# APPENDIX

# APPENDIX

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**APPENDIX A**

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

**No. 19-2807**

**[Filed May 20, 2020]**

ANNA BARAN,
Appellant

v.

ASRC/MSE; ROSE WELLS

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 1:17-cv-07425)
District Judge: Honorable Renee M. Bumb

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
April 14, 2020

Before: CHAGARES, SCIRICA, and ROTH,
Circuit Judges

## OPINION*

CHAGARES, Circuit Judge.

Appellant Anna Baran claims that her former employer Missions Solutions, LLC ("MSE") defamed her by falsely reporting that she had threatened workplace violence. After a trial, the District Court set aside the jury's verdict in favor of Baran, holding that her defamation claims are time-barred. We will affirm.

### I.

We write for the parties and so recite only the facts necessary to our disposition.

### A.

Baran is a former employee of MSE, a military defense contractor that supplies systems and software engineering, integration services, and products for mission-critical defense systems. Baran worked as a Senior Quality Assurance Engineer, a position that requires a security clearance, until she was terminated for allegedly threatening to shoot three of her supervisors at MSE.

According to Baran's coworker Rosemarie Wells, Baran had long complained that she was the victim of "bullying" by one of her supervisors. Appendix ("App.") 245. On January 7, 2013, Baran allegedly told Wells,

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

"don't be surprised if this place goes up," and stated that "if [she] had a gun," she would shoot her three supervisors. App. 244–45. Wells reported Baran's comments to MSE's Facility Security Officer Francis McKenna, and Baran was suspended pending an investigation. During the investigation, Baran denied making any threats. Nevertheless, on January 9, 2013, Baran was arrested and charged with making a terroristic threat. A few days later, on January 14, 2013, MSE terminated Baran's employment.

On January 15, 2013, McKenna updated Baran's incident history in the Joint Personnel Adjudication System ("JPAS") to reflect the circumstances surrounding Baran's employment. JPAS is the U.S. Department of Defense ("DOD") personnel database of record for security clearance processing. MSE claims that McKenna entered this information as required by federal regulations, reflected in the National Industrial Security Program Operating Manual ("NISPOM"). NISPOM directs employers to update JPAS with any "adverse information about a cleared employee that would indicate that [her] ability to protect classified [information] might be compromised." App. 253. On May 1, 2013, McKenna finalized his earlier incident report about Baran's termination in JPAS (the "JPAS Report").

Although the criminal charges against Baran were eventually dropped and her record was expunged, the JPAS Report does not reflect this final disposition. Baran claims that MSE's comments about the nature of her termination in the JPAS Report prevented her from obtaining a comparable job; on one occasion, a job

offer was rescinded because she was unable to obtain a security clearance due to the description of events in the JPAS Report.

B.

On January 6, 2015, Baran filed a complaint against MSE in the Superior Court of New Jersey, Burlington County, alleging claims including defamation and retaliation. Over the course of several years, the case was dismissed, reinstated, proceeded through discovery, set for trial in state court, and then removed to federal court pursuant to 28 U.S.C. § 1442.

The Superior Court had dismissed Baran's defamation claims as untimely before trial, leaving only Baran's retaliation claim. Baran moved for reconsideration of this dismissal, however, arguing that the defamation claims should be reinstated because they were premised upon McKenna's statements in the JPAS Report. During oral argument on the motion, Baran conceded that the statements in the JPAS Report were made in 2013 and, therefore, that her claims normally would be time-barred under New Jersey's one-year statute of limitations for defamation. Baran argued, however, that her claims should be tolled under the discovery rule, because she did not learn of the JPAS Report until August 2014, when she interviewed with a potential employer. The Superior Court asked Baran's counsel, "Does the discovery rule apply to defamation?" to which she responded, "Yes, I'm – I'm sorry." App. 140. The Superior Court thus held that the discovery rule applied and tolled Baran's claims. As a result, the court reinstated Baran's defamation claims.

MSE then removed the case to federal court under 28 U.S.C. § 1442, asserting federal officer jurisdiction because Baran's defamation claims were based on statements mandatorily entered into the DOD's JPAS system. After a four-day trial, the jury found that MSE's statements in the JPAS Report were false and defamatory, and awarded Baran $3.5 million in damages. Following the announcement of the verdict, MSE renewed its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) on the grounds that Baran's defamation claims were barred by the statute of limitations.

The District Court granted MSE's motion, holding that because Baran's defamation claims were based on the statements in the JPAS Report, which was finalized on May 1, 2013, and the discovery rule does not apply to defamation claims in New Jersey, her claims are time-barred. The District Court rejected Baran's argument that MSE abandoned its statute of limitations defense by not including it in MSE's amended answer or the joint final pretrial order.

This timely appeal followed.

## II.

The District Court had jurisdiction under 28 U.S.C. §§ 1442(a)(1) and 1332, and we have appellate jurisdiction under 28 U.S.C. § 1291. "We exercise plenary review of an order granting or denying a motion for judgment as a matter of law and apply the same standard as the district court." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

## III.

Baran contends that MSE forfeited its statute of limitations defense by failing to include it in MSE's amended answer or the joint final pretrial order and that the discovery rule should be applied here.[1] We address each argument in turn.

