IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

ALFASIGMA USA, INC.,	:	
	:	
Plaintiff,	:	
	:	Case No. 465781-V
v.	:	
	:	
EXEGI PHARMA LLC, et al.,	:	
	:	
Defendants.	:	

Attorneys and Law Firms:

Robert S. Brennen, Esq., Bradford S. Bernstein, Esq., Erinn M. Maguire, Esq., Miles & Stockbridge P.C., counsel for the plaintiff.

Jeremy W. Schulman, Esq., Jeffrey S. Gavenman, Esq., Schulman Bhattacharya, LLC, counsel for the defendants.

MEMORANDUM AND ORDER

On July 31, 2020, the parties appeared, through counsel, for a hearing on the defendants' motion for summary judgment. The court concludes that the motion should be granted for the reasons set out below.

Procedural Background

The plaintiff, Alfasigma USA, Inc., ("Alfasigma"), is a corporation organized under the laws of Delaware, with its principal place of business in Covington, Louisiana. Defendant ExeGi Pharma, LLC ("ExeGi") is a limited liability company organized under the laws of New York, with its principal place of business in Rockville, Maryland. Defendant Claudio De Simone ("De Simone") is an individual residing in Switzerland and is a citizen of Italy.

In the early 1990's, De Simone invented a high-potency, eight strain probiotic that was used in the treatment of certain dietary conditions. Commonly knows as "the De Simone

Formulation," the product contained a proprietary formulation of eight probiotic strains and was produced using a proprietary manufacturing process. Initially, the De Simone Formulation was licensed by VSL Pharmaceuticals, Inc. ("VSL"). The product was sold to the public under the brand name VSL#3 from 2002 until 2016. This relationship was ended by De Simone in January 2016. In 2016, De Simone then partnered with ExeGi to create a new brand albeit using the original formulation. The new brand is known as Visbiome.

VSL#3 was re-formulated after De Simone terminated VSL's license to sell the De Simone Formulation. Since June 2016, the plaintiff, Alfasigma, has been the exclusive distributor in the United States of the re-formulated version of VSL#3. The owner of the trademark, VSL, is not a party to this case.

The parties are not strangers to litigation. On November 20, 2018, after a fourteen-day jury trial in the United States District Court for the District of Maryland, the defendants in this case, ExeGi and De Simone, were the successful plaintiffs in federal litigation against Alfasigma and VSL.[1] The result of the federal litigation is well summarized by the district judge in two detailed written opinions. *De Simone v. VSL Pharmaceuticals, Inc.*, 395 F. Supp. 3d 617 (D. Md. 2019)(denying defendants' post-trial motions); *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574 (D. Md. June 20, 2019)(granting a permanent injunction against Alfasigma, among others, as an additional remedy for false advertising). The defendants in the federal litigation have appealed to the United States Court of Appeals for the Fourth Circuit. Alfasigma cross-appealed the district court's denial of certain post-verdict relief. In short, multiple appeals are pending in the Fourth Circuit.

[1] Leadiant Biosciences, Inc. was a defendant in the federal suit but is not a party to this case.

In brief, the federal jury found Alfasigma (and its federal co-defendant, Leadiant) to be liable to ExeGi for false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a)(2012). The jury awarded damages to ExeGi, and against Alfasigma, in the amount of $15 million. This sum represented ExeGi's lost profits from July 2016 through November 2018. ExeGi did not seek money damages against Leadiant in the federal trial.

In post-trial rulings, the district judge examined, and rejected, many of Alfasigma's contentions regarding the false advertising claim. With respect to the jury's award of $15 million in damages for false advertising in violation of the Lanham Act, the district court concluded that the evidence presented at trial was sufficient to establish a number of false statements, including the statement that VSL# 3 contained "the original proprietary mix of eight strains of live bacteria," when it did not. *De Simone v. VSL Pharmaceuticals, Inc.*, 395 F. Supp. 3d at 624. Another, separate false statement was that VSL#3 contained "the same genus and species of bacteria in the same proportions" as the original formula, when it did not. *Id.* In other words, Alfasigma's advertising claims that VSL#3 was the same as the De Simone formula, was, according to the district court, literally false. 395 F. Supp. 3d at 625. As summarized by the district court: "[T]he heart of ExeGi's claim is that the falsity of Alfasigma's advertising is the representation that, in essence, its product is the exact same product, with the exact same formulation, as ExeGi's product, where it is undisputed that the De Simone Formulation is otherwise available only through ExeGi in the form of Visbiome." 395 F. Supp. 3d at 631.

