005).....	6, 7, 8, 12
<i>Scott v. District of Columbia</i> , 493 A.2d 319 (D.C. 1985).....	8
<i>In Re Subpoena Duces Tecum to America OnLine, Inc.</i> , 52 Va. Cir. 26 (Va. Cir. Ct. 2000), <i>rev'd on other grounds, America OnLine, Inc. v. Anonymous Publicly Traded Co.</i> , 261 Va. 350, 542 S.E. 2d 377 (Va. 2001)	18
<i>Weakley v. Burnham Corp.</i> , 871 A.2d 1167 (D.C. 2005).....	7
<i>Wheeler v. Goulart</i> , 593 A.2d 173 (D.C. 1991).....	13

I. STATEMENT OF THE ISSUES

- A. Whether the amended complaint states claims upon which relief can be granted.
- B. Whether the Superior Court properly quashed Solers' subpoena to the Software and Information Industry Association.

II. STATEMENT OF THE CASE

Appellant Solers, Inc. ("Solers") filed its original three-count complaint in this matter on May 18, 2005.¹ Solers asserted its claims against an unknown individual identified in the complaint as Defendant John Doe ("Doe"). Solers' complaint asserted claims against Doe for defamation, tortious interference, and for an injunction. The factual basis for Solers' claims was Doe's publication of false and defamatory statements to a software industry trade association called Software and Information Industry Association ("SIIA").

After filing the complaint, Solers immediately arranged issuance of a subpoena to SIIA. *See* App. 14. Solers' subpoena sought production of documents related to Doe's defamatory publication to SIIA as well as documents identifying Doe. Solers needed documents identifying Doe to proceed with service of process.

On June 8, 2005, SIIA served objections to Solers' subpoena and refused to produce any responsive information. On June 10, 2005, Solers filed a motion to enforce the subpoena. SIIA thereafter filed a motion to quash. The parties filed a series of memoranda related to the motions, and the Superior Court heard argument on two occasions.

¹ A copy of Solers' initial complaint appears in the accompanying Appendix at page 6. The amended complaint appears at page 198 of the Appendix. Hereafter, citations to the Appendix appear as "App. ___."

On June 16, 2006, Solers timely filed an amended complaint. *See* App. 198. The amended complaint added terminology to incorporate language that had been explicitly acknowledged as sufficiently stating defamation claims under District of Columbia law. Solers filed an accompanying memorandum explaining these changes. *See* App. 207.

On August 16, 2006, the Superior Court, through Judge Anna Blackburne-Rigsby, issued an order granting SIIA's motion to quash ("August 16 Order"). *See* App. 220. The order tacitly denied Solers' motion to enforce the subpoena. As more fully discussed below, the principal basis for the August 16 Order was the lower court's conclusion that Solers' amended complaint failed to state a claim upon which relief can be granted.

With its subpoena to SIIA quashed, Solers had no means of proceeding with service of process upon Doe. Solers sought review by the Court of Appeals of the August 16 Order under the collateral order doctrine. By order dated November 30, 2006, the Court of Appeals dismissed the appeal "for lack of jurisdiction as having been taken from a non-appealable order." The Court's *per curiam* order noted that "Judge Steadman voted to construe the grant of the motion to quash subpoena as a dismissal of the suit for failure to make a claim of relief thus making it a final order."

The case came on for a status conference on January 12, 2007. At the status conference, the Superior Court, through Judge Jennifer M. Anderson, took under advisement how to dismiss the trial court action so that an appeal could be taken to the Court of Appeals. On February 12, 2007, the Superior Court issued an order dismissing the trial court action for failure to state a claim upon which relief could be granted, for the reasons articulated by Judge Blackburne-Rigsby in the August 16 Order. *See* App. 235. Solers filed its Notice of Appeal and a Praeceptum Supplementing Notice of Appeal on February 12, 2007, and March 9, 2007. *See* App. 233, 236.

III. STATEMENT OF FACTS

This appeal presents the question whether Solers' amended complaint states claims upon which relief can be granted. Accordingly, the following statement of Solers' factual allegations is recited virtually verbatim from the amended complaint.

1. Doe is an individual who published false and defamatory statements regarding Solers to SIIA. The publication of these statements occurred at SIIA's office in the District of Columbia. App. 199, ¶ 4.

2. SIIA describes itself on its website (www.siaa.net) as "the principal trade association for the software and digital content industry." SIIA's website describes its mission as providing "global services in government relations, business development, corporate education and intellectual property protection to the leading companies that are setting the pace for the digital age." App. 200, ¶ 7.

3. As part of its efforts to "protect the intellectual property of member companies," SIIA operates what it calls the Corporate Anti-Piracy Reward Program. Through this program, SIIA solicits "sources" to provide information that individuals or companies are pirating software and thereby infringing intellectual property rights of SIIA members or participants. SIIA offers its sources confidentiality and up to \$50,000 for reports of "verifiable corporate end-user piracy." App. 200, ¶ 8; *see also* App. 43-50.

