ORIGINAL

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL SOCIETY,	:	Case No. 2010-1335
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
LEADSCOPE, INC., et al.,	:	Court of Appeals Case No. 08AP-1026
Appellees.	:	

REPLY MERIT BRIEF OF APPELLANT THE AMERICAN CHEMICAL SOCIETY

Michael G. Long (0011079)
(COUNSEL OF RECORD)
Kimberly Weber Herlihy
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
(614) 464-6297 (telephone)
(614) 719-4829 (facsimile)
mglong@vorys.com

David W. DeBruin
Matthew S. Hellman
Lindsay C. Harrison
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
Tel: (202) 639-6000

COUNSEL FOR APPELLANT
THE AMERICAN CHEMICAL SOCIETY

Alan L. Briggs (0019247)
(COUNSEL OF RECORD)
Squire, Sanders & Dempsey L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-2700 (telephone)
(614) 365-2499 (facsimile)
abriggs@ssd.com

COUNSEL FOR APPELLEES
LEADSCOPE, INC.,
PAUL E. BLOWER, JR.,
WAYNE P. JOHNSON,
AND GLENN J. MYATT

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INTRODUCTION

Appellees have filed a pair of response briefs that have almost nothing to say about the important legal issues this case presents. In concert with Appellees' motions to dismiss and strike, the implication is obvious: Appellees cannot prevail on the merits. Rather than address the arguments ACS advanced, Appellees devote dozens of pages to issues of waiver and related procedural objections. Those objections are groundless. Not only did ACS expressly preserve every argument presented here, but each argument was addressed on the merits below. This case presents legal issues of significant public importance concerning the right of a party to seek legal relief and to make statements related to a pending lawsuit; *amici* representing a broad range of views have urged this Court to reverse; and no impediment prevents this Court from reaching the correct result the law requires.

The other dominant feature of Appellees' response briefs is their repeated claim that they are victims who deserve compensation. Appellees' briefs are full of strong rhetoric, appeals to sympathy, and an argumentative presentation of the facts as Appellees perceive them. These tactics were successful before the jury, but they are irrelevant to the legal issues before this Court. ACS could respond to each of Appellees' rhetorical and factual claims, but those are not the issues that this Court agreed to hear. Appellees' multiple counterclaims all fail because ACS's lawsuit, and its statements about that lawsuit, had a legitimate, adequate objective basis, as the trial court necessarily found. This Court should reverse.

ARGUMENT

I. Appellees Do Not Seriously Defend The Constitutionality Of The Unfair Competition Verdict And Their Waiver Arguments Have No Merit.

Appellees essentially have conceded that Proposition I is correct on the merits – *i.e.*, that a party has a constitutional right to petition the courts and cannot be found liable for having done

so unless its lawsuit is objectively baseless.[1] Appellees instead primarily offer waiver arguments raised previously, none of which the Court of Appeals accepted. As explained below and in ACS's opposition to Appellees' motion to dismiss, these arguments are meritless.

A. ACS Preserved Proposition I For Appellate Review.

1. As ACS demonstrates in its response to Appellees' pending motion to dismiss, ACS explicitly raised the claim presented in Proposition I. *See* ACS Opp. to Mot. to Dismiss 2-6 (filed Apr. 29, 2011) ("Opposition"); *see also* ACS Memo. in Support of Jurisdiction 6, 9 n.5 (filed July 30, 2010) ("Memorandum"). To summarize, ACS expressly argued in the trial court for a directed verdict on the unfair competition and tortious interference claims on the ground that ACS was "entitled to bring the lawsuit" because there was an "enormous amount of evidence" to support it. Tr. 5372 (Supp. 173); *see also* Tr. 5333 (Supp. 134), Tr. 5347 (Supp. 148), Tr. 5378 (Supp. 179).[2] Further, ACS requested a jury instruction that mirrored the constitutional standard set forth in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. 49, 60-61 ("*PRE*"). The instruction would have required Appellees to establish that ACS's lawsuit was brought "without probable cause" and that "ACS's lawsuit had no basis." Pl. Obj. to Jury Instructions 47-48 (Mar. 24, 2008) (Supp. 290-91). The trial judge refused to give that instruction.

This was more than sufficient to preserve the issue for appellate review. *See R.H. Macy & Co. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108, 110 (a party need only "request[] the inclusion" of the "correct law" in "the trial court's charge to the jury" to preserve its objection).

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[1] Appellees limit their substantive response to a footnote arguing that this Court is free to make a "policy choice" not to follow this constitutional law. *See* Leadscope Br. 14 n.2. That argument, which the Court of Appeals accepted, is incorrect. ACS Br. 17-19.

[2] Citations to "App." and "Supp." are to the Appendix and Supplement to ACS's Merit Brief filed February 28, 2011.