### A.

Baran first claims that the District Court erred in "exercis[ing] its discretion to rule upon [MSE's] statute of limitations affirmative defense." App. 43. We disagree.[2]

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[1] Although the parties use the term "waiver," the issue in this case is more accurately described as one of forfeiture. See Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist., 877 F.3d 136, 147 (3d Cir. 2017) (describing forfeiture as "the failure to make the timely assertion of a right" and waiver as "the intentional relinquishment or abandonment of a known right" (quotation marks omitted)); see also Kontrick v. Ryan, 540 U.S. 443, 458 (2004) (analyzing the question of whether "Kontrick forfeited his right to assert the untimeliness of Ryan's amended complaint by failing to raise the issue until after that complaint was adjudicated on the merits").

[2] The parties disagree about the standard of review for this argument: Baran claims our review is plenary, while MSE contends that we review for abuse of discretion. Baran is correct that "[i]nasmuch as the claim of [forfeiture] raises legal questions, our review on the issue is plenary." Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160 n.6 (3d Cir. 1989). Here, however, we are reviewing the District Court's determination that MSE did not forfeit its statute of limitations defense. And "[w]e review a lower court's decision regarding the [forfeiture] of an affirmative defense for abuse of discretion." Sharp v. Johnson, 669 F.3d 144,

Baran argues that MSE forfeited its statute of limitations defense when it failed to include the defense in either its amended answer or the joint final pretrial order. It is true that parties should generally "assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved." Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002). "However, there is no hard and fast rule limiting defendants' ability to plead the statute of limitations." Cetel v. Kirwan Fin. Grp., Inc., 460 F.3d 494, 506 (3d Cir. 2006). Indeed, "affirmative defenses can be raised by motion, at any time (even after trial), if plaintiffs suffer no prejudice." Id. (emphasis added). Additionally, "[i]t is well established that departure from or adherence to the pretrial order is a matter peculiarly within the discretion of the trial judge." Beissel v. Pittsburgh & Lake Erie R.R. Co., 801 F.2d 143, 150 (3d Cir. 1986).

Here, the District Court determined, and we agree, that Baran suffered no undue prejudice because she "knew of [MSE's] statute of limitations objection for almost two years before trial," when she "sought to keep the defamation claim[s] alive based on a misapplication of the discovery rule" in the Superior Court. App. 40. Although MSE could have raised the issue earlier, either in its amended answer or the joint final pretrial order, the Superior Court had previously ruled that the issue was to be tried before a jury. See App. 151 (Superior Court noting that it was "not preventing [Baran] from putting together a case to

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158 (3d Cir. 2012). Accordingly, we review the District Court's decision about forfeiture for abuse of discretion.

bring to the jury on defamation," although it "may not let the . . . jury consider" the defamation claims depending on the evidence presented at trial).

Indeed, MSE raised its statute of limitations defense several times throughout the litigation, including in its two motions to dismiss, opposition to Baran's motion for reconsideration, and pretrial brief. In short, Baran had sufficient notice of MSE's statute of limitations defense and ample time to explore the issue and prepare a response. The District Court, therefore, was well within the bounds of its discretion to allow MSE to raise this affirmative defense in its Rule 50 motion, even if it had not done so in its amended answer or the joint final pretrial order.

B.

Baran next argues that we should extend the discovery rule to her defamation claims because the JPAS Report was confidential and not accessible to her.[3] In New Jersey, however, the discovery rule cannot extend the limitations period for defamation claims. See Nuwave Inv. Corp. v. Hyman Beck & Co., 114 A.3d 738, 741 (N.J. 2015) (rejecting "plaintiffs' invitation for the Court to amend the applicable one-year statute of limitations" for defamation claims because it is "bound by the plain language of the statute" which "requires all libel claims to be made within one year of the date of the publication").

[3] We review this claim de novo, as it raises legal questions. See Bradford-White Corp., 872 F.2d at 1160 n.6.

Nevertheless, Baran urges us to find a limited exception here in the interest of justice, which "demands the application of the discovery rule in this case where the jury has reached a verdict." Baran Br. 24. Because Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), requires us "to follow state law as announced by the highest state court," however, we must reject Baran's argument and defer to the Supreme Court of New Jersey. Sheridan v. NGK Metals Corp., 609 F.3d 239, 253 (3d Cir. 2010) (quotation marks omitted).

* * *

Baran does not contest that if MSE did not forfeit its statute of limitations defense, and if the discovery rule does not apply, her defamation claims are time-barred. Indeed, as the District Court correctly found, the statements in the JPAS Report were the only evidence supporting Baran's defamation claims; the JPAS Report was finalized on May 1, 2013; and Baran did not commence this action until January 6, 2015. Baran's defamation claims thus fall outside of New Jersey's one-year statute of limitations period. See N.J. Stat. Ann. § 2A:14-3.[4]

IV.

For these reasons, we will affirm the order of the District Court.