4. According to its website, SIIA will not consider an informant's allegations of software piracy unless the informant signs and agrees to be bound by the terms and conditions of SIIA's Corporate Anti-Piracy Reward Program. These terms and conditions make clear that District of Columbia law shall apply and that disputes arising from or relating to the reward program shall be litigated before a court in the District of Columbia. The terms and conditions

further set forth the amount of reward that will be paid to informants who provide information regarding software piracy that leads to monetary recovery by SIIA from allegedly infringing users. App. 200, ¶ 9.

5. Doe used SIIA's Corporate Anti-Piracy Reward Program to publish false and defamatory statements about Solers. Upon information and belief, Doe used forms available on SIIA's website to publish these false and defamatory statements. App. 201, ¶ 10.

6. Solers learned of Doe's tortious conduct on May 2, 2005, when the President of Solers, Mr. David H. Kellogg, received a letter from William M. Stevens, a partner with Holland & Knight LLP in Chicago, Illinois. In his letter, Mr. Stevens identified himself as an attorney representing SIIA. Mr. Stevens proceeded to accuse Solers of intentional piracy through copyright infringement of computer software, as follows:

I represent the Software & Information Industry Association ("SIIA"), and the software publishers that participate in SIIA's antipiracy program . . . in connection with your company's copyright infringement of the computer software published by the software publishers listed [below].

App. 201, ¶ 11; *see also* App. 18.

7. The Stevens letter did not specify the software that was the subject of SIIA's allegations. Nevertheless, the letter proceeded to allege that SIIA was in possession of "evidence" that Solers had unlawfully obtained and used unlicensed copies of certain proprietary software published by members of SIIA. The letter threatened costly legal action against Solers unless Solers willingly complied with SIIA's demands. The letter stated as follows:

SIIA has evidence that SOLERS, INC. is engaged in the unlawful copying and use of software published by the software publishers listed in Exhibit A in violation of the Copyright Act, Title 17 U.S.C. § 501, *et seq.* The remedies under the Copyright Act that are available for a violation such as this include statutory damages up to \$150,000 per violation for willful violations and \$30,000 per violation for non-willful violations, plus attorneys fees and an order requiring the

destruction or other disposition of all copies found to have been made or used in violation of the copyright owner's exclusive rights.

App. 201, ¶ 12; *see also* App. 18.

8. After threatening legal action against Solers, the Stevens letter demanded that Solers take action to guarantee to SIIA that Solers would terminate the use of unlicensed software, pay damages for past unlicensed use, and promise that future copyright violations would not occur. Specifically, the Stevens letter demanded that Solers conduct an audit of its computer systems to identify all instances of unlicensed software use. Further, the Stevens letter demanded that Solers provide SIIA with the actual results of the electronic audit to be performed by Solers, as well as documentation demonstrating the current license status of all of the software identified through Solers' audit of its computer systems. App. 202, ¶ 13; *see also* App. 18-22.

9. The Stevens letter stated that, after the audit process was complete, SIIA would demand that Solers pay "a negotiated amount based on a multiple of the manufacturer's suggested retail price of each copy of unlicensed software reflected by the audit." In addition, SIIA stated through its attorney that SIIA would expect Solers to destroy all unlicensed software, computers, and servers, and promise to refrain from future use of unlicensed software. App. 202, ¶ 14; *see also* App. 18-22.

10. When the Stevens letter was received, neither Mr. Kellogg nor anyone else at Solers believed that Solers had infringed any software copyright. Despite its conviction that SIIA's allegations were baseless and false, Solers conducted a thorough investigation. App. 202, ¶ 15.

11. As part of this investigation, representatives of Solers requested additional specification from SIIA's attorney as to the alleged copyright infringement. Mr. Stevens supplied this specification by identifying certain software programs published by Microsoft and Symantec.

At the same time, Solers conducted a thorough review of its computer systems, including both a manual review and an electronic audit. App. 202, ¶ 16.

12. Solers' investigation confirmed the falsity of the allegations regarding copyright infringement. Solers neither formerly possessed nor currently possesses unlicensed software by either Microsoft or Symantec or any other publisher of software. App. 203, ¶ 17.

13. After confirming the falsity of the allegations regarding its software use, Solers communicated its findings to SIIA. Solers requested identification of the person who had provided the false information regarding its alleged copyright violations. SIIA's representative, Mr. Stevens, refused to identify the source of SIIA's false allegations, stating that SIIA guaranteed confidentiality to its sources except upon receipt of legal process such as a subpoena. SIIA, through Mr. Stevens, identified the source of its information as an individual, but did not provide further identifying information. App. 203, ¶ 18.

14. To seek legal relief for the tortious injury caused by Doe, Solers filed suit against Doe on May 18, 2005. Solers' complaint asserted three claims for relief: (1) defamation; (2) tortious interference; and (3) injunction.