Apart from monetary relief, ExeGi and De Simone also sought injunctive relief in federal district court. Post-trial, the district court held that a permanent injunction under the Lanham Act was appropriate because "the De Simone Parties have suffered an irreparable injury." *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574, at *2. According to the district court, "[i]n

passing off Italian VSL#3 as the De Simone Formulation, Alfasigma and Leadiant deprived the De Simone Parties of a legitimate competitive advantage and reduced consumers' incentive to purchase Visbiome, which actually contains the De Simone Formulation, rather than Italian VSL#3." *Id.*

In crafting the scope of the permanent injunction, the district court first considered the nature of the harm. In its view, the principal harm was "the VSL Parties' repeated false assertions in their advertising that Italian VSL#3 continues to be composed of the De Simone Formulation," when it did not. *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574, at *3. The district court then enjoined Alfasigma (and others) from claiming or suggesting in any promotional materials that VSL#3 contained the same blend or mix of ingredients as the De Simone Formulation. It further enjoined Alfasigma (and others) "from citing any clinical study performed on the De Simone Formulation or implying that any such study was conducted on Italian VSL#3." *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574, at *4.

On July 30, 2020, the district court ruled on a motion to hold Alfasigma and Leadiant in civil contempt of the permanent injunction, which was issued on June 20, 2019. The district court granted the motion, in part, concluding that three online promotional statements made by Alfasigma regarding VSL#3 violated the permanent injunction. The district court also found that a September 9, 2019, press release issued by VSL's chief executive officer describing Visbiome as the "generic" version of VSL#3 violated the permanent injunction. The district court ultimately found both VSL and Alfasigma in contempt for violating the permanent injunction. As a remedy, the district court ordered the removal of all contumacious statements from the relevant media and required the contemnors to pay De Simone's and ExeGi's legal fees in bringing the contempt motion.

The Claims in this Lawsuit

This suit was filed on April 16, 2019. Alfasigma's claims in this case are based on "cease and desist" letters sent, beginning on December 4, 2018, at the defendants' behest, to a number of companies that had distributed or sold VSL#3 in the United States.[2] Among other things, Alfasigma contends that the letters contained a number of false or misleading statements. For example, Alfasigma alleges in paragraph five of its complaint that the letters falsely state or suggest that Alfasigma was selling "counterfeit VSL#3."[3] Alfasigma also alleges that the letters falsely state or suggest that Alfasigma was "in breach of its agreements with its distributor or business partner."[4] In addition, Alfasigma alleges that the defendants "have threatened to commence litigation against Alfasigma's distributors and business partners, which Defendants know to be baseless and made in bad faith. . . ."[5] As a result of the defendants' letters, Alfasigma contends that "several of Alfasigma's key distributors and business partners have ceased purchasing and selling Alfasigma VSL#3 products, notwithstanding the tremendous consumer demand for these products."[6]

According to Alfasigma, the VSL#3 trademark is valid, registered in the United States and elsewhere, and, since June 2016 Alfasigma has been the only party authorized in the United States to use that trademark. In the plaintiff's view, the VSL#3 products sold by Alfasigma cannot be counterfeit because the VSL#3 trademark is genuine, the mark is duly registered with

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[2] A copy of the letter that was sent to McKesson Corporation is attached to Alfasigma's complaint as Exhibit A. This letter is similar, if not identical to, the letters sent to other distributors and re-sellers of VSL#3.

[3] Complaint at ¶ 5.

[4] Complaint at ¶ 5.

[5] Complaint at ¶ 6.