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[4] Because we will affirm the District Court's holding that Baran's defamation claims are time-barred, we need not reach Baran's argument that MSE is not entitled to qualified immunity for any defamatory conduct. Nor do we address Baran's contention that her "counsel did not make a misrepresentation to the state court." Baran Br. 27.

## APPENDIX B

[Dkt. No. 60]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

**Civil No. 17-7425 (RMB/JS)**

**[Filed July 9, 2019]**

| | |
|---|---|
| ANNA BARAN, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| ASRC FEDERAL, MISSION SOLUTIONS, ROSE WELLS, FRANCIS MCKENNA, SUSAN GOLDBERG, | ) |
| | ) |
| Defendants. | ) |

### OPINION

**APPEARANCES:**

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**RENÉE MARIE BUMB**, United States District Judge:

Following four years of litigation – which included almost three years in state court, removal to federal court, and a four-day trial before this Court – the jury spoke: Defendant Mission Solutions, LLC ("MSE" or "Defendant"), owed its former employee, Plaintiff Anna Baran, $3.5 million in compensatory damages for defaming her by falsely reporting that she had threatened workplace violence. It is a verdict that Defendant contends must be set aside because Plaintiff's defamation claim was time-barred long before she ever commenced suit.

As odd as it seems, it was not until the close of Plaintiff's case that the Court learned about the parties' longstanding disagreement over the statute of limitations for the defamation claim. Defendant argues that neither Plaintiff's pleadings nor the evidence presented at trial support a finding that any defamatory conduct occurred within the statute of limitations. Plaintiff disagrees, contending that a prior state court ruling, which applied the "discovery rule"

and ordered Plaintiff's defamation claim to proceed to trial, binds this Court as "law of the case."

With the benefit of post-trial briefing, this Court agrees with Defendant: the defamation claim should have never proceeded to trial. Plaintiff clearly misstated the law to the state court, precipitating the state court's erroneous application of the discovery rule to a defamation claim. Thus, the state court's unfortunate and incorrect ruling that Plaintiff could present her defamation claim to a jury, which extended the case for years and resulted in the verdict in Plaintiff's favor, was a direct result of Plaintiff's misstatements.

This Court holds that a verdict caused by a legal calamity of Plaintiff's own creation cannot stand. For that reason, Defendant's Renewed Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b), or in the alternative a New Trial pursuant to Fed. R. Civ. P. 59(a)(1) [Dkt. Nos. 59, 60, 67], will be **GRANTED**, and the jury verdict on the defamation claim will be set aside. The Court will direct the entry of judgment on the jury's verdict on the retaliation claim and judgment as a matter of law in favor of Defendant on the defamation claim.

## I. FACTUAL BACKGROUND

Plaintiff Anna Baran is a former employee of MSE, a military defense contractor that supplies systems engineering, software engineering, integration services and products for mission-critical defense systems. Plaintiff worked for MSE as a Senior Quality Assurance Engineer, a position that required security

clearances, until she was terminated for allegedly threatening to shoot three of her supervisors at MSE.

According to Plaintiff's co-workers, Rosemarie Wells and Gaynelle Johnson, Plaintiff had long complained that she was the victim of "bullying" by one of her supervisors, Sue Goldberg. On January 7, 2013, Plaintiff allegedly told Wells, "don't be surprised if this place goes up." Plaintiff allegedly stated that "if [she] had a gun," she would shoot Goldberg, Pat Brencher, and Paul Nocito (her other supervisors). Given Plaintiff's history of complaining about "bullying," Wells became concerned and "very, very upset" about Plaintiff's statements. That same day, Wells reported Plaintiff's comments to MSE's Facility Security Officer Francis McKenna. Soon thereafter, Plaintiff was suspended pending an investigation into her alleged threats. During the investigation, Plaintiff denied making any such threats. Despite Plaintiff's denials, she was arrested and charged with making a terroristic threat on January 9, 2013. A few days later, January 14, 2013, Defendant terminated Plaintiff's employment.

On January 15, 2013, McKenna updated Plaintiff's incident history in the Joint Personnel Adjudication System ("JPAS" or the "JPAS system") to reflect the circumstances surrounding Plaintiff's termination. JPAS functions as the Department of Defense ("DoD") personnel database of record for security clearance processing. According to MSE, McKenna entered this information because federal regulations, reflected in the National Industrial Security Program Operating Manual ("NISPOM"), require MSE to update JPAS with any "adverse information coming to their

attention concerning any of their cleared employees." See NISPOM, Section 3, at 1-302(a). On May 1, 2013, McKenna finalized his earlier incident report about Plaintiff's termination in JPAS (hereinafter referred to as the "JPAS Report"). In its entirety, the JPAS Report submitted by McKenna states:

> "On 1/7/13 MSE employee [Rosemarie Wells] advised FSO [Francis McKenna] that MSE employee Anna Baran allegedly made statements to [Rose] that she intended to go get a rifle and return to MSE and shoot 3 employees. This was partly due to a human resources issue in which Baran alleged workplace bullying by her supervisor. On 1/8/13 Baran was sent home on administrative leave while the allegations were investigated. The Moorestown, NJ Police were notified (incident # 2003-000002810 and they interviewed [Rose] as part of their investigation. Burlington County Judge Lois Downey charged Baran with terroristic threats and as a bail condition ordered that Baran be evaluated by the Screening Crisis Intervention Program. This was done at 1AM on 1/9/13. She was released at 6AM and taken to the Burlington County Jail on the above charge. MSE HR investigation was done from 1/9-14/13 and the decision to terminate Baran was made on 1/14/13."