IV. STANDARD OF REVIEW

This appeal arises from Judge Anderson's dismissal of Solers' amended complaint, which was based on the reasoning set forth by Judge Blackburne-Rigsby in the August 16 Order. Because the lower court dismissed Solers' amended complaint for failure to state a claim upon which relief can be granted, the Court should review the trial court's order *de novo*. *Sarete, Inc. v. 1344 U Street Limited Partnership*, 871 A.2d 480, 496 (D.C. 2005).

Even if this appeal involved direct review of the August 16 Order, *de novo* would still be the appropriate standard of review. Discovery orders are ordinarily reviewed for abuse of

discretion; however, a trial court must exercise its discretion on the basis of “correct legal principles.” *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1179 (D.C. 2005), citing *In Re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991). Where the appellate court must review whether or not the lower court applied correct legal principles in interpreting a procedural rule, *de novo* is the correct standard. *Ferguson v. United States*, 866 A.2d 54, 59 (D.C. 2005) (also quoting *In Re J.D.C.* for the proposition that “judicial discretion must . . . be founded upon correct legal principles”); see also *In Re Public Defender Service*, 831 A.2d 890, 898 (D.C. 2003).

V. ARGUMENT

A. The Amended Complaint Properly States A Defamation Claim Under District Of Columbia Law.

1. Standards Applicable to Rule 12(b)(6)

The standards applicable to this Court’s *de novo* review of the order dismissing the amended complaint require the Court “to construe the complaint in the light most favorable to the plaintiff, while taking the facts alleged in the complaint as true.” *Sarete*, 871 A.2d at 497, quoting *Casco Marina Dev., LLC v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 81 (D.C. 2003). As stated in *Sarete* and *Casco Marina*, the Court of Appeals “will affirm a dismissal only when it appears, beyond doubt, that the plaintiff [] can prove no set of facts in support of [its] claim which would entitle it to relief.” *Id.* at 496 (quoting *Klahr v. District of Columbia*, 576 A.2d 718, 721 (D.C. 1990)) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).²

² The Supreme Court recently clarified the language in *Conley* by holding that wholly conclusory factual allegations may not be sufficient to survive a Rule 12(b)(6) motion. *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955, 1968-69 (2007); see also *Franco v. Nat’l Capital Revitalization Corp.*, 2007 D.C. App. Lexis 398 n.6 (July 12, 2007). Nevertheless,
(continued...)

Under the principles of notice pleading, “a complaint is sufficient so long as it fairly puts the defendant on notice of the claim against him.” *Sarete*, 871 A.2d at 497 (quoting *Scott v. District of Columbia*, 493 A.2d 319, 323 (D.C. 1985)). A complaint should not be dismissed “because the Court doubts that a plaintiff will prevail on a claim,” nor is it proper to dismiss a complaint “on the ground that no ‘evidence has been offered by Plaintiffs[.]’” *Id.* (quoting, respectively, *Duncan v. Nat’l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997) and *Casco Marina*, 834 A.2d at 81).

2. Elements of Defamation Under District of Columbia Law

Under the standards set forth above, it is clear that Solers’ amended complaint states a defamation claim upon which relief can be granted. The pattern jury instructions for the District of Columbia state the four elements of private defamation against a non-media defendant as follows:

- (1) that the defendant published a false statement about the plaintiff;
- (2) that the statement was defamatory;
- (3) that the defendant was negligent in publishing the statement; and
- (4) that the plaintiff suffered actual injury as a result.

See Standardized Civil Jury Instructions for the District of Columbia (2006 ed.) No. 17-1 (“Instruction 17-1”).³ For authority to support this definition, Instruction 17-1 cites four decisions by this Court: *Columbia First Bank v. Ferguson*, 665 A.2d 650, 655 (D.C. 1995); *Kendrick v. Fox Television*, 659 A.2d 814, 819, 821-22 & n.17 (D.C. 1995); *Moss v. Stockard*,

(...continued)

even under the 12(b)(6) standard as clarified by *Twombly*, Solers’ amended complaint sufficiently states claims upon which relief can be granted.

³ Instruction 17-1 appears in the Appendix at App. 187-88.

580 A.2d 1011, 1022 n.23 (D.C. 1990); and *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 80 (D.C. 1980).⁴

Solers' amended complaint clearly and specifically alleges each element of defamation.

Paragraphs 21-24 of the amended complaint state Solers' defamation claim as follows:

21. Defendant published a statement or statements to SIIA that falsely accused Solers of copyright infringement and software piracy. By doing so, Defendant alleged to a trade association representing Solers' industry that Solers lacked fundamental financial integrity and honesty. Such statements constitute actionable defamation under District of Columbia law.

22. Defendant published his/her statements regarding Solers' alleged copyright infringement and software piracy without privilege. Defendant had neither an interest in the subject matter of the false and defamatory statements nor any duty to report such allegations to any person or organization.