[6] Complaint at ¶ 7.

the United States Patent & Trademark Office, and Alfasigma is the exclusive, authorized licensee of the VSL#3 trademark in the United States.[7] It further contends that, contrary to the defendants' view, no jury ever has found any product sold by Alfasigma to be counterfeit. Alfasigma also notes that no claim for counterfeiting or trafficking in counterfeit goods was pled in the Maryland federal lawsuit.[8]

Finally, Alfasigma contends that De Simone does not own the "know how" or any other intellectual property rights in the products sold by Alfasigma, which was suggested in the letters sent to the wholesalers and distributors. [9] In that vein, Alfasigma argues that neither the district court nor the jury in the federal lawsuit found that Alfasigma infringed or misappropriated any of the defendant's intellectual property.[10] In short, Alfasigma contends that the defendants falsely led the wholesalers and distributors to believe that they could be held liable under anti-counterfeiting laws simply by making Alfasigma's products available for sale in the United States.[11]

Later in the complaint, Alfasigma asserts that "ExeGi instituted a groundless civil action by filing a complaint in the United States District Court for the Southern District of California against TrueCommerce, Inc., Nexternal Inc. and Highjump Software, Inc.. . . . seeking compensatory damages in excess of $15,000,000."[12] Alfasigma says that the claims asserted in

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[7] Complaint at ¶ 17.

[8] Complaint at ¶ 19.

[9] Complaint at ¶ 21. The wholesalers and distributors which received the "cease and desist letters" include McKesson Corporation, Walgreens Boots Alliance, Inc., Amazon, Inc., Cardinal Health, Inc., CVS/Caremark, COSTCO Inc., TrueCommerce, Inc., and Rite Aid.

[10] Complaint at ¶ 21.

[11] Complaint at ¶ 23.

[12] Complaint at ¶ 54.

the California complaint are "legally frivolous" and that ExeGi "had no conceivable basis for the amount and/or type of damages it sought against the defendants in that case."[13] Yet, at least one of the California defendants, TrueCommerce, Inc., stopped selling VSL#3, on April 9, 2019, after receipt of the letter. Alfasigma claims that this constituted a breach of existing contracts between Alfasigma and TrueCommerce, Inc.[14]

The defendants moved for summary judgment on March 20, 2020. On June 3, 2020, the court granted the defendants' motion to stay discovery until after a ruling on the defendants' summary judgment motion. At the scheduling hearing on June 12, 2020, the parties agreed that the plaintiff would file its opposing brief on July 13, 2020, and that the summary judgment motion would be heard on July 31, 2020.

The Defendants' Summary Judgment Contentions

In their summary judgment motion, the defendants advance several arguments in support of summary judgment at this early stage of the case. They contend, first, that every statement made in the "cease and desist letters" is protected by the litigation privilege. In their view, each statement in every letter was sent either to threaten or forestall litigation if the recipient did not take certain actions with respect to Alfasigma's false advertising of VSL#3. In short, the defendants contend that each letter, and every statement in each letter, was related to actual threatened or plainly anticipated litigation over what they view as the continued false advertising by Alfasigma of VSL#3.

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[13] Complaint at ¶ 56.

[14] Complaint at ¶ 65. The TrueCommerce letter is dated March 14, 2019. TrueCommerce administered an e-commerce platform and allowed sponsors of VSL#3 to sell product on the websites www.vsl3.com and www.shop.vsl3.com. The letter alleged that TrueCommerce was allowing a continuing violation by Alfasigma of the Lanham Act, due to the alleged false advertising of VSL#3.

The defendants contend, second, that, contrary to the allegations in Alfasigma's complaint, no statement in any of the cease and desist letters is false. In other words, although the complaint makes allegations of falsity, a careful review of the letters themselves, particularly when read as a whole, reveals no such thing.

Third, the defendants contend that because the cease and desist letters are in fact accurate, the sending of the letters cannot be tortious. They contend that specifically at issue in the federal trial were Alfasigma's packaging and marketing materials promoting VSL#3 to be the equivalent of Visbiome, the De Simone Formulation. They note that the jury found Alfasigma's advertising to be false and awarded $15 million in compensatory damages. The defendants also cite to the district court's two post-trial decisions which confirmed the jury verdict, permanently enjoined Alfasigma from citing to any clinical study that was performed on the De Simone Formulation, and prohibited Alfasigma from suggesting that its product, VSL#3, was equivalent to the De Simone's Formulation.