MSE Trial Ex. 27.

Although the criminal charges against Plaintiff were eventually dropped, and her record was expunged, the JPAS Report does not reflect the final disposition

of that matter. In this action, Plaintiff contended that MSE's comments about the nature of her termination in the JPAS Report prevented her from obtaining a comparable job.[1] In at least one instance, Plaintiff claimed that a job offer was rescinded because she was unable to secure a security clearance due to the description of events in the JPAS Report. Consequently, Plaintiff alleged that Defendant's actions continued to negatively impact her professional, financial, and emotional well-being.

## II. PROCEDURAL HISTORY

The procedural history of this case is long and complicated. It began over four years ago, on January 6, 2015, when Plaintiff filed her original pro se Complaint against Defendant in the Superior Court of New Jersey, Law Division, Burlington County (Case No. BUR-L-53-15). Throughout the course of those years, the case had been dismissed, reinstated, proceeded through discovery, and finally set for trial in state court – all before it was removed to this Court pursuant to 28 U.S.C. § 1442 (the "Federal Officer Removal Statute") on the eve of trial in state court.

### A. *Early Stages in New Jersey State Court*

In her initial pro se Complaint, Plaintiff alleged causes of action that she described as negligence, malicious prosecution, intentional and negligence infliction of emotional distress, defamation, slander,

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[1] As discussed infra Section IV.A, at trial, Plaintiff's defamation claim was based solely upon information contained in the JPAS report.

tortious interference, and retaliation. On April 24, 2015, the Superior Court granted Defendant's Motion to Dismiss and dismissed Plaintiff's pro se Complaint without prejudice, but ordered that: (1) Plaintiff was required to retain legal counsel by July 1, 2015; (2) Defendant was required to issue a neutral employment reference; and (3) Defendant was required to use its best efforts to assist Plaintiff in obtaining a security clearance. [Dkt. No. 1-2, at 69].

Almost seven months passed before Plaintiff's current attorneys first entered an appearance on her behalf on November 16, 2015. Another eight months passed before Plaintiff filed a Motion to Correct a Clerical Error and Amend Complaint on July 26, 2016, seeking to reinstate the case. On October 6, 2016, the Superior Court granted Plaintiff's motion, reinstating the case and permitting Plaintiff to file an Amended Complaint. [Dkt. No. 1-2, at 72].

Plaintiff, at this point represented by counsel, filed her Amended Complaint on October 18, 2016, almost two years after she originally commenced the case. Plaintiff's Amended Complaint asserted four counts against Defendant: (1) Defamation, Libel and Slander (Count One); (2) Defamation, Libel and Slander per se (Count Two); (3) Hostile Environment in violation of the New Jersey Law Against Discrimination ("NJLAD") (Count Three); and (4) Retaliatory Discharge in Violation of the NJLAD (Count Four). See Pl.'s Am. Compl. [Dkt. No. 1-2, at 81-90].

On March 6, 2017, the Superior Court dismissed Counts One, Two, and Three of Plaintiff's Amended Complaint, leaving only Plaintiff's retaliation claim

under the NJLAD (Count Four) as the parties proceeded to discovery. [Dkt. No. 1-2, at 73-80]. After the parties conducted depositions and other discovery on Plaintiff's lone remaining retaliation claim, Defendant moved for summary judgment. In response, Plaintiff filed a Motion for Reconsideration of the Superior Court's prior order dismissing the defamation claims.

**B.** ***Motion for Reconsideration***

At oral argument before Superior Court Judge John E. Harrington on September 8, 2017, one month before the scheduled trial, Plaintiff's counsel argued for the first time that her defamation claims should be reinstated because they were premised upon McKenna's statements in the JPAS Report. During oral argument, counsel for Plaintiff conceded that the statements in the JPAS Report were made in 2013 and, thus, would normally be time-barred under New Jersey's one-year statute of limitations for defamation claims. See Superior Court Hearing Transcript, September 8, 2017 ("Superior Court Transcript")[Dkt. No. 59-1, Ex. E], at 13:14-23. However, Plaintiff argued, her claims should be tolled under the "discovery rule," because Plaintiff did not learn of the existence of the JPAS Report until August 2014, when it impacted her ability to obtain a security clearance. See id., at 13:23-17:16. In relevant part, Plaintiff's counsel had the following exchange with Judge Harrington:

> **THE COURT**: Okay. From your perspective, what is the operative date that is within the one year? Because it's a hard and fast rule unless

you can tell me discovery or some other exception. So, go.

**MS. BLAND-TULL**: Simply put, what Your Honor just said is exactly true. Ms. Baran did not discover this JPAS entry until she began to search for employment.