23. Defendant willfully published false and defamatory statements despite his/her knowledge that the statements were false. Defendant's false statements imputed to Solers the defamatory implication that its business ethics were improper and untrustworthy.

24. The statements made by Defendant were defamatory because the statements tended both to injure Solers in its trade,

⁴ In the August 16 Order, the Superior Court cites *Carter v. Hahn*, 821 A.2d 890, 893 (D.C. 2003), which sets forth the elements needed to prove defamation in somewhat different terms. Apparently because the case involved appellate review of an order granting a directed verdict, the *Carter* formulation also includes a reference to the affirmative defense of privilege. As discussed below, however, the possible existence of a qualified privilege cannot justify an order granting dismissal pursuant to Rule 12(b)(6).

profession, and community standing and to lower Solers in the estimation of the software development community by imputing falsehood, dishonesty, and/or fraud to Solers' business practices. Solers has been prejudiced in the conduct of its business and has been deprived of its good commercial reputation, subjecting it to contempt and deterring others within the software development industry from dealing with it. Doe's misconduct has caused cognizable harm in an amount to be proven at trial.

See App. 203-04.

These allegations specifically recite the elements of defamation under District of Columbia law. First, by alleging that Doe communicated to SIIA the false statement that Solers had engaged in copyright infringement and software piracy, Solers alleged that Doe published a false statement about the plaintiff. *See* ¶ 21, *supra*. Second, by alleging that Doe's communications to SIIA had injured Solers in its trade, profession and community standing and lowered Solers in the estimation of the software development community, Solers alleged that Doe's statement was defamatory.⁵ *See* ¶¶ 23-24, *supra*. Third, by alleging that Doe willfully published his statements with knowledge of their falsity, Solers sufficiently alleged fault on the part of the defendant. *See* ¶ 23, *supra*. Finally, by alleging the defamatory nature of Doe's publication, as well as prejudice in the conduct of Solers' business, deprivation of Solers' good commercial reputation, and deterrence by others from doing business with it, Solers alleged actual defamation injury. *See* ¶¶ 23-24, *supra*.

⁵ The amended complaint uses the precise language set forth in the Comment to Instruction 17-1 as the definition of "defamatory statement." *See* Instruction 17-1, citing *Kendrick*, 659 A.2d at 819.

The August 16 Order appears to turn on the putative insufficiency of Solers' allegations regarding defamation injury. SIIA had argued that the original complaint did not adequately allege the fourth element of defamation. Solers disagreed that its original complaint was insufficient, but in an effort to moot the argument Solers filed an amended complaint for the specific purpose of employing language previously approved as stating defamation injuries by corporate plaintiffs. See App. 208-09, citing *Southern Air Transport, Inc. v. American Broadcasting Co.*, 670 F. Supp. 38, 41 (D.D.C. 1987) ("defamation suits brought by corporations will lie when 'the corporation is one for profit, and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it'") (quoting Restatement (Second) of Torts § 561(a)); *Golden Palace, Inc. v. Nat'l. Broadcasting Co., Inc.*, 386 F. Supp. 107, 109 (D.D.C. 1974) ("[w]here corporate libel suits have been upheld, the defamation in question has involved the financial integrity or honesty of the company").

B. The Superior Court Erred By Applying A Heightened Standard To Solers' Amended Complaint And Subpoena.

In concluding that Solers had failed to state a defamation claim under District of Columbia law, the trial court misapplied the standards governing motions brought under Rule 12(b)(6). Most fundamentally, the trial court did not accept Solers' allegations as true, but instead reached its conclusion on the basis of a finding that Solers had not identified sufficient evidence to proceed.

The following statements from the August 16 Order demonstrate that the lower court found Solers' evidence, rather than its allegations, insufficient:

- "Solers has not substantiated that any of its Department of Defense contracts, Solers main client, have been compromised by Doe's statements." App. 226.

- “Additionally, even if threatened harm were sufficient for a defamation claim, Solers has not demonstrated any risk of harm[.] . . . There is no indication that any entity other than [SIIA] had knowledge of Doe’s alleged defamatory statements. . . . It is unlikely that a risk of harm can exist because the statements were made only to [SIIA] and [SIIA] has opted not to pursue Doe’s allegations.” *Id.*
- “Publication towards a targeted community does not establish harm. Solers must show actual harm.” App. 225.
- “Even if Solers only had to demonstrate harm to its reputation regardless of lost profit, it has not done so. Although there are some classes of statements which alone cause harm, the mere allegation by Doe of copyright infringement in and of itself does not establish harm to Solers reputation.” App. 226.