Alfasigma's Arguments

Alfasigma counters that summary judgment is not warranted (particularly at this early stage) and that, moreover, discovery is necessary as material facts are in dispute. Alfasigma advances a number of contentions.

First, according to Alfasigma, the defendants' assertions in their letters that "counterfeit products" and "counterfeit VSL#3" were being sold are false because Alfasigma is authorized to sell VSL#3 and there were no claims of counterfeiting pled in the federal action. Alfasigma argues that the defendants' statements are capable of a defamatory meaning and that makes the question of defamation one for the factfinder. Second, Alfasigma argues that there are genuine

issues of material fact as to whether the defendants are liable for tortious interference with business relations and the common law claim of unfair competition.

Lastly, Alfasigma contends that common law privileges do not apply to defamation-based claims. According to Alfasigma, the litigation privilege "is not a defense to a tortious interference claim based not on defamation, but on Defendants' institution and threats of groundless litigation." [15]

Discussion

The parties have thoroughly briefed all of the legal points raised in their summary judgment papers. The court has determined that one issue, the litigation privilege, is dispositive as to all claims advanced in the complaint. Therefore, there is no need to, and the court does not, consider the parties' other contentions in this summary judgment ruling.

1. Summary Judgment

Summary judgment is appropriate only if the moving party shows two things. First, that there are no genuine issues of material fact. Second, that it is entitled to judgment as a matter of law. Md. Rule 2-501(f). This standard is well-settled. The number of reported cases interpreting Md. Rule 2-501 are legion. The citation of case authority by this court, on this point, would serve no useful purpose.

Before ruling on the pending summary judgment motion, however, the court must rule on a preliminary matter. Earlier in the case, the court granted the defendants' motion staying discovery. Alfasigma now claims that it needs discovery, and that the court should deny summary judgment, or defer a ruling, pending the conclusion of discovery.

[15] Alfasigma's Opposition to Defendants' Motion for Summary Judgment at p. 25.

The court is not persuaded to do so in this case. Md. Rule 2-501(d) does give the court the discretion to deny or continue a summary judgment motion if the court is satisfied that the "facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit" submitted under the Rule. Alfasigma has submitted such an affidavit, signed by its general counsel. Although the affidavit does recite reasons why discovery is sought, it does not, in this court's view, state with clarity why the information sought to be discovered is necessary to the court's consideration of the pending summary judgment motion, why the information sought would raise a genuine factual issue regarding the application of the litigation privilege, or specify the reasons for the non-moving party's failure, to date, and particularly in light of the contentious litigation history among the parties, to obtain such information directly from the recipients of the defendants' "cease and desist" letters.[16] *See Brown v. Suburban Cadillac, Inc.*, 260 Md. 251, 256-57 (1971); *Channel Master Satellite v. JFD Electronics Corp.*, 748 F. Supp. 373, 395 (E.D.N.C. 1990). The court has sufficient information to rule on the legal issues that have been presented and the discovery sought would unduly delay the resolution of the pertinent issues. *See Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 87-89 (2000). Further, any factual disputes that do exist are simply not material to the outcome, much less to the application of the litigation privilege under the particular circumstances of this case.

2. The Litigation Privilege

The so-called absolute litigation privilege has long been recognized by Maryland common law. *DiBlasio v. Kolodner*, 233 Md. 512, 522 (1964); *Maulsby v. Reifsnider*, 69 Md.

[16] Alfasigma's discovery requests (interrogatories and requests for production of documents) are attached as exhibits to the defendants' motion to stay discovery. DE # 48. In the court's view, the interrogatories and document requests are extremely broad, and, basically, seek every scrap of paper referring or relating to each defendant's contacts with Alfasigma's distributors and re-sellers. They are not tailored to any of the key arguments made in the summary judgment papers, and Alfasigma has not so tailored them to date. *See Androutsos v. Fairfax Hospital*, 323 Md. 634, 639-40 (1991).

143, 151 (1888). If applicable, the Court of Appeals explained in *Kennedy v. Cannon*, 229 Md. 92, 97-98 (1962), this privilege is absolute.

