IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

OMEGA FLEX, INC., Plaintiff, v. CUTTING EDGE SOLUTIONS, LLC and ROBERT TORBIN, Defendants.	Case No. 1:08-cv-12009-RWZ **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND SPECIAL MOTION TO DISMISS PURSUANT TO M.G.L. c. 231 § 59H**

DATED: February 20, 2009

Respectfully submitted,

ROBERT TORBIN and
CUTTING EDGE SOLUTIONS, LLC,

By their attorney,

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Defendants Cutting Edge Solutions, LLC and Robert Torbin (collectively, "Torbin") respectfully move under Fed. R. Civ. P. 12(c) for judgment on the pleadings. Plaintiff fails to state a claim for relief for Lanham Act false advertising and judgment on the pleadings is appropriate. Torbin further moves for costs and attorneys' fees under 15 U.S.C. § 1117(a).

As for Counts II through VI of the Amended Complaint, Torbin specially moves for dismissal and attorneys' fees pursuant to M.G.L. c. 231 § 59H. In the alternative, Torbin moves for dismissal of those counts for failure to state a claim for relief.

ARGUMENT

I. Legal Standard

There is a slight difference between a Rule 12(c) motion for judgment on the pleadings and a Rule 12(b)(6) motion to dismiss in that the former implicates the pleadings as a whole and not just the complaint. *See Aponte-Torres v. University of Puerto Rico*, 445 F.3d 50, 54-55 (1st Cir.2006). Still, both motions are analyzed under the same standard, which the Supreme Court recently modified: the pleadings must establish a "plausible entitlement to relief." *ACA Financial Guaranty Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (2008) (quoting *Bell Atlantic*, 550 U.S. 544, 127 S. Ct. at 1967-69 (2007)); *Rodriquez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007).[1] The complaint must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008). All well-pleaded factual allegations are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *Gray v. Evercore Restructuring L.P.*, 2007 WL 3104597 (D. Mass. 2007) (Zobel, J.). However, the Court need not "accept as true a legal conclusion couched as a factual allegation." *City of*

[1] The prior standard required that it appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The new standard gives the rule "more heft." *ACA Financial*, 512 F.2d at 58.

Boston v. Bureau of Special Educ. Appeals, 2008 WL 2066989, *2 (D. Mass. 2008) (Zobel, J.), or consider "bald assertions [or] unsupportable conclusions." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996). The facts alleged to "must be enough to raise a right to relief above the speculative level." *Faust v. Coakley*, 2008 WL 190769 at *2 (D.Mass 2008) (Zobel, J.)

II. Count I Fails To State A Plausible Claim For Relief Under The Lanham Act.

A. Count I Fails to State a Claim for Relief For Lanham Act False Advertising.

A "crucial limitation" of the Lanham Act is that it "prohibits misrepresentations only in 'commercial advertising or promotion.'" *Podiatrist Ass'n v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003). To be commercial advertising or promotion, a statement must:

> (a) constitute commercial speech (b) made with the intent of influencing potential customers to purchase the speaker's goods or services (c) by a speaker who is a competitor of the plaintiff in some line of trade or commerce and (d) disseminated to the consuming public in such a way as to constitute "advertising" or "promotion."

Id. Omega Flex's failure to satisfy any of these elements is "fatal" to its Lanham Act false advertising claim. *Encompass Ins. Co. v. Giampa*, 552 F. 2d 300, 311 (D. Mass. 2007).

First, the "core notion" of commercial speech is that it does "no more than propose a commercial transaction." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993); *Landrau v. Solis-Betancourt*, 554 F. Supp. 2d 117, 123 (D.P.R. 2008). None of the complained-of statements "proposed a commercial transaction" at all. Mr. Torbin said nothing about purchasing or not purchasing any CSST product or CounterStrike.[2] Rather, he gave his opinion about bonding requirements to two government agencies responsible for public safety.

[2] Even if, for argument's sake, Mr. Torbin had an economic motive for his statements (and he did not), this would not suffice to transform them into commercial speech. *Landrau*, 554 F. Supp. 2d at 124 (*citing Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 67 (1983)).

Second,Torbin's statements reflect no intent to influence customers to purchase "the speaker's" (*i.e.*, Torbin's) goods. He provided information to government agencies investigating public safety issues and he sells no CSST products and thus could not influence a customer to purchase them. *See Rotbart v. J.R. O'Dwyer Co.*, 34 U.S.P.Q. 2d 1085 (S.D.N.Y. 1995) (harsh newsletter comments not intended to influence potential customers where not employed for express purpose of influencing customers to buy competitor's goods). Even if, as Omega Flex would like, Torbin were to be "charged" with the manufacture and sale of CSST manufactured by his consulting clients, the statements do not explicitly or implicitly urge the purchase of that CSST. And even if it could be said that the statements promoted the sale of conventional CSST instead of CounterStrike (which they did not), those statements would promote the sale of Omega Flex's TracPipe conventional CSST product just as much as the sale of any other conventional CSST product, whether or not manufactured by one of Torbin's consulting clients.