There is no "magic words" requirement under which ACS was required to use the words "*Noerr-Pennington*" or "First Amendment." In Ohio, an objection is preserved "[w]here the record affirmatively shows that a trial court has been fully apprised of the correct law. . . , and that the complaining party has unsuccessfully requested the inclusion of that law in the trial court's charge to the jury." *Kirschbaum v. Dillon* (1991), 58 Ohio St.3d 58, 61. Appellees cite Civ. Rule 51(A), but "[t]he purpose of Civ. R. 51(A) is to provide a trial court with an opportunity to correct any errors. . . , and that purpose is fully served where the appellant has formally requested an instruction to the contrary, and the issue has been argued to the trial court." *Id.*

Put simply, ACS argued that it could not be found liable as a matter of law for bringing a lawsuit that was supported by substantial evidence, and it sought an instruction that incorporated the constitutional standard. Appellees insist – without supporting citation – that the argument was made under Ohio law alone, even though ACS accurately stated the requirements imposed by constitutional standards as well.[3] Neither the law nor common sense supports that result. ACS made its objection clear at all relevant times, and this Court should not find waiver.

2. Appellees also argue that ACS's claim that its lawsuit was not "objectively baseless" is an "affirmative defense" that ACS failed to raise in its Answer. That is wrong both because *Appellees* were required to prove as an element of their counterclaims that ACS's suit was objectively baseless, and because ACS nevertheless *raised* the issue as a defense.

First, the U.S. Supreme Court and Ohio courts recognize objective baselessness as an element of Appellees' claims of "wrongful" litigation, with the burden of proof falling on

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[3] Additionally, Appellees overlook the fact that Ohio law must accommodate federal constitutional requirements. Thus, even if ACS had made its objection solely under Ohio law, federal constitutional issues were implicit in that objection. And that is enough to defeat waiver. *See Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.* (1993), 67 Ohio St.3d 274, 279; *see also* Opposition 5-6.

Appellees, and not as an affirmative defense. *See PRE*, 508 U.S. at 62 (stating that the First Amendment "requires the *plaintiff* to prove" objective baselessness (emphasis added)); *All Metal Sales, Inc. v. All Metal Source, LLC* (N.D. Ohio Mar. 11, 2011), No. 1:10 CV 2343, 2011 WL 867020, at *2, *6-7; *Lender's Serv., Inc. v. Dayton Bar Ass'n* (S.D. Ohio 1991), 758 F. Supp. 429, 440. Accordingly, courts regularly dismiss claims for malicious litigation or similar torts where the party asserting the claim fails to meet that burden.[4]

The cases cited by Appellees are not on point. They concern *Noerr-Pennington* under antitrust law and therefore relate to statutory claims that have different elements from the torts at issue here. And even in that context, the majority rule is that *Noerr-Pennington* immunity is *not* an affirmative defense. *See, e.g., IGEN Int'l, Inc. v. Roche Diagnostics* GmbH (C.A. 4, 2003), 335 F.3d 303, 311; *McGuire Oil Co. v. Mapco, Inc.* (C.A. 11, 1992), 958 F.2d 1552, 1559 n.9; *United States ex rel. Wilson v. Maxxam, Inc.* (N.D. Cal. Feb. 9, 2009), No. C 06-7497 CW, 2009 WL 322934, at *11-12; *Primetime 24 Joint Venture v. Nat'l Broad. Co.* (S.D.N.Y. 1998), 21 F. Supp. 2d 350, 355-56, *rev'd on other grounds*, 219 F.3d 92 (C.A. 2, 2000); *Defino v. Civic Center Corp.* (Mo. Ct. App. 1989), 780 S.W.2d 665, 668-69.

Indeed, Appellees previously recognized that objective baselessness was an element of their claim, because they specifically pleaded that ACS's lawsuit was objectively baseless. *See* Appellees' Counterclaim ¶¶ 54, 56. They shifted gears only after it became apparent, following 14 days of trial testimony by ACS, that they could not prevail under that standard.

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[4] *See All Metal Sales*, 2011 WL 867020; *see also, e.g., Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.* (C.A. 2, 2000), 229 F.3d 1135, 2000 WL 1508873, at *1 (unpublished table decision); *Havoco of Am., Ltd. v. Hollobow* (C.A. 7, 1983), 702 F.2d 643, 651; *Ravet v. Solomon, Ward, Seidenwurm & Smith, LLP* (S.D. Cal. July 17, 2007), No. 07 CV 0031, 2007 WL 2088381, at *6; *Neway Anchoelok Int'l, Inc. v. Longwood Indus., Inc.* (W.D. Mich. 1999), 107 F. Supp. 2d 810, 812-13.

In any event, even if ACS were required to raise the issue as an affirmative defense, ACS did so in its Answer. ACS denied that its lawsuit was "objectively baseless," asserted that Appellees failed to state a claim upon which relief could be granted, and argued that Appellees' counterclaims were barred because ACS's own claims were true. Reply of Pl. to Counterclaim ¶¶ 54, 80-81. These are precisely the issues before this Court.

B. The Jury Instructions Did Not Incorporate Objective Baselessness.

Because the Constitution prohibits the imposition of liability upon a party for filing a lawsuit that has an adequate objective basis, Appellees argue that the jury instructions incorporated that element. The instructions did not.