In *Adams v. Peck,* 288 Md. 1, 7-8. (1980), the Court of Appeals held that the litigation privilege, and the rationale for its application, extended beyond statements made in open court and in documents that were filed in a lawsuit. The Court of Appeals in *Adams* extended the absolute privilege to "statements published in documents which are prepared for use in connection with a pending judicial proceeding but which have not been filed." *Id.* at 6.

The Court of Appeals further elaborated upon *Adams* in *Norman v. Borison*, 418 Md. 630 (2011). In *Norman*, Judge Harrell explained that, contextually, the privilege could exist under three sets of circumstances that arise outside of an actual judicial proceeding: (1) statements made that produce a judicial proceeding, such as a complaint to the police or to Bar counsel; (2) statements made in preparation for or in advance of a to-be-filed judicial proceeding; and (3) statements made during the course of a pending or ongoing judicial proceeding, albeit not in the course of the actual proceeding itself. *Norman*, 418 Md. at 653-56. In sum, statements made outside of the courtroom may be absolutely privileged not only where a judicial proceeding is ongoing but also where such a proceeding is contemplated in good faith and under serious consideration at the time the statements were made. *Norman*, 418 Md. at 657-58.

The reasoning of *Adams* was further extended by the Court of Special Appeals in *Arundel Corp. v. Green*, 75 Md. App. 77 (1988). In that case, a lawyer for asbestos plaintiffs sent letters to Arundel Corporation ("Arundel") indicating, among other things, that workers may have been exposed to asbestos from crushed stone Arundel had supplied to its customers and requested certain information. Arundel was never named as a defendant by any asbestos plaintiff, or as the

supplier of asbestos-containing materials. The statements in the letters about asbestos-contaminated crushed stone were alleged by Arundel to be false and defamatory.

In that case, the Court of Special Appeals, speaking through Judge Karwacki (later a Judge of the Court of Appeals), held that the litigation privilege extended to communications made by counsel before the institution of a lawsuit he contemplated filing on behalf of a client. Relying on, among other authorities, the Restatement (Second) of Torts § 586 (1977), the Court of Special Appeals held that an attorney's otherwise defamatory statements were absolutely privileged, if they were made in relation to an anticipated judicial proceeding. *Ardundel Corp. v. Green*, 75 Md. App. at 84-85. The views expressed in *Arundel Corp.* are consistent with those held by the majority of state appellate courts. *See, e.g., Russell v. Clark*, 620 S.W.2d 865, 868-70 (Tex. Civ. App. – Dallas 1981)(collecting cases). *See also Visto Corp. v. Sproqit Technologies, Inc.*, 360 F. Supp. 2d 1064, 1068-70 (N.D. Cal. 2005)(discussing California litigation privilege); *Yang v. Lee*, 163 F. Supp. 2d 554, 562 (D. Md. 2001)(applying California law).

The Court of Special Appeals in *Arundel Corp.* also held that the burden is on the attorney -- the proponent of the litigation privilege -- to show that the statements were, in fact, made in anticipation of a judicial proceeding. That particular question ordinarily is for the court, if there are no genuine disputes of material fact pertaining to this issue. *Id.* at 85-86. The Court of Special Appeals in *Arundel Corp.* remanded the case to the trial court for a determination of whether the matters described in the letters had some relation to the suit that ultimately was filed. The evidentiary materials of record in *Arundel Corp.* were simply too sparse to permit this aspect of the inquiry to be resolved on summary judgment. *Id.* at 86.

Subsequently, in *Mixter v. Farmer*, 215 Md. App. 536, 544 (2013), the Court of Special Appeals re-affirmed its view that the absolute litigation privilege "extends to statements made prior to, and in contemplation of, judicial proceedings." The court went on to note that prior decisions both of the Court of Appeals, *Carr v. Watkins*, 227 Md. 578, 582-83 (1962), and the Supreme Court, *Barr v. Matteo*, 360 U.S. 564, 569 (1959), recognized that the privilege was not limited to the tort of defamation, and that it applied to other torts. *Mixter,* 215 Md. App. at 546-47.[17]

More recently, in *O'Brien &. Gere Eng'rs, Inc. v. City of Salisbury*, 447 Md. 394, 410-14 (2016), the Court of Appeals began its discussion of the litigation privilege by re-affirming its long standing recognition of the privilege, and then reiterated that this privilege is not limited to the tort of defamation. 447 Md. at 410-11. *See also Walker v. D'Alesandro*, 212 Md. 163, 169 (1957) ("Privilege is not confined in the law of torts to matters of defamation.") The Court of Appeals in *O'Brien* went on to extend the absolute litigation privilege to cover claims sounding in contract.