Third, Torbin is not a "competitor" of Omega Flex "in some line of trade or commerce."[3] Omega Flex does not allege that he manufactures or sells CSST products. As he is not a "competitor" in any traditional sense, Omega Flex tries to redefine the word, asserting that he "competes" by: (i) acting as a consultant to some Omega Flex's competitors; (ii) publicly disparaging CounterStrike; and (iii) lobbying government agencies responsible for codes and regulations. (Amended Complaint ¶ 28.) Taking those allegations as true (though they are not), Omega Flex has not alleged any fact supporting its view that Torbin "competes" with it "in a line of trade or commerce," as those terms are normally understood or are used in the Lanham Act.

[3] To have standing to bring a Lanham Act false advertising claim, "the plaintiff must be a competitor of the defendant and allege a competitive injury." *Telecom Int'l America, Ltd. v. AT&T Corp.*, 280 F.3d 175 (2d Cir. 2001). Omega Flex thus lacks standing, and the Court lacks subject-matter jurisdiction. Where standing is absent, the court should dismiss for lack of subject-matter jurisdiction. *Cytologix*, 2007 WL 3037404 at *2.

See, e.g., Alflex Corp. v. Underwriters Laboratories, Inc., 1990 WL 129482 at *2 (9th Cir. 1990) (organization established to promulgate safety requirements did not compete with manufacturer of flexible aluminum conduit by certifying competing plastic product); T*elecom Int'l*, 280 F.3d at 197 (provider of telephone equipment and service to telephone service reseller did not compete with reseller and therefore reseller lacked standing to assert Lanham Act claim).

That Lanham Act false advertising may not require *direct* competition does not change the fact that *competition* is required. Thus, in *Camel Hair & Cashmere Institute of America v. Associated Dry Goods Corporation*, 799 F.2d 6 (1st Cir. 1986), the court held that members of an organization of manufacturers and sellers of camel hair and cashmere had standing to sue a coat manufacturer for misstating the amount of cashmere in its coats. The court held that although none sold cashmere coats in direct competition with the defendant, their "position as *manufacturers and vendors of fabric and clothing containing cashmere* gives them a strong interest in preserving cashmere's reputation as a high quality fibre." *Id.* (emphasis added). Torbin does not manufacture or sell CSST and Omega Flex does not provide consulting services. Neither is in any sense a "competitor" of the other "in some line of trade or commerce."

Fourth, Torbin did not "disseminate" the alleged statements "to the consuming public" in a manner that constitutes "advertising or promotion":

> To constitute advertising or promotion, commercial speech must at a bare minimum target a class or category of purchasers or potential purchasers, not merely particular individuals.

Podiatrist, 332 F.3d at 19. Omega Flex halfheartedly asserts that "some" attendees at the NH and MA presentations "potentially" might have been consumers of CSST, and "some" hypothetical subset of those may have been "potential" customers of Omega Flex (it does not

even allege that they were "potential" purchasers of CounterStrike, as opposed to TracPipe).[4, 5] (Amended Complaint ¶¶ 31, 35.) The Court should not credit these bald assertions as to the possible presence of "potential" consumers, *Doyle*, 103 F.3d at 190, and the speculative possibilities piled atop those bald assertions do not show "disseminat[ion] to the consuming public." Nor do they even come close to lifting Omega Flex's claim to relief "above the speculative level" as required to survive. *Faust*, 2008 WL 10769 at *2. Taking the allegations as true, the most they establish is that Torbin made statements in person to some unknown individuals allegedly present at the time. As Omega Flex does not allege that Torbin's statements targeted a "class or category of purchasers or potential purchasers," it has not alleged a required element and the Court should dismiss Count I. *Encompass Ins.*, 552 F. 2d at 311.

Finally, the statements were Torbin's opinions, and cannot support a Lanham Act claim. *See* 2-7 Gilson on Trademarks § 7.02 at 12 (2008) ("Congress added the words 'of fact' …, thus making it clear that the Section did not extend to false and misleading statements of opinion.").

B. <u>The Court Should Award Torbin His Attorneys' Fees.</u>

The Lanham Act provides for an award of attorneys fees to a prevailing party in "exceptional cases." 15 U.S.C. § 1117(a). Although sufficient, it is not necessary for a defendant to show that the plaintiff acted in bad faith. *Yankee Candle Co. v. Bridgewater Candle Co.*, 140 F. Supp. 2d 111, 120-21 (D. Mass. 2001), *aff'd* 259 F.3d 25 (1st Cir. 2001), *abrogated in part on other grounds, InvesSys, Inc. v. McGraw-Hill Companies, Ltd.* 369 F.3d 16 (1st Cir.

[4] In fact, the NH Fire Marshal meeting was "closed door" and included only NH Fire Marshal employees. (Answer to Amended Complaint ¶ 31.)

[5] In its Amended Complaint, Omega Flex baldly asserts "upon information and belief" that Mr. Torbin may have made other, unspecified, offensive statements "to other audiences in other forums, including but not necessar[il]y limited to audiences in Oregon and Minnesota." (Amended Complaint ¶ 37.) This new allegation adds nothing to the analysis.