**THE COURT**: When was that?

**MS. BLAND-TULL**: She was on unemployment for a few months and, then, once she interviewed with L3 in August of 2015, they –

**MR. HAGERTY**: '14.

**MS. BLAND-TULL**: I'm sorry. 2014, excuse me, Your Honor. That is when she discovered and they alerted her to the fact that they were unable to continue or they had to rescind the offer that was forthcoming to her –

**THE COURT**: Because –

**MS. BLAND-TULL**: – – because of this information in the JPAS system. So, that is when she first –

**THE COURT**: August of

**MS. BLAND-TULL**: – – learned of it.

**THE COURT**: All right. So, discovery is August '14. We'll get into all whether it's true or not. August '14. So, if that's the operative –that's the discovery date, it relates back to all these other circumstances. So the defamation, even though it occurred some time ago, would have been filed

within time. Does the discovery rule apply to defamation? I mean, I know it does –

**MS. BLAND-TULL**: Yes, I'm – – I'm sorry.

**THE COURT**: – – with neg – – with negligence and –

**MS. BLAND-TULL**: I – – I was – – my partner was just alerting me to the fact that, because I'm getting my dates mixed up. If it occurred in August of 2014, she was actually within the statute of limitations

**THE COURT**: I know.

**MS. BLAND-TULL**: – – when she filed.

**THE COURT**: I know that. But, –MS.

**BLAND-TULL**: Okay.

**THE COURT**: The occurrence is her being told. But, the action occurred past – – beyond the one year; but, she didn't know about it until within the one year.

[]

**THE COURT**: So, if she knew in May of '13, then, obviously, it's too late, correct?

**MS. BLAND-TULL**: Correct.

Id., at 13:23-15:19; 16:12-14. (emphasis added)

Defendant objected to the applicability of the discovery rule. Judge Harrington, however, held that the discovery rule or the "continuing tort" doctrine

served to toll Plaintiff's defamation claim, meaning it accrued in August of 2014 rather than May of 2013. Under Judge Harrington's analysis, Plaintiff's Amended Complaint was also timely because her claims fell within the parameters of her original Complaint. See Superior Court Transcript, at 31:15-32:9. In relevant part, Judge Harrington stated:

> **THE COURT**: I believe the discovery rule applies. I believe that it relates back. I believe that from the very, very beginning, she's been aggrieved about the actions of – – of – – of the employer. The employer did – – now, they should have, could have, would have she would have known that this was going down, would have been something she should have known. That's a different problem for you in the case. What I mean by that is sending it to this – –
>
> **MS.BLAND-TULL**: JPAS.
>
> **MR. LEAHY**: The JPAS.
>
> **THE COURT**: J-Pack (sic), yeah. If she's in the business, she would have known that was happening. I think I got her to admit that somewhere along the way when we were talking here. But, I'm – – I'm fairly confident that I can read the complaint to include all tortious acts as continuing tort. They – they committed a second tort. You're allowed to – – to file a complaint for that basis. I'm comfortable with that. That's what I was going to do.

Id. (emphasis added)

Despite Defendant's argument that the defamation claims were barred by the statute of limitations, Judge Harrington granted Plaintiff's Motion for Reconsideration and reinstated Plaintiff's defamation claim. The court explained that his decision was final and that he would allow Plaintiff to present the defamation case to the jury at trial. See Superior Court Transcript, at 36:15-37:3. The court clarified that he was not "finding up-front that there's a defamation claim. I'm simply saying that you can continue to present this to the jury." Id. at 41:24-42:2 (emphasis added).

At the conclusion of oral argument, Judge Harrington ordered the parties to conduct expedited discovery on the defamation claim, specifically, the date of Plaintiff's discovery of the JPAS report, and scheduled trial for October 2017. On September 28, 2017, a formal Order was entered by the Superior Court [Dkt. No. 74], granting Plaintiff's Motion for Reconsideration, denying Defendant's Motion for Summary Judgment, and requiring Defendant to file an Amended Answer.[2]

**C. *Removal to Federal Court***

Following Judge Harrington's decision to reinstate Plaintiff's defamation claim, Defendant removed the case to this Court on September 25, 2017. [See Dkt. No.

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[2] Because the September 28, 2017 Order simply formalized Judge Harrington's holdings made on the record at oral argument on September 8, 2017, it is assumed to be binding on the parties, even though it was not entered until after the case had been removed to this Court on September 25, 2017.

1]. Defendant argued that because Plaintiff's defamation claim was based on statements mandatorily entered into the DoD's JPAS system, removal was warranted under the Federal Officer Removal Statute. Specifically, Defendant contended that, because it was required to report adverse information into JPAS, it was entitled to absolute immunity defense under federal law. Furthermore, Defendant argued that removal was timely because it had just learned that the JPAS Report was central to the defamation claims at the September 8, 2017 oral argument, a position that Plaintiff does not dispute. On October 24, 2017, Plaintiff filed a Motion to Remand [Dkt. No. 5] the case back to state court. On June 20, 2018, this Court held that Defendant was entitled to the benefit of the Federal Officer Removal Statute and that removal was timely. [See Dkt. No. 15].