The Court of Appeals in *O'Brien* also specifically quoted with approval the Restatement (Second) of Torts § 586 (1977), which provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

447 Md. at 411 n.10.[18]

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[17] In *Mixter*, as an alternative holding, the Court of Special Appeals determined that summary judgment was properly granted as to the torts of interference with contracts and interference with prospective business advantage for reasons other than immunity. 215 Md. App. at 549-50.

[18] Notably, the Court of Special Appeals in *Arundel Corp. v. Green*, 75 Md. App. at 83-84, also relied on this same section of the Restatement in concluding that the letters at issue were within the ambit of the privilege.

The "cease and desist" letters in question begin by identifying the lawyer as litigation counsel to both De Simone and ExeGi.[19] The letters summarize the past business relationship between De Simone and VSL, and describe the result of the federal litigation against VSL and Alfasigma. Counsel then state: "the jury unanimously found that the distributors were liable for false advertising by misrepresenting VSL#3 to be the same as the original De Simone formulation now sold as Visbiome. The jury awarded ExeGi Pharma damages of $15 million on its false advertising claim, which represented Alfasigma USA's wrongfully earned profits on sales of the fake VSL#3 product." The letters do refer to VSL#3 as a "counterfeit version" of the De Simone formulation. There is other colorful language which, for present purposes, the court assumes to be defamatory.

The letters then note that the recipient is a re-seller or distributor of VSL#3 and demand that they stop selling "all VSL#3 product containing or otherwise associated with false advertising equating the product with the De Simone formulation or otherwise falsely indicating that VSL#3 consists of 8 strains of bacteria and is supported by clinical studies on the product." A disgorgement of profits is requested, settlement discussions are proposed, and litigation is threatened to recover "future profits" earned by the distributors of VSL#3.

The letters demand a litigation hold on all documents be put in place, including any electronically stored information. The level of detail regarding document retention and preservation is extensive, and there is a notice warning against spoliation.

The letters end by demanding a response by a date certain. If no response is received, the threat is to "take all appropriate actions without further notice to you."

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[19] The letters are identical in all material respects, apart from the ones to the internet web hosting companies which contain additional legal assertions. These differences are not germane to the court's decisions.

Alfasigma contends that the letters the defendants' lawyer sent to distributors and re-sellers of VSL#3 are not protected by the litigation privilege because they were not made in good faith. Alternatively, Alfasigma argues that there is a genuine question of fact in this regard. The proof of this, they urge, is that the letters falsely accuse Alfasigma of the criminal offense of counterfeiting and that such a false accusation is defamatory.[20]

In this court's view, Alfasigma's focus on the falsity of the accusations leveled against it in the letters is misplaced. The good faith test outlined in *Norman*, 418 Md. at 658, and other cases, does not require that the challenged statements ultimately be found to be true (almost always, in this context, they are not). What is required in this context is that the speaker hold a reasonable belief in the validity of the statements or the claims made in the letters (or other communications with the distributors) and that, absent compliance with the writer's demands, litigation against the recipient is seriously contemplated. *Arundel Corp.*, 75 Md. App. at 84; Restatement (Second) of Torts § 586, comment (e). And, in this arena, the "relevance" of the statements in the letters to the anticipated or contemplated judicial proceeding is gauged contextually, not in an evidentiary sense. *Norman*, 418 Md. at 658 & n.17, 660 & n.19.

Contrary to Alfasigma' s contention, the application of the litigation privilege to the pre-litigation demand letters sent by the defendants' counsel to Alfasigma's distributors and re-sellers does not prop the barn door wide open for any and every sort of false or malicious pre-litigation charge or innuendo. Manifestly, under the case law and the Restatement (Second) of Torts, there must be a logical or rational connection between the pre-litigation statements and the anticipated or contemplated litigation described in the demand letters. The litigation privilege is not an open-ended invitation to defame or disparage a competitor.