2004). Instead, the Court must consider "the totality of the circumstances, applying traditional principles of equity." *Yankee Candle*, 140 F. Supp. 2d at 121. The Court may examine:

> the plaintiff's litigating conduct; whether plaintiff's behavior included economic coercion; plaintiff's use of groundless arguments; failure to cite controlling law, and the generally oppressive nature of the case.

Id. (citing *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest*., 771 F.2d 521, 526 (DC Cir.1985); *Door Systems, Inc. v. Pro-Line Door Systems, Inc*., 126 F.3d 1028, 1032 (7th Cir. 1997); and *Stephen W. Boney, Inc. v. Boney Services, Inc*., 127 F.3d 821, 827 (9th Cir. 1997)). An "exceptional case" also exists where "plaintiff's claims are designed to harass or are so unfounded as to be frivolous or patently baseless." *LaAmiga del Pueblo, Inc. v. Robles*, 748 F. Supp. 61, 63 (D.P.R. 1990); *see also Lorillard Tobacco Co. v. Engida*, 556 F.Supp.2d 1209, 1213 (D. Colo. 2008) (considering whether suit was unfounded or was brought for harassment).

This lawsuit falls well within the scope of the "exceptional case." Omega Flex does not allege facts sufficient to support a single one of the required elements of its Lanham Act claim, which is "so unfounded as to be frivolous or patently baseless." Indeed, it is so completely without merit that it is reasonable to infer that Omega Flex's real motivation is to harass and silence Torbin through financial pressure simply because Omega Flex believes his opinions undercut its ability to exploit confusion about bonding to sell CounterStrike. Omega Flex is a publicly-traded corporation with net sales of more than $17,000,000 in the third quarter of 2008 *alone*. (*See* Omega Flex, Inc. SEC Form 10-Q for quarterly period ending Sept. 30, 2008, attached hereto as **Exhibit 1**.)[6] Torbin is an individual operating a small consulting business. The tremendous imbalance in power and financial strength, the frivolousness of Omega Flex's

[6] The Court may take judicial notice of Omega Flex's SEC filings in ruling on this motion. *See, e.g., In re Stone & Webster, Inc., Sec. Litig.*, 253 F. Supp. 2d 102, 129 n.11 (D. Mass. 2003) (court may consider SEC filings on motion to dismiss without converting to summary judgment).

Lanham Act claim and the oppressiveness of its baseless preliminary injunction motion are ample reason to hold this is an "exceptional case" and to give Torbin "a remedy against unfounded suits." *Yankee Candle*, 140 F. Supp. 2d at 120 (quoting S.Rep. No. 1400, 93rd Cong., 2d Sess. 5, *reprinted in* 1974 U.S.Code Cong. & Admin. News 7132-33).

III. Special Motion To Dismiss The State Law Claims (M.G.L. c. 231 § 59H).

Under M.G.L. c. 231 § 59H (anti-SLAPP), claims based on a party's exercise of the constitutional right to petition the government, are subject to a "special motion to dismiss" that must be granted unless the other party shows by a preponderance of the evidence that the petitioning lacked "any reasonable factual support or any arguable basis in law." M.G.L. c. 231 § 59H; *Baker v. Parsons*, 434 Mass. 543, 553-54 (2001). Otherwise, there is no discretion; the court must dismiss and award attorney's fees and costs. *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167 (1998); *McLarnon v. Jokisch*, 431 Mass. 343, 350 (2000).

Had Omega Flex sued in state court, § 59H would mandate dismissal and attorney's fees—the state law claims are exclusively based on Torbin's exercise of his right to petition the government to adopt codes requiring direct bonding. The burden thus shifts to Omega Flex to prove "by a preponderance of the evidence" that the petitioning "lacked any reasonable factual support or any arguable basis in law." *Baker*, 434 Mass. at 553-54. It is not sufficient to state that he was wrong; Omega Flex must show that "no reasonable person" could have concluded that his statements were correct. *Id.* at 555 n.20. Omega Flex cannot meet this burden. Indeed, this case is strikingly similar to *Baker*, where an independent expert also provided opinions on matters being considered by a government agency. This is exactly the kind of case to which § 59H is directed: it is, at base, a defamation case and "it is axiomatic that by exercising one's right to petition …, defamation claims may arise simply because of the nature of the petitioning activity itself." *Cormier v. MacDow*, 2007 WL 2429558, *4 (Mass. Super. Ct. 2007).

The only question to be resolved is whether § 59H applies to state law claims brought in federal court. Torbin acknowledges that some of the judges of this Court have held that it does not.[7] Still, this Court has stated only that the application of § 59H in federal court "is not free from doubt." *AB Initio Software Corp. v. Inchingolo*, 2007 WL 534452, at *1 (D. Mass. Feb. 16, 2007) (Zobel, J.). Torbin respectfully suggests that this Court correctly left the door open. No court in this District has fully analyzed the applicability of § 59H to state law claims brought in federal court, and this case presents an opportunity for the Court to resolve that issue.