1. The trial court's instruction on the unfair competition claim clearly did not incorporate an objective element. Appellees argue that the instruction required a finding that the litigation was "not founded in good faith." Leadscope Br. 14-15. But "not founded in good faith" was not defined to mean "objectively baseless," but rather "with the intent and purpose of harassing and injuring a rival engaged in the same business." Tr. 5878 (Supp. 243). That is indisputably a *subjective* standard. Indeed, Appellees argue that the court's instructions followed Ohio precedent, which they say does not incorporate the constitutional limit. *See* Leadscope Br. 22-23. Appellees cannot have it both ways.

2. Appellees also argue that because the jury found that ACS brought its claim in "bad faith" and was instructed that "bad faith means that Plaintiff's claim *lacked merit*," Tr. 5871 (Supp. 241) (emphasis added), the constitutional standard was met. That argument fails.

First, on its face, the "bad faith" instruction did not require the jury to determine whether ACS's lawsuit was objectively baseless. Rather, consistent with the plain meaning of "bad faith," the jury was told that "[i]n determining . . . bad faith . . . , you must consider the

Plaintiff's *subjective state of mind* when deciding to bring its claim." Tr. 5871 (Supp. 241) (emphasis added).[5]

Second, the "bad faith" instruction did not ask the jury whether ACS's lawsuit was "objectively baseless," but rather whether "Plaintiff's claim lacked merit." Tr. 5871 (Supp. 241). The two are not equivalent because, by definition, a claim may be found to have "lacked merit" whenever it does not *prevail*. *See* ACS Br. 24. Thus, a finding of "without merit" does not necessarily imply a finding of "objective baselessness." That is underscored by the contrast between the attorneys' fees statute at issue here, which provides fees to a "prevailing party," R.C. 1333.64, and other attorneys' fees statutes, which reserve fee awards to "frivolous cases" for which there are "clearly no legal grounds" to support the claim, R.C. 2743.65(F)(1)-(2). That contrasting language further demonstrates that Ohio law does not require – and the jury was therefore not instructed to find – objective baselessness in awarding fees here.

Third, the distinction between the two standards should not be a mystery to Appellees because they successfully argued below that they were entitled to fees under the instruction so long as they simply *prevailed* on the claim and ACS acted with subjective bad faith. *See* App. 41, ¶ 85 (Court of Appeals declines to require objective baselessness for fees because it would "introduce a new and more stringent standard than that set forth in the statute") . Having argued for a broader interpretation of the fee statute that would give them recovery so long as they merely prevailed, they cannot now claim that the jury's finding establishes baselessness.

Finally, the "bad faith" instruction is irrelevant in any event because Appellees' counterclaims should never have been *submitted* to the jury. As explained in ACS's opening

[5] At a minimum, the jury was given inconsistent and conflicting instructions (one stating that "*bad* faith" means that a claim "lacked merit"; the other stating that a claim "is not founded in *good* faith" if it is brought "for the purpose of harassing and injuring a rival"). As a result, reversal is required. *Onderko v. Richmond Mfg. Co.* (1987), 31 Ohio St.3d 296, 299-300.

brief and *infra* Section I.C, ACS was entitled to a directed verdict on those counterclaims because the trial court necessarily found there was an adequate basis for its lawsuit as a matter of law. No instruction, or finding by the jury, could preserve the damages award in this case.[6]

C. As a Matter of Law, ACS's Claims Were Not Objectively Baseless.

As a matter of law, ACS's claims had a constitutionally adequate basis. They survived both summary judgment *and* motions for a directed verdict. The trial court's ruling that ACS's claims were sufficient to reach the jury necessarily determined that ACS's lawsuit had an adequate basis. *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 328, 2007-Ohio-6442, ¶ 16 (if a lawsuit "raises [a] genuine issue of material fact" and is sufficient to withstand a motion for summary judgment or a directed verdict, "the suit does not fall under the definition of sham litigation"); ACS Br. 30-31. ACS was thus entitled to a directed verdict on Appellees' counterclaims.[7]

Appellees attempt to recast this argument as a challenge to the sufficiency of the evidence. This straw man allows Appellees to belabor their highly argumentative view of the facts, but the facts as they cast them are irrelevant. ACS does not dispute that the jury accepted their version of the facts. But the fact that ACS's claims were ultimately rejected by the jury is irrelevant to the question of whether ACS's claims had an objective basis as a matter of law. *See*

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[6] Appellees also argue that the "two issue" rule bars recovery. As ACS shows at length in its opposition to the same argument in Appellees' motion to dismiss, *see* Opposition 12-15, this argument fails because (1) liability for unfair competition cannot be sustained on the alternate theory that ACS made "false or disparaging statements," for the reasons set forth in Proposition III; (2) the "two-issue rule" would not apply in this case in any event, as the rule "does not apply where there is a charge on an issue upon which there should have been no charge," *Hampel v. Food Ingredients Specialties, Inc.* (2000), 89 Ohio St.3d 169, 185 (quotation marks omitted) – here, the "malicious litigation" charge; and (3) further, the rule arises "where there are two causes of action," *id.*, and not, as here, a single cause of action for unfair competition.

[7] As ACS has explained previously, the objective basis for ACS's claims bars all Appellees' counterclaims. *See* ACS Br. 13-14 n.4, 18.

PRE, 508 U.S. at 60 n.5 (explaining that courts "must resist the understandable temptation to engage in *post hoc* reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation") (internal quotation marks omitted).