After the Motion for Remand had been resolved, Defendant filed an Amended Answer [Dkt. Nos. 19, 20] in accordance with Judge Harrington's September 28, 2017 Order. Notably, neither Defendant's Amended Answer nor the Final Pre-Trial Order [Dkt. No. 30] included the statute of limitations affirmative defense to the defamation claim, which Judge Harrington had already ruled could be presented at trial. Defendant asserted the statute of limitations affirmative defense, for the first time following removal, in its Trial Brief, which was filed less than a month before trial on February 11, 2019. [See Dkt. No. 38, at 11].

**D. *Trial and Jury Verdict***

During a four-day jury trial, from March 4 through March 7, 2019, Plaintiff presented her case that

Defendant (1) violated NJLAD by terminating Plaintiff in retaliation for her complaints about discriminatory treatment by her supervisor, Sue Goldberg, and (2) defamed Plaintiff through the incident report entered into the JPAS system. In presenting these claims to the jury, Plaintiff alleged that MSE's stated reason for her termination was pre-textual, and that MSE actually terminated Plaintiff in retaliation for her alleged previous complaints (and threats to file an EEOC complaint) that Sue Goldberg was discriminating against Plaintiff on the basis of her Polish national origin. Plaintiff also alleged that the incident entered into the JPAS system was knowingly false and defamatory.

At the close of Plaintiff's case, Defendant moved for Judgment as a Matter of Law, arguing that Plaintiff's defamation claims should not be allowed to proceed to the jury because (1) they were barred by the statute of limitations, and (2) the statements in the JPAS Report were entitled to absolute immunity. The Court reserved judgment on Defendant's motion and allowed the jury to consider the defamation claim. The jury found that Defendant's statements in the JPAS Report were false and defamatory, and awarded Plaintiff $3.5 million in damages.

Following the announcement of the verdict, Defendant renewed its Motion for a Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b), and moved in the alternative for a New Trial pursuant to Fed. R. Civ. P. 59(a)(1) or a Remittitur of the jury award. Meanwhile, Plaintiff requested that the jury remain empaneled for a trial on punitive damages. In

light of the parties scant briefing on the statute of limitations issue prior to trial, the Court determined that more briefing was necessary before deciding the issue. Therefore, pending the outcome of the Motion for Judgment as a Matter of Law, the Court discharged the jury and adjourned the trial on punitive damages.

## III. LEGAL STANDARD

A motion for judgment as a matter of law may be granted where "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). "While a district court is permitted to enter judgment as a matter of law at the conclusion of a trial, when it concludes that the evidence is legally insufficient, it is not required to do so. To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting such motions." Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006).

If the Court denies or reserves on a motion for judgment as a matter of law raised during trial, the moving party may renew that motion post-trial under Fed. R. Civ. P. 50(b). In order to preserve the right to renew a motion for judgment as a matter of law, the moving party must raise a Rule 50(a) motion with "sufficient specificity to put the [nonmovant] on notice" before the case is submitted to the jury. Williams v. Runyon, 130 F.3d 568, 571–72 (3d Cir. 1997). Rule 50(b) provides that, in deciding a 50(b) motion, the court may: "(1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or

(3) direct the entry of judgment as a matter of law." Fed. R. Civ. P. 50(b).

The standard for deciding the renewed motion is the same as the standard for deciding the motion made at trial. Neville Chem. Co. v. Union Carbide, 422 F.2d 1205, 1210 n.5 (3d Cir. 1970), cert. denied, 400 U.S. 826 (1970). A Rule 50 motion "should only be granted if 'the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." Raiczyk v. Ocean County Veterinary Hospital, 377 F.3d 266, 269 (3d Cir. 2004)(citing Trabal v. Wells Fargo Armored Serv. Corp., 269 F.3d 243, 249 (3d Cir. 2001)). The key "question is not whether there is literally no evidence supporting the unsuccessful party, but whether there is evidence upon which a reasonable jury could properly have found its verdict." Johnson v. Campbell, 332 F.3d 199, 204 (3d Cir. 2003)(emphasis in original)(quoting Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1083 (3d Cir. 1995)).

"In making this determination, 'the court may not weigh the evidence, determine the credibility of the witnesses, or substitute its version of the facts for the jury's version.'" TransWeb, LLC v. 3M Innovative Properties Co., 16 F. Supp. 3d 385, 391–92 (D.N.J. 2014) (quoting Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir.1993), aff'd, 812 F.3d 1295 (Fed. Cir. 2016)). The Court must "disregard all evidence favorable to the moving party that the jury is not required to believe . . . [t]hat is . . . give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent

that that evidence comes from disinterested witnesses." Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 151 (2000)(citation and internal quotation marks omitted).