In *Baker v. Coxe*, Judge Saris glossed over whether § 59H was procedural or substantive:

> To the extent that the anti-SLAPP statute imposes additional procedures in certain kinds of litigation in state court, it does not trump Fed.R.Civ.P. 12(b)(6). … Accordingly, this Court will examine the allegations of the complaint under the well-worn standards governing Fed.R.Civ.P. 12(b)(6) motions, not the hybrid statutory procedure in section 59H which is more akin to a summary judgment motion.

940 F. Supp. at 417. In *Stuborn*, the court built on *Baker* and although acknowledging that "respectable arguments" could be made either way, it focused only on the procedural effects of § 59H and concluded that they conflicted with the Federal Rules. 245 F. Supp. 2d at 315-16. Likewise, the court in *Lynch* did not analyze whether the statute was substantive or procedural; it simply quoted the SJC's statement that § 59H created a "procedural mechanism" to protect the right to petition, referred to *Baker* and *Stuborn*, and concluded that "because it relates to procedure, it is inapplicable in this case, where procedure is governed solely by the Federal Rules." 2008 WL 2682692, at *1. Finally, in *S. Middlesex*, the court acknowledged that the line between substance and procedure "is not always clearly delineated" but stated that § 59H

[7] *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2008 WL 4595369 at *9 (D. Mass. Sept. 30, 2008) (Woodlock, J.); *Lynch v. Hayes*, 2008 WL 2682692 (June 30, 2008) (O'Toole, J.); *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (Lasker, J.); *Baker v. Coxe*, 940 F. Supp. 409, 417 (D. Mass. 1996) (Saris, J.).

"governs the rules for the dismissal of claims and regulates the burden shifting that occurs when a defendant introduces evidence that the plaintiff has engaged in a SLAPP suit." 2008 WL 4595369, at *9. With that, the court concluded that § 59H conflicted with the Federal Rules. *Id.* at 10. In rejecting the defendants' alternate argument that *Stuborn* was wrongly decided, the court confined its analysis to quoting *Stuborn* and observing that the SJC had referred to the statute as a "procedural remedy for early dismissal of the disfavored SLAPP suits." *Id.* at *10 (quoting *Duracraft*, 427 Mass. at 161). The court deemed unpersuasive another statement in *Duracraft* that "the statute on its face alters procedural *and substantive* law in a sweeping way." *Id.* at *10 n.4 (quoting *Duracraft*, 427 Mass. at 167) (emphasis added).

As the foregoing shows, the courts that have held that § 59H inapplicable have performed only a cursory analysis of its procedural or substantive nature. Each case after *Baker* has relied on Judge Saris's gloss that § 59H is procedural and has at most quoted a passage from an SJC decision to that effect while dismissing a different passage describing it as both procedural and substantive. Torbin respectfully submits that the Court should take this opportunity to closely analyze § 59H. If the Court agrees with Torbin that § 59H is substantive, then the state claims must be dismissed on that basis and the Court must award Torbin his attorney's fees.[8]

The SJC has referred to § 59H as "creating a procedural remedy" and as "alter[ing] procedural *and substantive* law in a sweeping way." *Duracraft*, 427 Mass. at 161 and 167 (emphasis added). The SJC clearly indicated its view that § 59H create both a *substantive right*

[8] If the Court concludes that § 59H applies to the state law claims, the Court must dismiss those claims on that basis and cannot decide to dismiss them instead for failure to state a claim. *See Kobrin v. Gastfriend*, 443 Mass. 327, 341 (2005) ("This sequence is dictated by the anti-SLAPP statute …. It is only when the special motion to dismiss is denied that the judge shall consider the [alternate motion] as an independent basis for dismissal.") That said, Torbin recognizes that Omega Flex is likely to appeal the application of § 59H here and Torbin would welcome the Court's further analysis and dismissal of the state law claims on the additional bases below.

and an integral procedural mechanism to protect that substantive right. That *substantive right* is immunity from suits based on the exercise of the right to petition. In tracing the history of § 59H, the SJC observed that the Legislature "intended to enact very broad protection for petitioning activity," and that an early version of the statute created "an absolute privilege for the right to petition." *Id.* at 162. The SJC held that "the Legislature intended to *immunize* parties from claims 'based on' their petitioning activities." *Id.* at 167 (emphasis added). The SJC repeatedly referred to § 59H as providing "immunity" from suit. *See id.* at 168 n.20 (observing that "based on" did not mean "in response to" and although claims and related pleadings filed in court may be petitioning activity, "plaintiffs are not thereby *immunized* from counterclaims filed in response to the claim") (emphasis added); *id.* at 168 ("Even though we hold that Marino may not avail himself of *immunity derived from the anti-SLAPP statute*," he might be able to "invoke any *other basis for immunizing* his deposition statements.") (emphasis added).