Appellees cite cases holding that a patent claim may be "frivolous" even if it survives summary judgment, but they are not Ohio cases, and this Court has made abundantly clear that under Ohio law a lawsuit that survives summary judgment "does not fall under the definition of sham litigation." *Greer-Burger*, 116 Ohio St.3d at 328, 2007-Ohio-6442, ¶ 16.[8] Moreover, ACS's claims survived not only summary judgment but also motions for a directed verdict, both at the close of ACS's case and after the close of all the evidence. Thus, even after it had the opportunity to hear the evidence at trial, the trial court determined that there was "substantial competent evidence" to support ACS's claims and reasonable minds could side with ACS. *See Wagner v. Roche Labs.* (1996), 77 Ohio St.3d 116, 119; Civ.R. 50. These findings simply cannot coexist with a conclusion that ACS's claims were objectively baseless. *See, e.g., Greer-Burger*, 116 Ohio St.3d at 328, 2007-Ohio-6442, ¶ 16; *Baker v. Beachwood Villas Condominium Owners Ass'n* (6th Dist.), 2004-Ohio-682, ¶¶ 23-24.

Because ACS's claims had an objective basis as a matter of law, ACS was entitled to judgment on Appellees' counterclaims. Those counterclaims should not have gone to the jury.

II. Appellees Cannot Defend The Unfair Competition Judgment Under Ohio Law.

Even if this Court were to find (contrary to the record below) that ACS failed to preserve its claim as a matter of constitutional law, the verdict would still need to be vacated on the basis

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[8] Numerous courts share this Court's view that where a genuine issue exists, a lawsuit is not baseless. *See, e.g., Sulzer Textil A.G. v. Picanol N.V.* (C.A. Fed. 2004), 358 F.3d 1356, 1370; *Twin City Bakery Workers & Welfare Fund v. Astra Aktiebolag* (S.D.N.Y. 2002), 207 F. Supp. 2d 221, 224; *ADT Sec. Sys., Inc. v. Guerra* (D. Conn. Mar. 4, 1997), No. 95-cv-1051, 1997 WL 114784, at *2; *Harris v. Custom Builders, Inc. v. Hoffmeyer* (N.D. Ill. 1993), 834 F. Supp. 256, 261-62; *Lender's Serv.*, 758 F. Supp. at 441.

of Ohio tort law. Appellees do not dispute that ACS preserved its state law claims. *See* Leadscope Br. 13 (arguing that ACS did not raise constitutional objections, but rather "argued only that the instruction 'improperly broadened Ohio law' and 'misstated Ohio law'"). Appellees further concede that their interpretation of Ohio law would permit tort liability based *solely* on a party's subjective motivations in filing suit. *Id.* at 22-23. Critically, Appellees do not even attempt to dispute that doing so would render Ohio's malicious prosecution tort superfluous and would invite an explosion of litigation by prevailing defendants. *See* ACS Br. 26-28. This Court should decline Appellees' invitation and should make clear that a lawsuit must be objectively baseless in order to give rise to a claim of unfair competition under Ohio law.

A. Ohio Law Requires Objective Baselessness.

Appellees argue that no Ohio case has ever required "objective baselessness" as an element of unfair competition by malicious litigation. However, Appellees have no response to *Henry Gehring*'s requirement that, in order to give rise to a malicious litigation counterclaim, a suit must have "no warrant or proof." *Henry Gehring Co. v. McCue* (8th Dist. 1926), 23 Ohio App. 281, 283-84. Appellees assert that the court did not state that this was "a distinct element" of the tort, but that is untrue. The court held that the claimant's case fell within the "class of cases" in which claimants obtain "successful recoveries because of malicious acts by way of litigation in the courts" precisely because the claimant alleged that the conduct of the defendant "had no warrant or proof." *Id.*

Furthermore, Appellees do not even attempt to explain how a malicious *litigation* tort aimed at purely subjective motives could coexist with this Court's precedents regarding the tort of malicious *prosecution*. Appellees' position invites precisely the "explosion of claims" this Court warned against in *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264,

270, and would impair the "free, unhampered access to the courts" this Court emphasized as critical in *Crawford v. Euclid National Bank* (1995), 19 Ohio St.3d 135, 138.

B. No Other State Permits Malicious Litigation Based Solely on Subjective Motivation.

Recognizing a tort of malicious litigation predicated on subjective bad faith would make Ohio the only State, as far as ACS is aware, to subject parties to liability on that basis. *See* ACS Br. 28-30. Appellees attempt to dispute that notion by citing four cases that, in Appellees' view, recognize an "unfair competition-by-litigation claim" based on a finding of subjective bad faith alone. *See* Leadscope Br. 24. Not one of those four cases supports their theory.

Two of those cases involve a plaintiff's allegation that the defendant's lawsuit was a "sham" – precisely the objective element for which ACS has argued here. *See Donnelly Corp. v. Reitter & Schefenacker USA L.P.* (W.D. Mich. Aug. 13, 2002), No. 1:00-CV-751, 2002 WL 31418042, at *1-2 (party alleged that the action was "baseless" and constituted "sham litigation"); *Mirafi, Inc. v. Murphy* (C.A. Fed. 1991), 928 F.2d 410, 1991 WL 10623, at *2 (unpublished table decision) (plaintiff expressly alleged suit was "a 'mere sham'").