As recognized by this Court in cases such as *Sarete* and *Casco Marina*, it is not proper to dismiss under Rule 12(b)(6) “on the ground that no evidence has been offered by Plaintiffs.” *Sarete*, 871 A. 2d at 497; *Casco Marina*, 834 A.2d at 81. A complaint is sufficient “so long as it fairly puts the defendant on notice of the claim against him,”⁶ and a complaint should not be dismissed “because the Court doubts that a plaintiff will prevail on a claim.” *Sarete*, 871 A.2d at 487. Notwithstanding these basic legal principles, and despite the complete absence of an evidentiary record, the lower court based its decision on factual conclusions such as those quoted

⁶ In addition to the foregoing passages from the August 16 Order, the trial court also stated as follows: “At this time, SILA [sic] has decided not to pursue a claim against Solers on Doe’s allegations of copyright infringement.” App. 221 (emphasis added). The court likely based this comment on statements by SIIA suggesting that it might reconsider its decision not to pursue Doe’s allegations against Solers. *See, e.g.*, App. 64 (“[c]ontrary to Solers’ suggestion...SIIA’s decision, which is subject to change, does not mean SIIA has concluded that John Doe’s information was false”). Such statements confirm the defamation injury suffered by Solers by demonstrating that, notwithstanding Solers’ denials, the principal trade association representing Solers’ industry still gives credence to Doe’s allegations. The tort of defamation exists to vindicate the interests of a party such as Solers that has been purposefully injured by communications such as Doe’s.

above.⁷ By engaging in such fact-finding to conclude that Solers' amended complaint failed to state a claim, the court committed error and should be reversed.

C. No Privilege Protects SIIA's Documents From Production To Solers.

The August 16 Order does not explicitly state why the lower court went beyond the allegations in the amended complaint to decide whether or not the subpoena to SIIA should be enforced. However, although the court did not specifically hold that SIIA enjoys a First Amendment privilege against disclosure of the information sought by Solers' subpoena, the court cites a small number of cases that discuss First Amendment issues. In addition, First Amendment concerns very likely prompted the following assertion in the August 16 Order:

Finally, Solers has failed to demonstrate that it exhausted alternative methods of obtaining Doe's identity. Only after a litigant has shown that he has exhausted every reasonable alternative source of information that a court will grant a subpoena as requested by Solers'. *Wheeler v. Goulart*, 593 A.2d 173, 174-75 (D.C. 1991).

See App. 226-27.

The discovery rules applicable to civil cases contain no requirement that a litigant must exhaust all alternative sources before pursuing discovery from the best and most logical source. *Wheeler*, however, addresses the intersection between a litigant's need for information and a reporter's First Amendment interest in not revealing her sources.⁸ The citation to *Wheeler* thus

⁷ It is perhaps most surprising that the lower court would conclude that Doe had only made his defamatory statements to SIIA. With Doe not having appeared, and with no discovery record having been developed, there is simply no way that Solers, SIIA, or the lower court could know if this is true.

⁸ Significantly, *Wheeler* revealed the limited, qualified nature of such First Amendment interests; in that case, this Court affirmed a trial court's order rejecting a reporter's argument that the First Amendment allowed her to refuse to identify her sources. *Wheeler*, 593 A.2d at 177.

strongly suggests that First Amendment concerns led the court to apply heightened standards in evaluating Solers' amended complaint and subpoena.

For two independently sufficient reasons, the First Amendment cannot be used to cloak Doe and his defamatory communications in anonymity. First, constitutional privileges have no legitimate bearing on the issues raised in this appeal. Second, even if the First Amendment were deemed to apply, any privilege invoked by Doe would be at most qualified. The applicability *vel non* of a qualified privilege could hypothetically be an affirmative defense, but the mere existence of an affirmative defense cannot justify an order of dismissal under Rule 12(b)(6). Accordingly, even if a qualified privilege might apply under certain circumstances -- which Solers respectfully submits are not present here -- Solers still should be permitted to proceed with its claims so that any decisions regarding the qualified privilege can be made on a full record.

1. The First Amendment Does Not Apply

The seminal Supreme Court case addressing the intersection of the First Amendment and the common law of defamation begins its analysis with the proposition that “the constitution does not protect libelous publications.” *New York Times v. Sullivan*, 376 U.S. 254, 264 (1964) (citations omitted). *Sullivan* holds that the First Amendment may protect certain allegedly defamatory speech about public officials acting in their official capacity, but no such limitations apply to private defamation. Indeed, concurring in the result in *Sullivan*, Justice Goldberg stated the distinction between communications involving the public acts of public officials and purely private communications:

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen . . . Purely private defamation has little to do with

the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.

Id. at 301-02 (emphasis added). In a later case, the Supreme Court expanded on this critical distinction, holding that the First Amendment does not limit the rights of states to prohibit defamation of private individuals, even where the defendant claims protection under the First Amendment freedom of the press. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

Since *New York Times v. Sullivan*, parties that have successfully used the First Amendment as a defense to defamation liability have argued that the challenged communications go to the core of the protection guaranteed by the First Amendment. Some such defendants have argued that their communications are protected by the First Amendment freedom of the press. *See, e.g., Sullivan*, 376 U.S. at 268. Others have argued that their communications constitute either political speech regarding matters of public concern or petitions to government to redress grievances. *See, e.g., Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 200 (1999) (political speech); *Ayala v. Washington*, 679 A.2d 1057, 1068 (D.C. 1996) (petition to government agency).