## IV. DISCUSSION

In its Motion for Judgment as a Matter of Law, Defendant argues that the jury verdict should be set aside because (1) Plaintiff's defamation claim is barred by the statute of limitations one-year period from publication, see Marino v. Westfield Board of Education, 2016 WL 2901706, at *5 (D.N.J. 2016)(citing N.J.S.A. § 2A:14-3) and (2) the contents of the JPAS Report are protected by absolute immunity. In response, Plaintiff argues, first, that "law of the case" doctrine binds this Court to Judge Harrington's decision that the discovery rule applied to Plaintiff's defamation claim. Second, Plaintiff argues that Defendant waived the statute of limitations defense by failing to assert it in either the Amended Answer or the Final Pre-Trial Order.

### A. *Statute of Limitations for Defamation*

At trial Plaintiff cited the statements in the JPAS Report as the lone evidence supporting her defamation claim.[3] This is consistent with what Plaintiff advised the state court as the basis for her defamation claim. It

[3] Although Plaintiff had previously contended that her defamation claim was supported by comments from McKenna to a prospective employer, by Plaintiff's own admission, she was unable to present any admissible evidence at trial to support this allegation. See Trial Tr., Mar. 6, 2019, at 642:3-16.

is undisputed that the JPAS Report was created by McKenna on January 15, 2013 and then finalized on May 1, 2013. Plaintiff, however, did not commence this action until January 6, 2015, over a year and a half after McKenna finalized the JPAS Report.

With the JPAS Report's publication date falling outside New Jersey's one-year statute of limitations period, Plaintiff continues to press the same argument before this Court as she did before Judge Harrington. She argues that her claim was nonetheless timely because she did not find out about the JPAS Report until August 2014. Thus, Plaintiff asserts the discovery date of August 2014 means that her defamation claim was within the one-year statute of limitations when her original Complaint was filed in January 2015. Plaintiff's argument fails before this Court and should have failed before the Superior Court.

This Court can find no legal precedent to apply the discovery rule to a defamation claim in New Jersey, as Plaintiff has argued for some years now. Judge Harrington previously allowed Plaintiff's defamation claim to proceed under a discovery rule theory. The Third Circuit, however, has explicitly stated that under New Jersey law, "the 'discovery rule' cannot extend the limitations period for defamation claims." O'Donnell v. Simon, 362 F. App'x 300, 305 (3d Cir. 2010)(citing Lawrence v. Bauer Publ'g & Printing Ltd., 78 N.J. 371, 396 A.2d 569, 570 (1979)). Indeed, New Jersey courts have repeatedly and consistently held that that the discovery rule cannot, under any circumstances, toll defamation actions. See, e.g., Nuwave Inv. Corp. v. Hyman Beck & Co., 221 N.J. 495, 500–01 (2015)("The

statute's clear and unqualified language requires all libel claims to be made within one year of the date of the publication. That language cannot be reconciled with the exception proposed by plaintiffs. In declining to create a judicial discovery rule, we leave amendment of the statute to the Legislature"); Burr v. Newark Morning Ledger Co., 2018 WL 1955050, at *2 (N.J. Super. Ct. App. Div. Apr. 26, 2018)(holding that "recent unambiguous precedent dictates" that the discovery rule is inapplicable to defamation claims); Sivells v. Sam's Club, 2017 WL 3151246, at *9, n.12 (D.N.J. July 25, 2017)( "As to the discovery rule, it may not apply to defamation claims at all.").

Second, Plaintiff cannot use the continuing tort doctrine to restart the statute of limitations each time a potential employer views the JPAS Report. As noted by the Superior Court of New Jersey, Appellate Division, "[o]ur courts have never applied the continuing violation doctrine to defamation claims." Roberts v. Mintz, 2016 WL 3981128, at *4 (N.J. Super. Ct. App. Div. July 26, 2016). Furthermore, application of the continuing tort doctrine under these circumstances would be at odds with the single publication rule in defamation cases, which provides that "a statement posted on the internet is deemed only to be published once for purposes of the statute of limitations; the limitations period does not restart every time the post is viewed." Id. at *5 (citing Churchill v. State, 378 N.J.Super. 471, 478, 876 A.2d 311 (App.Div.2005)).

Based on the facts in this case, the publication date for statute of limitations purposes was May 1, 2013: the

date McKenna finalized the JPAS Report within the system. As such, Plaintiff would have needed to assert her defamation claims no later than May 1, 2014. Under the law, these dates cannot be tolled because Plaintiff only found out about the report in August 2014. In short, Plaintiff's defamation claim was already too late when she filed her initial pro se Complaint in January 2015.

**B. *"Law of the Case" Doctrine***

Alternatively, Plaintiff argues that this Court should abide by Judge Harrington's prior ruling because it has become "law of the case." This Court disagrees. The law of the case doctrine is "an amorphous concept which generally holds that 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" In re Caterpillar Inc., 67 F. Supp. 3d 663, 669–70 (D.N.J. 2014)(quoting Arizona v. California, 460 U.S. 605, 618 (1983)). As explained by the Supreme Court, however, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loath to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would make a manifest injustice." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988). The Third Circuit has recognized several "extraordinary circumstances" which would permit revisiting a prior decision. Such circumstances exist where (1) new evidence is available; (2) a supervening new law has been announced; (3) the order clarifies or corrects an earlier,

ambiguous ruling; and (4) where a prior ruling, even if unambiguous, might lead to an unjust result. See In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 439 (3d Cir.2009). Significantly, "the law of the case doctrine does not restrict a court's power but rather governs its exercise of discretion." In re City of Phila. Litig., 158 F.3d 711, 718 (3d Cir. 1998).