The third case, *Opti-Copy, Inc. v. Dalpe* (Mass. Super. Ct. Oct. 6, 1994), No. 92-3151, 1994 WL 879362, at *2, merely holds that objective baselessness is not an element of the tort of "abuse of process," an entirely different theory of relief that Appellees did not pursue. *See Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St. 3d 294, 297-98 (setting forth the elements of "abuse of process" as distinct from malicious prosecution).

The final case cited by Appellees, *Jenn-Air Corp. v. Modern Maid Co.* (D. Del. 1980), 499 F. Supp. 320, 333, was decided before the Supreme Court's decision in *PRE* and does not have any bearing on Ohio law. *See Baxter Travenol Labs., Inc. v. LeMay* (S.D. Ohio 1982), 536 F. Supp. 247, 248 (explicitly rejecting *Jenn-Air Corp.* and holding, under Ohio law, that a claim

of "institut[ing] [a] lawsuit maliciously, falsely and without probable cause" could be brought only as a "malicious prosecution" claim and not as an "unfair competition" claim (internal quotation marks omitted)).

In sum, Appellees fail to identify any other jurisdiction where a party can be sued solely for its subjective motives in bringing objectively adequate claims. As *amici* have explained in detail, Ohio law will become uniquely inhospitable to business if the judgment below is affirmed. Ohio Chamber of Commerce Br. 2. This Court should not permit such a result.

III. Appellees Cannot Recover For Defamation.

A. The Two Statements at Issue Here Cannot Be the Basis for Liability.

ACS's statements in the All-Staff Memo and the *Business First* article went no further than the allegations contained in ACS's complaint, and Appellees do not contend otherwise. As a result, these allegations cannot support liability. They are absolutely privileged, and, in any event, they are not defamatory.

1. ACS explained in its opening brief that the All-Staff memo, which directed ACS employees *not* to comment on the litigation, is the type of statement that is absolutely privileged. As ACS's *amici* have explained, such instructions are a necessary feature of modern litigation. *See* OSBA Br. 16 ("The statement [in the memo] is of a type that an organizational litigant *must make* at the outset of a case").[9] In response, Appellees do not cite a single case involving a "do not comment" directive to employees. Instead, they continue to rely on inapposite cases involving other types of statements to employees. Whatever the status of those statements, an

[9] Appellees claim that ACS has waived this argument because it did not claim the memo was absolutely privileged when the trial court decided absolute privilege issues for other statements. Leadscope Br. 29-30. But Appellees omit that at that time they had not yet even claimed the statement to be defamatory. *See* Opposition 9. Appellees made this same flawed waiver argument in the Court of Appeals, which addressed the issue on the merits.

instruction not to comment on a case that had just been filed, like an instruction to preserve documents, is clearly the type of statement that is "relevant to judicial proceedings" and should be treated as absolutely privileged. *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 448-49.

Like the Court of Appeals, Appellees suggest that the statement might have been absolutely privileged if it had been sent to a smaller number of employees. Leadscope Br. 31. But Appellees offer no reliable method for corporate counsel to determine which employees may be asked questions about a case. And Appellees concede that it would have been appropriate for ACS to tell its employees that ACS had "filed a lawsuit against the Defendants regarding the Leadscope product." Leadscope Br. 32. That is virtually identical to the statement at issue.

It is ironic that Appellees attempt to assure this Court that the qualified privilege offers sufficient protection to business. Leadscope Br. 32. To be sure, reversal would be required here even if the statement were subject only to a qualified privilege. *See infra* Section III.B. But Appellees' constant refrain has been that the qualified privilege does *not* bar liability where there is a subjective intent to harm. Recognition of only a qualified privilege risks subjecting every lawsuit to defamation countersuits based on wholly ordinary, appropriate, and necessary statements related to the lawsuit.

2. Reversal is also required because neither the All-Staff Memo nor ACS's statement in the *Business First* article is defamatory.[10] Appellees rely heavily on Ohio's fair report statute, R.C. 2317.05. According to Appellees, an accurate recounting of allegations is not necessarily "true" because Ohio has said they are protected by only a *qualified* privilege. But as Appellees concede, cases like *Early* and *Sethi* hold that where it is clear a party is giving an

[10] Appellees contend this argument is waived, but ACS expressly argued in the trial court that statements repeating what the complaint said were true and not defamatory. *See* Tr. 5407 (motion for directed verdict); *see also* Opposition 8-9. In addition, the two issue rule requires reversal even if this Court finds that only one statement is actionable. *Id.* at 14.

account of contested allegations, the statements simply are not defamatory, even if they might *also* be entitled to a qualified privilege. Leadscope Br. 29. Appellees seek to distinguish those cases on the ground that the statements were made by "impartial" media defendants, but those cases did not turn on the identity of the speaker. Rather, they turned on the fact that the statements accurately reported allegations that were to be adjudicated by a court. The same is indisputably true of ACS's statements here. Whatever additional protection the fair report statute may offer, the fact remains that ACS's two statements were a limited, accurate account of contested allegations and thus cannot be defamatory.