Thus, § 59H altered the substantive law of Massachusetts by creating a new immunity from suits based on petitioning activity. Such immunities are substantive and are as applicable in federal court as they are in state court. *See, e.g., Braga v. Genlyte Group, Inc.*, 420 F.3d 35, 38 (1st Cir. 2005) (employer immunity created by Massachusetts workers compensation law); *Horta v. Sullivan*, 36 F.3d 210, 211 (1st Cir. 1994) (immunity created by M.G.L. c. 258 § 10(b)).[9]

Certainly, § 59H also creates a procedure for protecting the immunity it created—the special motion to dismiss—but it is an "integral part" of the new substantive right rather than a mere procedural rule, and "must be considered part and parcel of" the substantive grant of

[9] *See also MHA Fin. Corp. v. Varenko Invs. Ltd.*, 583 F. Supp. 2d 173, 182 (D. Mass. 2008) (applying MA state law litigation privilege but holding that under the circumstances of that case, immunity had been waived.); *Fine Mortuary Coll., LLC v. Am. Bd. of Funeral Serv. Educ., Inc.*, 473 F. Supp. 2d 153, 161 (D. Mass. 2006)(applying M.G.L. c. 231 § 85K, which creates charitable immunity capping liability on state tort claims at $20,000).

immunity. *See Covel v. Safetech, Inc.*, 90 F.R.D. 427, 429 (D. Mass. 1981) (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)). The statute reflects the Legislature's substantive policy decisions to vigorously protect the right to petition. The special motion to dismiss and award of attorney's fees each manifest that substantive policy decision. First, by providing a motion that must be advanced in front of all others and that stays discovery until it is resolved, the statute ensures that the immunity is not destroyed by the litigation it is intended to preclude. *See N. Am. Expositions Co. v. Corcoran* 452 Mass. 852, 868 (Mass. 2009) ("To allow the addition of a claim for declaratory relief to deprive the defendants of their immunity from suit under the anti-SLAPP statute would defeat the purpose and intent of the statute to protect against harassment and the burden of litigation"); *Baker v. Hobson*, 62 Mass. App. Ct. 659, 663 (2004) ("Had the defendant in *Fabre* not been granted an interlocutory appeal, she would have been required to bear the burden of defending …, and would have lost the immunity from suit provided by § 59H.).[10] Second, by mandating the award of attorney's fees, the statute ensures that those who exercise the right to petition will not bear the cost of resulting litigation that would inevitably chill the exercise of that right, and dissuades those who might otherwise engage in SLAPP suits. These policy decisions are inextricably bound to the statutory procedure.

In *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), Oklahoma law provided that actions were not "commenced" for statute of limitations purposes until service of the summons, while under Fed. R. Civ. P. 3 actions are commenced by filing a complaint. The Court held that Rule 3 and the statute could "exist side by side … each controlling its own intended sphere of coverage without conflict." *Id.* at 750-51. The statute was more than a procedural rule:

[10] *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (qualified immunity "is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.") (emphasis in original).

> [T]he Oklahoma statute is a statement of a substantive decision by [Oklahoma] that actual service on, and accordingly actual notice to, the defendant is an integral part of the several policies served by the statute of limitations…. **It is these policy aspects which make the service requirement an "integral" part of the statute of limitations**…. As such, the service rule must be considered part and parcel of the statute of limitations.

Id. at 751 (emphasis added). The Court observed that, although failure to apply the statute might not lead to forum shopping, it would result in "an 'inequitable administration' of the law":

> **There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants**. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

Id. at 753 (emphasis added).

Federal courts frequently invoke *Armco Steel* in applying state statutes with procedural aspects integral to the policies of the substantive law. For example, M.G.L. c. 231 § 60B creates a procedure to filter medical malpractice claims by requiring an initial tribunal hearing. In *Feinstein v. Mass. Gen. Hosp.*, 643 F.2d 880 (1st Cir. 1981), the court held that § 60B serves substantive policy objectives, and was not just procedural:

> Failing to apply [§ 60B] in malpractice actions brought in the federal court would encourage forum-shopping by out-of-state plaintiffs… wishing to avoid the screening procedure mandated in the Massachusetts courts…. It would result in inequitable administration of the law by compelling a defendant sued in federal court to forego the procedural protection and substantive right to recovery of costs afforded by section 60B solely because of the fortuity that there is diversity of citizenship between the litigants.

Id. at 886 (internal quotation omitted). The Court further held that not applying § 60B would undercut the state's remedy for the crisis that prompted it, a result "inconsistent with the

principles of federalism underlying the Rules of Decision Act and the *Erie* decision."[11] *Id.* The court reasoned that § 60B addressed concern over malpractice premiums by discouraging frivolous claims, and its "referral procedure and associated provisions were designed to serve these substantive policy objectives," and were "more than simply a 'form and mode' of regulating litigation in the state courts." *Id.* at 885.