Such First Amendment concerns do not apply to the kind of purely private defamatory communication at issue in this case. Doe is not an individual who availed himself of a public forum to discuss legitimately public issues; rather, Doe is an individual who chose to publish defamatory statements through a private channel, in a manner calculated to cause business injury. SIIA is neither a governmental enforcement agency nor a public forum for the free expression of ideas; SIIA is a private association that operates to protect the pecuniary interests of its members. Solers is not a publicly held company, but a company privately held by its employees. In short, defamation of the kind communicated by Doe to SIIA is the kind of purely

“private defamation” that Justice Goldberg recognized to be outside the ambit of constitutional protection.

In *Ayala v. Washington*, 679 A.2d 1057 (D.C. 1996), this Court explored at length the kind of communications that are “matters of public concern” and therefore subject to possible protection under the First Amendment. The plaintiff in *Ayala* was an airline pilot who had been falsely accused by an ex-girlfriend of using marijuana in his off hours. 679 A.2d at 1059. The defendant’s defamatory communications, ostensibly about the plaintiff’s fitness as a pilot, were made both to the Federal Aviation Administration (“FAA”) and to the plaintiff’s employer. *Id.* The Court of Appeals distinguished between these separate communications, finding that the FAA communications were sufficiently public to warrant constitutional protection, but that the communications to the employer did not justify such protection because they did not involve “the ordering of government and society at large.” *Id.* at 1065. Doe’s defamatory publications to SIIA are in the same category as the *Ayala* defendant’s communications to the plaintiff’s employer.

Doe’s statements did not involve good-faith petitions to government agencies; they were instead defamatory statements to a private organization about a private person, and they are therefore actionable.⁹

⁹ *Ayala* discusses at length the defendant’s argument that the employer communications should also be protected because marijuana use by airline pilots is inherently a matter of public concern. 679 A.2d at 1064-68. The Court in *Ayala* rejected this argument because the allegations, when made to the plaintiff’s employer, were not addressed to governmental affairs. *Id.* at 1068. In the lower court, SIIA made similar arguments about the importance of its mission to prevent software piracy, but SIIA remains a private trade association created to promote the private interests of its members. Under the analysis in *Ayala*, SIIA is not a public body vested with authority by a legislative body; therefore, its private receipt of defamatory communications cannot be characterized as involving matters of “public concern.”

The *Ayala* decision strongly suggests that Doe's defamatory publications to SIIA cannot as a matter of the law qualify as constitutionally protected speech. However, even if Doe's defamatory communications could somehow be characterized as protected speech, Doe's anonymity would still not be justified. This is because courts have consistently recognized that no individual has a blanket entitlement to anonymity, particularly where the individual has engaged in conduct that is actionable by the plaintiff. In the *Wen Ho Lee* case, the federal court in the District of Columbia ruled that reporters could not preserve the anonymity of government officials who had violated Mr. Lee's rights under the Privacy Act. *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15, 18 (D.D.C. 2003). Where the information sought is of critical importance to a plaintiff's case, and the information is unavailable from other sources, the *Lee* court held that even the First Amendment freedom of the press must yield to the necessity of disclosing the identity of anonymous individuals.¹⁰ *Id.* (citation omitted). Furthermore, the *Lee* opinion raised a substantial question as to whether a person engaged in illegal conduct can properly avoid liability by invoking the First Amendment. *Id.* at 23 (“[t]he Court has some doubt that a truly worthy First Amendment interest resides in protecting the identity of government personnel who disclose to the press information that the Privacy Act says they may not reveal”).¹¹

¹⁰ It is moreover noteworthy that in *Lee* the parties seeking to protect the anonymity of sources were reporters who could make arguments about freedom of the press. As a private association seeking to shield private defamation, SIIA can claim no such First Amendment interest.

¹¹ The decision in *Lee* was based in large part on *Branzburg v. Hayes*, 408 U.S. 665 (1972), which is the same authority on which the federal court in the District of Columbia found Judith Miller in contempt of court in the Valerie Plame case. *In Re Grand Jury Subpoena*, 365 U.S. App. D.C. 13, 397 F.3d 964, (D.C. Cir. 2005). In both cases the court concluded that any First Amendment interest in anonymity must yield where the anonymous speaker is alleged to have made illegal statements.

The First Amendment analysis in *Lee* demonstrates that Solers' subpoena should have been enforced. Solers' amended complaint alleges that Doe engaged in illegal conduct by uttering defamatory statements for the sole purpose of injuring Solers. Solers cannot pursue remedies for Doe's misconduct without first obtaining Doe's identification through subpoena to SIIA. Thus, on the one hand, Solers cannot proceed with its case without the information being shielded by SIIA; on the other hand, neither Doe nor SIIA has any legitimate interest in preserving anonymity to avoid private defamation liability. Under these circumstances, Solers' need for the relevant information clearly trumps any conceivable First Amendment interest of Doe. Indeed, as stated in *Lee*, it is doubtful that Doe has any "worthy First Amendment interest," since the relevant communications are private defamatory falsehoods.