Appellees also claim that other jurisdictions do not protect counsel's statements about litigation. But many cases they cite do not involve situations where counsel's statements were limited to an accurate account of allegations in a pending suit that had an adequate objective basis.[11] The better view is that publication to the media of material that the media was independently entitled to view cannot provide a basis for a claim of defamation. ACS Br. 37; *Kelley v. Bonney* (Conn. 1992), 606 A.2d 693, 707. This Court should so hold.

B. Actual Malice Cannot Be Found in This Case.

Even if ACS's statements are subject only to a qualified privilege, they cannot support liability here. Appellees argue at length the facts that they contend show that ACS acted with actual malice. But these arguments ignore the *legal* issue before this Court. In addition, they are insufficient to meet the demanding standards for actual malice in any event.

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[11] *E.g.*, *Encompass Ins. Co. of Mass. v. Giampa* (D. Mass. 2007), 522 F. Supp. 2d 300, 309 (liability for "added statements" beyond pleading); *Scott Fetzer Co. v. Williamson* (8th Cir. 1996), 101 F.3d 549 (liability for publishing private pre-suit demand letter); *Seidl v. Greentree Mortg. Co.* (D. Colo. 1998), 30 F. Supp. 2d 1292, 1315 (no discussion of statements that merely accurately track pleadings); *Green Acres Trust v. London* (Ariz. 1984), 688 P.2d 617 (liability for publishing pre-suit draft complaint).

1. At the outset, ACS contends that malice – properly defined – cannot be found where statements do no more than repeat the allegations in a public lawsuit that has an objective basis in fact. *See* ACS Br. 31-44; Memorandum 11-13 (and authorities cited). To resolve this issue, this Court need only consider that (a) Appellees never even *contended* at trial that ACS filed its lawsuit without probable cause or an adequate objective basis, and (b) the trial court's ruling that ACS's claims were sufficient to reach the jury necessarily *determined* that ACS's lawsuit had an adequate basis. *Greer-Burger*, 116 Ohio St.3d at 328, 2007-Ohio-6442, ¶ 16. No more is needed to establish that ACS's statements were *not* of the "inherently improbable" character that is necessary to clearly and convincingly demonstrate actual malice. ACS Br. 42.

2. In any event, Appellees dramatically understate the stringent requirements of the actual malice standard. As this Court has explained, actual malice applies to only the most culpable falsehoods. *A&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trade Council* (1995), 73 Ohio St.3d 1, 13. That is why this Court has granted judgment to the defamation defendant in almost every actual malice case it has considered, including many cases in which the plaintiff had obtained a jury verdict in its favor. *See* ACS Br. 39-40. It is not enough for Appellees to prove that ACS *should* have known that its claims were false (although the record reveals nothing of the sort). *Id.* Nor would it even be enough for them to show that ACS was *uncertain* that its claims were true (although again the record reveals nothing of the sort). *Varanese v. Gall* (1988), 35 Ohio St.3d 78, 80. Instead, Appellees had to prove by clear and convincing evidence that ACS had a "*high* degree of awareness of *probable* falsity" "or in fact entertained *serious* doubts" regarding the truth of its statements. *Id.* (emphases added).

This demanding standard has both a subjective component (which Appellees misstate) and an objective component (which Appellees ignore). Appellees' argument has been that in the

absence of "direct evidence of actual malice," the jury was free to infer actual malice from ACS's subjective feelings about them. Leadscope Br. 36 (emphasizing testimony that ACS was "pissed" at Appellees). That type of subjective inquiry is improper under this Court's precedents. To be sure, actual malice requires an inquiry into what the defendant believed to be true, *i.e.*, whether the defendant had a high degree of awareness of the probable falsity of its statements. But that subjective state of mind "may *not* be inferred from evidence of personal spite, ill-will, or intention to injure on the part of the [defendant]." *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119 (emphasis added).

Thus, the Court of Appeals erred when it never inquired into whether ACS believed its allegations to be true, and rested instead on the proposition that ACS disliked the Appellees sufficiently to suppress "a competitor by any means necessary." App. 27, ¶ 61. A defendant that believes it has been injured may employ all available means to remedy the injury, yet that does not establish actual malice. In *A&B-Abell*, for example, this Court upheld a directed verdict in favor a defendant who intended to "bury" the plaintiff with his disparaging remarks, on the ground that he "firmly believed" his accusations and the evidence underlying those accusations was at least equivocal. 73 Ohio St.3d at 10-11, 13.

Critically, where "direct evidence of actual malice is absent" this Court has looked to *objective* criteria, not subjective attitudes, to ascertain reckless disregard. And those objective criteria are stringent. Thus, actual malice is reserved for statements that are "inherently improbable," or which have "no basis," or which are based solely on obviously suspect sources like an "unverified phone call." *McKimm v. Ohio Elections Comm'n*, 89 Ohio St.3d 139, 148-49, 2000-Ohio-118 (emphasizing five times that defendant acted with actual malice because he admitted he had "no basis" for his allegations); *Varanese*, 35 Ohio St. 3d at 81; *A&B-Abell*

Elevator Co., 73 Ohio St.3d at 13. Thus, unless a defendant has simply "invented the accusations," reckless disregard is not present. *A&B-Abell Elevator Co.*, 73 Ohio St.3d at 13.