Similarly, the Massachusetts Legislature enacted § 59H to address concerns over frivolous lawsuits directed against "generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." *Duracraft*, 427 Mass. at 161. The statute represents the Legislature's considered policy decision that the right to petition was a critical right that deserved special protection, and that this right must be protected from the outset rather than forcing the citizens to incur legal fees. *See id.*

As with *Armco Steel* and its progeny, the procedural aspects of § 59H are an "integral part" of the substantive immunity § 59H created, and they manifest the conscious policy decisions that led the Legislature to enact it. In the same vein, the Federal Rules do not purport to protect the right to petition and do not displace the state's policy decision to protect that right. Thus, § 59H does not conflict and may peacefully coexist with the Federal Rules. In addition,

[11] *See also Daigle v. Mass Medical Ctr.*, 14 F.2d 684, 689 (1st Cir. 1994) (evidentiary rules of Maine law "bound up with the state's substantive decision making" and because Federal Rules "do not seek to displace the Health Act's policy of limiting frivolous malpractice suits," both "peacefully coexist, each operating within its own sphere of influence."); *In re Relafin Antitrust Litigation*, 221 F.R.D. 260 (D. Mass. 2004) (NY rule barring class action recovery of statutory penalties reflected state interest in avoiding multiple recoveries, and as there was no direct conflict with Fed. R. Civ. P. 23 not applying it would encourage forum shopping); *Covel v. Safetech, Inc.*, 90 F.R.D. 427 (D. Mass. 1981) (applying Massachusetts' relation-back rule instead of Fed. R. Civ. P. 15(c) where state rule reflected "conscious substantive policy choice in favor of allowing plaintiffs to add new transaction-related defendants … even though as to them the statute of limitations would have run but for relation-back" and was a "firm declaration of substantive policy, in contrast to a rule merely regulating 'procedure' in the *Erie*-related sense").

applying § 59H to state law claims in federal court will avoid the obvious forum-shopping problem when a plaintiff can strip a defendant of protections he otherwise would have simply by filing in federal court. Refusing to apply § 59H undercuts the state's effort to remedy the problem of SLAPP suits, inconsistently with the principles of federalism underlying the Rules of Decision Act and *Erie*. Applying § 59H avoids the inequity of removing defendants' legal rights due to the fortuity of diversity. In short, § 59H is substantive and must be applied in state and federal court, and Torbin should not be stripped of immunity because of the fortuity of diversity.

IV. Each of the State Law Claims Fails To State A Plausible Claim For Relief.

As discussed, Massachusetts anti-SLAPP statute requires dismissal of the state law claims. Still, Mr. Torbin respectfully requests that the Court alternatively dismiss each of the state law claims for failure to state a claim.

A. Count II Fails to State a Plausible Claim for Relief Under M.G.L. c. 93A.

Chapter 93A bars both "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." M.G.L. c. 93A § 2. Omega Flex recites both indiscriminately. *See, e.g.*, Complaint ¶ 66 ("By virtue of these acts, Defendants have willfully engaged in unfair competition or deceptive acts or practices in violation of M.G.L. ch. 93A, §§ 2 and 11.") Nevertheless, they are subject to different standards and we address each.[12]

1. Omega Flex Fails to State a Claim for "Unfair Competition."

To state a c. 93A claim for unfair competition, the acts "must have an adverse impact on *competition*, and not simply on competitors." *Whitehall Co. Ltd. v. Merrimack Valley Distrib. Co.*, 56 Mass. App. Ct. 853, 862-863 (2002) (emphasis added). Omega Flex has not alleged any

[12] M.G.L. c. 93A § 11 explicitly requires that the allegedly unfair method of competition have "occurred primarily and substantially within the commonwealth." As a matter of law, the statements made before the NH Fire Marshal meeting or anywhere else outside of MA cannot support Omega Flex's 93A claim.

injury to competition; it has alleged injury to itself. Even if Omega Flex were a competitor (which it is not), an alleged injury to itself does not state a c. 93A claim. Nothing in the Amended Complaint supports an allegation of injury to *competition*, nor is there a plausible basis for such an allegation. Omega Flex fails to state a claim for unfair competition under c. 93A.

2. Omega Flex Fails to State a Claim for "Unfair or Deceptive Acts or Practices in the Conduct of Any Trade or Commerce."

To state a claim under this clause, the plaintiff must "allege some sort of transaction between the parties." *L.B. Corp. v. Schweitzer-Mauduit Intern., Inc*., 121 F. Supp. 2d 147, 152 (D. Mass. 2000). In fact, the SJC "has stressed the existence of some contractual or business relationship between the parties as a *precursor to liability* under Chapter 93A." *John Boyd Co. v. Boston Gas Co.*, 775 F. Supp. 435, 440 (D. Mass. 1991) (emphasis added). The statute covers only acts that are "perpetrated in a business context." *Lantner v.Carson* 374 Mass. 606, 611 (1978). To require less "would run the danger of converting any tort claim against a business into a Chapter 93A claim, because all torts encompass 'acts or practices' that could arguably be considered 'unfair.' *Cash Energy, Inc. v. Weiner*, 768 F. Supp. 892, 893 (D. Mass. 1991). Also, where acts have a "predominantly public motivation" there is no c. 93A claim. *Peabody N.E., Inc. v. Marshfield*, 426 Mass. 436, 440 (1998); *The Ryan Co., Inc. v. Massachusetts Port Authority*, 2000 WL 1678011 (Mass. Super. 2000). Omega Flex alleges no business transaction between it and Torbin, and it is evident from the pleadings that Torbin's statements had a "predominantly public motivation."