The decision in *Lee* is consistent with several other cases that have concluded that an individual may not avoid defending civil claims by claiming a constitutional right to remain anonymous. *In Re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244 (D.D.C. 2003) (requiring disclosure of anonymous Internet users who allegedly infringed copyright by illegally downloading music), *rev'd on other grounds, Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 359 U.S. App. D.C. 85, 351 F.3d 1229 (D.C. Cir. 2003); *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004) (denying motion to quash where Doe defendants had allegedly engaged in copyright infringement; their "First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious [claims]"); *In Re Subpoena Duces Tecum to America OnLine, Inc.*, 52 Va. Cir. 26, 35 (Va. Cir. Ct. 2000), *rev'd on other grounds, America OnLine, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E. 2d 377 (Va. 2001) (because "defamatory statements made by one or more of the John Doe defendants would not be

entitled to any First Amendment protection,” disclosure of identity appropriate to ensure that defendants who have engaged in illegal conduct “can be made to answer for such transgressions”).

Rather than focus on cases from this jurisdiction such as *Ayala* and *Lee*, the August 16 Order cites three cases from other jurisdictions that discuss the First Amendment right of individuals to use the Internet to anonymously express opinions about public companies. Although all of the cases cited by the lower court recognize that an individual’s right to anonymity when engaging in such public speech is not absolute, the lower court nevertheless relied on these cases in deciding that Solers’ amended complaint failed to state a claim. *See* App. 23-24, citing *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (recognizing that disclosure of an anonymous individual may be necessary “to provide injured parties with a forum in which they may seek redress for grievances”); *Dendrite Int’l, Inc. v. Doe*, 775 A.2d 756, 767 (N.J. Super. App. Div. 2001) (allowing case to proceed against some Doe defendants but not others to strike a balance between constitutional interests and “the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims”); *Highfields Capital Management L.P. v. Doe*, 395 F. Supp. 2d 969, 979 (N.D. Cal. 2005) (allowing anonymity where the defendant’s communication was at the core of the rights protected by the First Amendment and were “clearly sardonic opinion or parody, not to be taken seriously by anyone”).

None of these cases apply District of Columbia law, and none of them deal with the kind of private defamation that is at issue in this case. Properly construed, none of the cases justify the conclusion that Solers has not stated a claim upon which relief can be granted. Because the

cases cited in the August 16 Order cannot support the conclusion reached by the lower court, the order of dismissal should be reversed.

2. A Hypothetical Qualified Privilege Cannot Justify Dismissal For Failure To State A Claim

For all of the foregoing reasons, Solers respectfully submits that Doe's defamatory communications are not protected by the First Amendment. However, there was an additional problem with the lower court's decision. The cases from this jurisdiction uniformly recognize that any analysis of a possible qualified constitutional privilege is necessarily fact-intensive. Moreover, when the qualified privilege applies, it functions as an affirmative defense to liability – not as a basis to justify dismissal of a complaint under Rule 12(b)(6).¹² By crediting a mere affirmative defense, without any evidentiary record, as a basis to dismiss under Rule 12(b)(6), the lower court committed reversible error.

In *Columbia First Bank*, this Court discussed the circumstances that justify protecting defamatory publications on the basis of a qualified constitutional privilege. The Court set forth the three elements of the qualified privilege defense as follows:

Even if a statement is defamatory, however, it may be protected by a qualified privilege if it is (1) made in good faith, (2) on a subject in which the party communicating has an interest or in reference to which [she] has, or honestly believes [she] has, a duty to a person having a corresponding interest or duty, (3) to a person who has such a corresponding interest.

Columbia First Bank, 665 A.2d at 655 (citations and internal punctuation omitted). The opinion in *Columbia First Bank* relies in part on *Moss v. Stockard*, which explicitly recognizes that “[t]he

¹² Soles specifically alleged that Doe published his defamation to SIAA “without privilege.” See App. 204, ¶ 22. This allegation was not strictly necessary to Solers' statement of its claim, but its inclusion makes the lower court's error all the more clear.

privilege also may be defeated by a showing that [the statement] was made in bad faith.” 580 A.2d at 1024.

The foregoing formulation of the qualified privilege makes clear that the lower court could not have properly concluded that a constitutional privilege required preservation of Doe’s anonymity. This was especially true at such an early stage of the litigation. Without any record having been developed, and without Doe having even appeared, the court could not have properly concluded that the first element of qualified privilege, communications by the defendant that were made in good faith, had been satisfied.¹³ The court also had no basis to conclude that the latter two elements had been satisfied. Doe’s absence foreclosed any basis the court could have had to conclude that Doe had a protectible interest in the information communicated or an affirmative duty to communicate the information. Further, as a private trade association working to protect its members’ pecuniary interest, SIIA as a matter of law cannot be the kind of person or entity to whom communications protected by a qualified constitutional privilege can be made.