3. An independent review of the record shows that ACS was anything but reckless in alleging that Leadscope had taken its intellectual property. In the first place, there is not a shred of evidence to suggest that ACS did not believe in the truth of its allegations. To the contrary, ACS demonstrated that it avidly believed that it was correct by devoting years to its litigation effort and presenting 14 days of lay and expert testimony in support of its claims. *See also* Tr. 250 (Massie) ("It's the conclusion of the American Chemical Society that trade secrets were taken."); Tr. 460 (Supp. 52) (Massie) ("to bring legal action . . . we had to have something really substantive"); Tr. 1907 (Michael Dennis) ("We believed that our technology was embodied in that patent"). The record contains no evidence that anyone involved in ACS's investigation doubted that Appellees were in the wrong. That alone is sufficient to disprove actual malice.

On top of this, ACS's allegations were natural and obvious, not inherently improbable. Leadscope was founded by former ACS employees who had worked on Pathfinder and then left to create a rival product that was "amazingly similar to" Pathfinder and that contained "identical" capabilities. Tr. 1396-97 (Supp. 67-68); Tr. 1678, 1683 (Supp. 91-92) (testimony of ACS experts). Leadscope's product had the same ability to manipulate a large database using both chemical structures and molecular properties, Tr. 1396 (Supp. 67); Tr. 1409-10; among other things, it included many of the same filters of molecular properties as PathFinder (including unusual ones), Tr. 1432-33; and it even implemented many of the specific suggestions that had been made by testers who had evaluated PathFinder, Tr. 1439, 1445-56.

In the face of this overwhelming record evidence disproving actual malice, Appellees offer four counterarguments. Each is faulty. *First*, Appellees contend that ACS acknowledged

that it had no basis for its allegations. Appellees repeat the irrelevancy that Mr. Swann knew of "no facts" to support ACS's claim. But as ACS explained in its opening brief, Mr. Swann had no role in ACS's investigation and he intentionally stayed as "far from it as possible." ACS Br. 43-44. Mr. Swann therefore had nothing probative to say about what ACS knew and believed about its allegations. The point bears repeating: Appellees' *sole* evidence offered to show that ACS did not believe its allegations is the testimony of someone who admitted to knowing nothing about the investigation.[12]

Second, Appellees contend that ACS "knew" that Pathfinder contained no trade secrets to be misappropriated. But not only is there zero evidence that ACS believed Pathfinder was in the public domain, such a contention is also flawed on its face. Appellees assert that the PathFinder technology was released into the public domain as a result of a 1996 article and various customer presentations. Leadscope Br. 35. But these materials merely illustrated the type of analysis PathFinder could perform, not the internal workings of the program. Tr. 1499. The technology underlying PathFinder was never released. Tr. 582-86, 1397-98, 1497-1505, 1597. In addition, as the jury was instructed, "limited disclosure to third parties (including actual or potential customers and alpha testers)" does not eliminate trade secret protection. Tr. 5864.

Third, Appellees bring out the canard that ACS delayed making its allegations to disrupt Appellees' financing. This amounts to an argument that ACS took too long to investigate and should have brought its claims sooner. But as ACS explained in its opening brief, taking time to

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[12] Appellees also cite testimony from Mr. Massie that he was not aware of Appellees "remov[ing]" anything "tangible" that belonged to ACS. This is misdirection. Trade secret misappropriation does not require taking anything "tangible," but instead involves the unauthorized *use* of intellectual property, as the jury was instructed. *See* Tr. 5861, 5866. Appellees' argument is like saying that an employee would not be misappropriating the formula for Coca-Cola so long as he merely memorized and replicated it without "removing" the "tangible" piece of paper it was written on.

investigate is the antithesis of reckless disregard, not evidence of it. ACS Br. 43. Appellees' argument also ignores the relevant course of events. It is *undisputed* that ACS authorized litigation *before* ACS ever learned of Appellees' specific financing plans. Thus, the suit could not have been motivated by information that a capital investment was pending.[13]

Fourth, and finally, Appellees contend that ACS acted with actual malice because it was angry at Appellees and saw their patent as a "threat." But, as explained above and in ACS's opening brief, ACS's subjective motivation for bringing the suit is not evidence of actual malice.

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In sum, both the law and common sense dictate that this is the polar opposite of an actual malice case. This is not a case in which ACS had "no basis" to make its allegations, but one where ACS had substantial information to support its beliefs. ACS investigated its claims for months before filing suit and proceeded only after obtaining the authorization of two governing Boards. ACS's allegations were supported by weeks of testimony, were strong enough to go to the jury, and persuaded a portion of it (as demonstrated by the non-unanimous verdict). If this is a "clear and convincing" example of reckless disregard, it is hard to imagine what would count as non-reckless. This Court should reverse even under the qualified privilege.