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[20] Alfasigma USA, Inc.'s Opposition to Defendants' Motion for Summary Judgment at p. 8-12.

The facts of this case are more favorable for the application of the litigation privilege than are those found in *Arundel Corp.*, a case in which the Court of Special Appeals concluded that the litigation privilege did apply to the allegedly defamatory statements. And, unlike the circumstance in *Arundel Corp.*, this court has a more than adequate record from which to determine there is no genuine issue of fact as to whether the allegedly tortious statements have the requisite relationship to an anticipated judicial proceeding (i.e., "contemplated in good faith and under serious consideration"). By any reasonable reading of the record before this court, they do.

On their face, the letters sent by the defendants to distributors such as McKesson Corporation, Walgreens, Cardinal Health, and CVS/Caremark were sent threatening, and in anticipation of litigation with each recipient if certain demands were not met. The letters summarized the results of the federal litigation, and most were sent during a time when post-trial motions were pending in the federal case. Hence, the letters were sent both in relation to the on-going federal case, in which a permanent injunction later was issued, and in relation to future litigation contemplated with each recipient of the letters.

The recipients manifestly understood the upshot of the letters, based on the letters' plain language, and most suspended their purchase or sale of VSL#3 rather than risk litigation with the defendants. One recipient, TrueCommerce, suspended sales upon receipt of the California federal complaint. There is no genuine issue of material fact in this case, based on the existing record, that the defendants' "cease and desist" letters were sent in relation to anticipated judicial proceedings.

There also is no genuine issue of material fact in this case that the "cease and desist" letters were sent "in good faith," within the meaning of comment € of the Restatement (Second)

of Torts § 586, and in connection with litigation that was "under serious consideration." The letters not only said as much in their text, but the summary judgment record leaves no doubt the defendants would and could, (and in one instance did) sue the recipients if certain demands were not met.

Nothing further is required to apply this well-recognized common law privilege. The litigation privilege recognized under Maryland common law is absolute and applies even if many (if not most) of the statements in the letters turn out to be false, a question this court does not resolve. Here, there is no litigable question as to whether they were sent "in good faith" and in relation to plainly anticipated litigation with each recipient. Within the meaning of the Restatement, the record in this case discloses that the speaker in each case had a reasonable, good faith belief in the validity of the claims asserted and that litigation was seriously contemplated. *See Yang*, 163 F. Supp. 2d at 562. Nothing more is required.

Here, ExeGi and De Simone were plainly looking to enforce their rights, established after the federal jury's verdict (which was largely in their favor) and to avoid future litigation with Alfasigma's VSL#3 distribution partners. The letters were properly targeted to the distributors and sellers of VSL#3 in the United States, clearly threatened litigation if certain demands were not met, and required that litigation holds be placed on key documents, including electronically stored information. The required nexus is manifest, and this case meets every requirement of *Norman*. There is a strong public interest in "true" advertising of products under the Lanham Act, as well as under state law. The statements that Alfasigma claims were tortious, which were contained in cease and desist letters (and related e-mails among lawyers) and the litigation hold demands, clearly contemplated impending litigation. There is no genuine issue of fact in this case as to whether the communications were related to legal proceedings that were contemplated

in good faith and under serious consideration within the meaning of the Restatement (Second) of Torts § 586; by the relevant legal tests, they were.[21]

For these reasons, the defendants' motion for summary judgment is granted. The complaint is dismissed, with prejudice, and without leave to amend. It is so Ordered this 20th day of August, 2020.

Ronald B. Rubin, Judge

[21] The court is aware of the unpublished, per curium decision of the Fourth Circuit in *Koolvent Aluminum Products, Inc. v. Azrael, Gann & Franz*, 52 F.3d 321 (4th Cir. 1995). That case is distinguishable factually, due to its lack of an adequate evidentiary record. The Fourth Circuit recognized that the litigation privilege covered statements by an attorney in soliciting prospective clients. It remanded the case to permit discovery into whether the factual preconditions for the privilege were met (including whether a lawsuit was in fact under serious consideration). Such is unnecessary given the evidentiary record in this case.