By issuing the August 16 Order without the benefit of a discovery or trial record, the lower court disregarded the fact that such constitutional issues are typically reviewed post-trial, rather than at the pleadings stage. Indeed, in *Columbia First Bank*, this Court recognized its duty, *after* a defamation plaintiff had won a verdict or judgment, to “make an independent examination of the whole record” to make sure that “the judgment does not constitute a forbidden intrusion on the field of free expression.” *Columbia First Bank*, 665 A.2d at 655, citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1994) (other

¹³ Moreover, Solers specifically alleged bad faith on the part of Doe. App. 204, ¶ 23 (“Defendant willfully published false and defamatory statements despite his/her knowledge that the statements were false”).

citations omitted). This is consistent with the cases cited by the lower court and in Instruction 17-1 as stating the elements of defamation, all of which were decided on full records. See *Carter*, 821 A.2d at 895 (reversing award of directed verdict); *Columbia First Bank*, 665 A.2d at 658 (review of JNOV, affirming in part and reversing in part); *Kendrick*, 659 A.2d at 825 (affirming summary judgment); *Moss*, 580 A.2d at 1036 (review of denial of directed verdict, affirming in part and reversing in part); *Phillips*, 424 A.2d at 80 (affirming denial of motion for new trial); see also *Ayalá*, 679 A.2d at 1070-71 (reversing JNOV).

By not allowing Solers first to proceed with service of process and then to develop a record to further rebut any privilege argument Doe might choose to make, the lower court committed error and should be reversed.

D. The Amended Complaint Sufficiently Alleges A Tortious Interference Claim.

Solers' complaint and amended complaint included a claim for tortious interference with prospective business advantage. The August 16 Order does not provide any discussion as to why this tort claim did not warrant enforcement of Solers' subpoena to SIIA. Because the amended complaint sufficiently stated a tortious interference claim under District of Columbia law, this omission from the August 16 Order further warrants reversal of the lower court's order of dismissal.

To state a claim under District of Columbia law for tortious interference with prospective business relations, a plaintiff must allege intentional interference by the defendant that results in damage to the plaintiff. *Brown v. Carr*, 503 A.2d 1241, 1247 (D.C. 1986). The elements of the tort are similar to tortious interference with contract, though the plaintiff must allege the existence of a prospective business relationship rather than a contract. *Id.*; see also *Casco Marina*, 834 A.2d at 84.

The amended complaint clearly and specifically alleges each element of tortious interference. Paragraphs 26-28 allege Solers' tortious interference claim as follows:

26. Solers is a government contractor employing approximately 140 individuals. Solers enjoys good relationships with numerous public and private entities, including government agencies. Through its ongoing efforts, Solers continually works toward prospective advantageous business transactions.

27. Defendant had sufficient knowledge of Solers and its operations to be aware of the nature of Solers' prospective advantageous business opportunities. Despite this knowledge, Defendant published false and defamatory statements to SIIA in an intentional effort to interfere with and damage Solers' prospective advantageous business opportunities.

28. The published statements by Defendant regarding Solers' alleged software piracy and copyright infringement have caused damage to prospective advantageous business opportunities. Such damage was proximately caused by the false and defamatory statements published by Defendant.

See App. 204-05.

The amended complaint specifically alleges the elements of tortious interference by alleging that "Defendant published false and defamatory statements to SIIA in an intentional effort to interfere with and damage Solers' prospective advantageous business opportunities." *See* ¶ 27, *supra*.. The amended complaint further alleges that Doe's statements "regarding Solers' alleged software piracy and copyright infringement has caused damage to Solers' prospective advantageous business opportunities." *See* ¶ 28, *supra*.

The language in Solers' amended complaint tracks the elements of tortious interference as stated in cases such as *Brown* and *Casco Marina*. Accordingly, because the court must accept Solers' well-pleaded allegations as true for purposes of evaluating whether the amended complaint states a claim upon which relief can be granted, the lower court erred when it concluded that the amended complaint failed to state a claim. For this reason as well, the lower court's order of dismissal should be reversed.

VI. 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,



Daniel J. Tobin, # 434058
Ballard Spahr Andrews & Ingersoll, LLP
4800 Montgomery Lane, 7th Floor
Bethesda, MD 20814-3401
(202) 664-6210/ (Fax) 664-6299

August 10, 2007

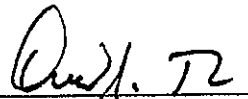
Attorneys for Appellant

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 10th day of August 2007 to:

Charles D. Tobin
Leo G. Rydzewski
Holland & Knight LLP
2099 Pennsylvania Ave., NW, #100
Washington, DC 20006
Telephone: (202) 995-3000
Facsimile: (202) 995-5564

*Attorneys for Intervenor-Appellee Software &
Information Industry Association*



Daniel J. Tobin