IV. Appellees' Defamation Claim Also Fails For Lack Of Proximate Cause.

Appellees' defamation claims also fail for the independent reason that, as a matter of law, Appellees cannot establish the element of proximate cause. *Brite Metal Treating, Inc. v. Schuler* (8th Dist. May 13, 1993), No. 62360, 1993 WL 158256, at *6; *accord Frigo v. UAW Local 549* (5th Dist.), 2005-Ohio-3981, ¶ 29; *Ferreri v. Plain Dealer Publ. Co.* (8th Dist. 2001), 142 Ohio App. 3d 629, 643 (same). Appellees do not dispute that everything contained in the allegedly

[13] The "timing" cases cited by Appellees are of no help to them. Leadscope Br. 35. Not one of them involved a case in which the defendant investigated its claims.

defamatory statements at issue here was already a matter of public record from the non-actionable parts of the *Business First* article and the court filings themselves. They claim, instead, that ACS's argument is foreclosed because ACS "failed to request an interrogatory to distinguish between special and general damages." Leadscope Br. 39. That line of reasoning betrays a fundamental misunderstanding of ACS's argument.

Appellees cannot establish proximate cause as a matter of law and that forecloses *any* recovery, regardless of the type or amount. Appellees assert, without authority, that "the incremental harm doctrine is not the same thing as the element of proximate cause." Leadscope Br. 43. But that notion is completely at odds with Ohio case law, which has held that if a statement cannot result in any "additional" injury beyond that already sustained as a result of statements in the public record, the statement "*is not the proximate cause*" of the plaintiff's injuries as a matter of law. *Brite Metal*, 1993 WL 158256, at *6 (emphasis added).[14]

Appellees attempt to explain away *Brite Metal* by claiming that it was decided under an older legal rule that Ohio jury instructions had not yet "respond[ed] to." Leadscope Br. 44. But they have no answer as to why *Ferrari* (decided in 2001) and *Frigo* (2005) reached the same result. Even where damages may be presumed, there is still the predicate question of whether the statements were the proximate cause. *See* Tr. 5880 (instructing the jury here on the proximate cause element of Appellees' defamation claims); *see also, e.g.*, *Temethy v. Huntington Bancshares, Inc.* (8th Dist.), 2004-Ohio-1253, ¶ 14 (requiring proximate cause).

Finally, Appellees urge this Court to abandon an eighteen-year-old line of case law in this State and reject out of hand the idea that a showing of additional or incremental harm is required as a matter of law in a defamation suit. To do so, however, would be an affront to this Court's

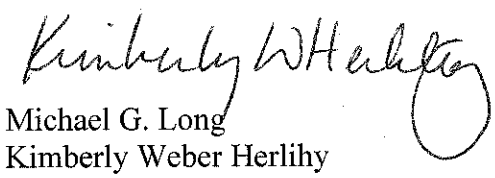
[14] Appellees' claim of waiver on this point is incorrect. *See* Opposition 10-11.

teaching that "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability." *Hester v. Dwivedi* (2000), 89 Ohio St. 3d 575, 581 (requiring a defendant to show "proximate cause"). Even if this Court were to hold in future cases that the "incremental harm" requirement is narrow in scope, *this* case presents the paradigmatic example of why a showing of incremental harm must be required. Appellees have premised a $15 million defamation judgment on two statements they concede were wholly repetitive of information *already in the public record.* Under those circumstances, Appellees cannot show proximate cause as a matter of law.

CONCLUSION

For the reasons set forth above, the decision below should be reversed, and judgment should be entered for ACS on Appellees' counterclaims and demand for attorneys' fees.

Respectfully submitted,



Michael G. Long
Kimberly Weber Herlihy
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Tel: (614) 464-6297
Fax: (614) 719-4829

David W. DeBruin
Matthew S. Hellman
Lindsay C. Harrison
Matthew E. Price
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
Tel: (202) 639-6000
Fax: (202) 639-6066

Counsel For Appellant The American Chemical Society

CERTIFICATE OF SERVICE

I certify that a copy of this Reply Brief of Appellant was sent by ordinary U.S. mail to the following parties on May 9, 2011:

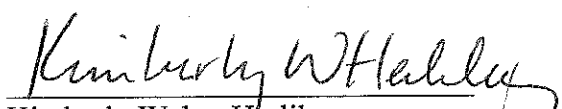
Eugene P. Whetzel
OHIO STATE BAR ASSOCIATION
1700 Lake Shore Drive
Columbus, OH 43204
Counsel For Amicus Ohio State Bar Association

Alan L. Briggs
Squire, Sanders & Dempsey L.L.P.
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215
Counsel For Appellees, Leadscope, Inc., Paul E. Blower, Jr., Wayne P. Johnson, and Glenn J. Myatt

Douglas R. Cole
Jones Day
325 John H McConnell Boulevard
Columbus, OH 43215
Counsel for Amicus Ohio Chamber of Commerce

Anne Marie Sferra
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
Counsel for Amici Ohio Manufacturers' Association and Ohio Council of Retail Merchants

Alexandra T. Schimmer
Solicitor General
Office of the Attorney General
30 East Broad Street, 17th Floor
Columbus OH 43215-3428
Counsel for Amicus The State of Ohio



Kimberly Weber Herlihy
COUNSEL FOR APPELLANT,
THE AMERICAN CHEMICAL SOCIETY