3. As a Matter of Law, the Allegedly Defamatory Statements Cannot Support a c. 93A Claim.

Finally, Torbin's statements were not defamatory and they therefore cannot support a cause of action under c. 93A. *Dulgarianv. Stone*, 420 Mass. 843, 853 (1995).

V. Count III (Tortious Interference With Business Relations) Fails To State A Claim.

Omega Flex must allege that: (i) it had a business relationship for economic benefit with a third party; (ii) Torbin knew of the relationship; (iii) Torbin interfered with the relationship through improper motive or means; and (iv) Torbin's conduct directly resulted in Omega Flex's loss of advantage. *Kurker v. Hill*, 44 Mass. App. Ct. 184, 191, (1998). Omega Flex fails to allege three of these elements at all, and as to the fourth, it offers bare, speculative assertion.

Omega Flex has not identified any business relationship that it had with anybody. It simply alleges that "some" of the attendees at the Massachusetts Plumbers' Board hearing were "potential consumers of CSST products." (Amended Complaint ¶ 35.) As to the NH statements, it asserts that "some" of the people who heard them were "potential consumers of CSST products," and of those "potential consumers," some were "potential customers of Omega Flex." (*Id.* ¶ 31.) Even more fundamentally, Omega Flex does not allege that any of the "potential" consumers of CSST who were "potential" customers of Omega Flex were "potential" consumers of CounterStrike, as opposed to Omega Flex's TracPipe CSST product. Omega Flex's piling of speculation upon hypothesis and supposition does not allege a specific business relationship.

Second, it should go without saying that if even Omega Flex can allege only that "some" people who heard the statements were "potential" consumers of CSST and of those, some unknown subset were "potential" customers of Omega Flex, then Torbin hardly can be said to have "known" of the hypothetical relationship. And, in fact, Omega Flex does *not* allege that he knew of any business relationship with any of the "double-potential" customers at all.[13]

As to the third element, Omega Flex recites that Mr. Torbin's *statements* were made "for an improper purpose or by improper means" (Amended Complaint ¶ 70), but does not allege that

[13] Omega Flex alleges that Torbin "knowingly and intentionally" made the statements (Amended Complaint ¶ 70), but that is a far cry from saying that he knew of Omega Flex business relations.

he *interfered* with Omega Flex's hypothetical business relations for an improper purpose or by improper means. Even if it had alleged that he interfered with specific contracts, "[o]ne who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person (a) truthful information, or (b) honest advice within the scope of a request for the advice." *Cavicchi v. Koski*, 67 Mass. App. Ct. 654, 660 (2006). This rule "protects the public and private interests in friendly intercourse," and requires only that advice be requested, be given be within the scope of the request, and be honest. Only good faith is needed, and it is immaterial if the person profits from the advice or takes pleasure in harming the subject of the advice. *Id.* at n. 10 (quoting *Restatement (Second) of Torts* § 772 comment c. at 50-51 (1979)). The pleadings provide no basis to conclude that Torbin's advice exceeded the scope of the requests of the MA Plumbers' Board or NH Fire Marshal. There is similarly no basis to conclude that, whether his advice was accurate or not (and it was), it was offered in bad faith.

Finally, accepting for the moment Omega Flex's allegations that Torbin is a "competitor" of Omega Flex (which he is not), acts done in furtherance of legitimate competitive interests are not "improper" for purposes of establishing tortious interference. *See Doliner v. Brown*, 21 Mass. App. Ct. 692, 695 (1986).

VI. Count IV (Business Defamation) Fails to State a Plausible Claim for Relief.

Each of the complained-of statements concerned the CounterStrike CSST product, and none imputed fraud or any other reprehensible conduct to Omega Flex.[14] As a matter of law, therefore, Omega Flex has not stated a claim for business defamation:

[14] Omega Flex's Amended Complaint alleges "upon information and belief" that Torbin has made other offensive statements. (Amended Complaint ¶ 37.) Omega Flex provides no information about them, other than that they may have been made in Oregon or Minnesota. These allegations provide no support at all for any of Omega Flex's claims. *See, e.g., McCarthy*

> where the statement or statements involve a company's services or product, *defamation will not lie* unless the statement or statements *impute to the corporation fraud, deceit, dishonesty or reprehensible conduct*.

First Act, Inc. v. Brook Mays Music Co., 429 F. Supp. 2d 429, 433 n.3 (D. Mass. 2006) (emphasis added); *Picker Int'l, Inc. v. Leavitt*, 865 F. Supp. 951, 964 (D. Mass. 1994).

Moreover, the threshold issue in defamation is a question of law for the court: whether the statements as a whole and in context are reasonably susceptible of a defamatory meaning. *Foley v. Lowell Sun Pub. Co.* 404 Mass. 9, 11 (Mass. 1989); *Nolan v. Krajcik*, 384 F. Supp. 2d 447, 473 (D. Mass. 2005). None of the statements are reasonably susceptible to a defamatory meaning when taken in context and as a whole.

As under the Lanham Act, "[s]tatements of fact may expose their authors or publishers to liability for defamation, but statements of pure opinion cannot." *King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987). This is a question of law for the Court to decide after examining the statements as a whole and in context. *Reilly v. AP*, 59 Mass. App. Ct. 764, 770 (2003). Torbin's statements were opinions, but if any of them were statements of fact, truth is an absolute defense, and substantial truth is sufficient. *Id.*; *Nolan v. Krajcik*, 384 F. Supp. 2d 447, 473 (D. Mass. 2005). Omega Flex has the burden of proving the statements' falsity, especially where, as here, they concern the public interest. *Gilbert v. Bernard*, 1995 WL 809550 at *1, *3-*4 (Mass. Super. Ct. 1995). On the face of the pleadings, Omega Flex cannot meet this burden.

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v. City of Newburyport, 252 Fed. Appx. 328, 334 (1st Cir. 2007) (plaintiff must allege at least one sentence of the alleged defamation and the approximate dates and means of publication). They do not even meet the minimal requirements of Fed. R. Civ. P. 8. The Court should not go outside the pleadings on a Rule 12(c) motion. However, to the extent that these allegations correspond to the alleged statements described at pages 3-4 of Omega Flex's Reply in support of its preliminary injunction motion, they did no more than express Torbin's interpretation of the 2009 IFCG code (Minnesota) or directly reproduce a statement made by CSA International (a certifying entity) that is not defamatory and that Omega Flex admits is accurate. (Reply at 4.)

Next, Omega Flex has "thrust" itself into the public controversy over direct bonding and therefore is at least a limited public figure in the context of that debate. It therefore must allege and prove actual malice. *See FloTech, Inc. v. E.I. du Pont doe Nemours Co.*, 627 F. Supp. 358, 366 (D. Mass. 1985). Omega Flex does not allege actual malice.

Finally, Torbin's statements in the context of hearings on public safety matters were conditionally privileged and cannot support defamation. *See Restatement (Second) of Torts* §§ 595, 646A, illus. 4 ("A informs B, a city milk inspector, that milk delivered in the city by the X Company is impure and dangerous to the public health. A is conditionally privileged."). *Cf.Atlas Elevator Serv., Inc. v. Thyssen Elevator (New England), Inc.*, 2000 WL 559550 (Mass. Super. 2000) (conditional privilege protected statements made in bid protest letter where publisher and recipient shared legitimate public interest reasonably calculated to be served by communication); *Eastern Contractors, Inc. v. Flansburgh & Assocs.*, 1993 WL 818778 (Mass. Super. Ct. 1993) (defendant asked by school board building committee to advise on skill and integrity of contract bidders was conditionally privileged).

VII. Count V Fails to State a Plausible Claim for Relief for Product Disparagement.

Since product disparagement overlaps defamation the Complaint fails to state a claim for defamation, it follows that there is no product disparagement. *See Mac-Gray Servs., Inc. v. Automatic Laundry Services Co.*, 2005 WL 3739853 at *4 (Mass. Super. 2005) (rejecting product disparagement claim on same basis it rejected defamation claim)

Product disparagement also requires the plaintiff to allege and prove "that the offending statements are false" and that it has suffered "special damages—specific pecuniary loss—before being entitled to recover." *FloTech, Inc. v. E.I. Du Pont de Nemours Co.*, 627 F. Supp. 358, 365 (D. Mass. 1985); *Dooling v. Budget Pub. Co.*, 144 Mass. 258, 259 (Mass. 1887) (product disparagement "though false and malicious, are not actionable without special damages").

Omega Flex does not name any "potential" consumer of CounterStrike that it lost and does not allege any specific pecuniary loss. Not only can it not establish any such hypothetical lost sale, there is no way of proving whether any such speculative loss was ameliorated by the consumer buying TracPipe instead. Omega Flex's purported damages are at best highly speculative and do not raise its claim "above the speculative level." *Faust*, 2008 WL 190769 at *2.

VIII. Count VI Fails to State a Plausible Claim for Relief for Common Law Unfair Competition.

Massachusetts common law unfair competition is limited to "cases involving consumer confusion" as to the source of the goods or services. *Cytologix Corp. v. Ventana Med. Sys., Inc.*, 2006 WL 2042331 (D. Mass. 2006) (Zobel, J.); *See generally*, 17A Massachusetts Practice ch. 36 ("Unfair Competition") (1997 ed.). Omega Flex does not allege that any of Torbins' statements are likely to create consumer confusion as to the source of CounterStrike, and it does not allege any facts that could even arguably support such a conclusion. Accordingly, Count VI must be dismissed for failure to state a claim for common law unfair competition.

CONCLUSION

For the foregoing reasons, Torbin respectfully requests that the Court: (i) dismiss Count I (Lanham Act); (ii) award Torbin his attorneys fees and costs as an "exceptional case" under 15 U.S.C. § 1117(a); (iii) dismiss each of the state law claims pursuant to M.G.L. c. 231 § 59H; (iv) award Torbin his attorneys fees as required by that statute; (v) in the alternative, dismiss each of the state law claims for failure to state a plausible claim for relief.

DATED: February 20, 2009

Respectfully submitted,

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/s/ Mitchell J. Matorin