The state court allowed Plaintiff's defamation claim to proceed on an erroneous application of the discovery rule. Moreover, the court compounded the error by ordering that the defamation claim would proceed to trial. This Court now exercises its discretion to correct the Superior Court's clearly erroneous application of the discovery rule to a defamation claim, which was precipitated by Plaintiff's misstatement of the law. Although the record in the state court action demonstrates that Defendant objected to the court's finding, Defendant did not prevail. The application of the discovery rule to a defamation claim was "clearly erroneous." To permit the verdict to stand under the law of the case doctrine would result in "manifest injustice."

**C. *Waiver of Defense***

Plaintiff argues that Defendant's statute of limitations defense should be considered waived because Defendant failed to include it in either its Amended Answer or the Final Pre-Trial Order. The Court finds this argument unpersuasive, but certainly questions why Defendant failed to raise this

affirmative defense earlier.[4] Indeed, Defendant could have moved to amend its Amended Answer to include the affirmative defense even after the issue had been raised before this Court at trial. See, e.g., Ajax Enters. v. Fay, 2007 WL 766335, at *2 (D.N.J. Mar. 7, 2007)(noting that "amendments may be made during trial, after the close of testimony, or even after judgment" as long as the nonmoving party will not be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence that it would have offered"). Defendant now states that "MSE should be permitted leave to amend and its Answer [] to include the statute of limitations as a defense," [Dkt. No. 67, at 3-4], but Defendant has never formally requested this Court's permission to do so, pursuant to Local Civil Rule 15.1.

Although it would have been wise for Defendant amend its Amended Answer, Defendant's failure to amend is not dispositive. Under established circuit law precedent, the failure to include a defense in a responsive pleading does not automatically result in a waiver. As previously noted by the Third Circuit,

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[4] The Court notes that at the time Defendant filed its Amended Answer (at the direction of Judge Harrington's September 28, 2017 Order), Defendant presumably believed, based on Judge Harrington's prior holding, that it was precluded from asserting the statute of limitations affirmative defense until trial. To that end, Judge Harrington's ruling would have still been binding upon Defendant, even though the Amended Answer was being filed in this Court, because "the orders or judgments entered by the state court prior to removal should be treated as orders or judgments entered by the district court." Tehan v. Disability Mgmt. Servs., Inc., 111 F. Supp. 2d 542, 547 (D.N.J. 2000).

affirmative defenses, which include the statute of limitations, are not waived if raised at a "pragmatically sufficient time" with no prejudice to the plaintiff. See Balter v. United States, 172 F. App'x 401, 403 (3d Cir. 2006)(citing Eddy v. VI Water & Power Authority, 256 F.3d 204, 209 (3d Cir. 2001)). Moreover, "issues tried by the express or implied consent of the parties are 'treated in all respects as if they had been raised in the pleadings.'" Charpentier v. Godsil, 937 F.2d 859, 864 (3d Cir. 1991)(quoting Prinz v. Greate Bay Casino Corp., 705 F.2d 692, 694 (3d Cir. 1983)). Furthermore, even though the statute of limitations affirmative defense was not asserted in the Final Pre-Trial Order, "[i]t is well established that departure from or adherence to the pretrial order is a matter peculiarly within the discretion of the trial judge." Beissel v. Pittsburgh & Lake Erie R. Co., 801 F.2d 143, 150 (3d Cir. 1986)(citing Berroyer v. Hertz, 672 F.2d 334, 338 (3d Cir. 1982)).

As acknowledged by Plaintiff, Defendant has asserted the statute of limitations defense since the case's time in the Superior Court. Plaintiff knew of Defendant's statute of limitations objection for almost two years before trial; Plaintiff cannot now claim to be prejudiced by the assertion of this defense. Plaintiff was aware of the statute of limitations defense, but sought to keep the defamation claim alive based on a misapplication of the discovery rule. In actuality, by arguing the law of the case, Plaintiff undermines her argument that she had insufficient notice of Defendant's statute of limitations defense:

> **MS. BLAND-TULL:** Yes, your Honor. And, Judge, I know that your Honor may not be bound by the previous ruling of the Superior Court judge in this case, but this has all been the subject of a motion, and the defendant's motion was denied with respect to these issues in Superior Court. So I understand we are in a different jurisdiction now, but I would respectfully argue that there is an issue of the law of the case that applies to this at this time.
>
> **THE COURT:** The judge ruled that the statute of limitations had not transpired on the defamation claim–
>
> **MS. BLAND-TULL:** That is correct, Judge.
>
> **THE COURT:** -- based on the pleading itself.
>
> **MS. BLAND-TULL:** Correct, Judge.

Trial Tr., Mar. 6, 2019, at 557:11-24 (emphasis added).

On the one hand Plaintiff seeks to prevent Defendant from raising the statute of limitations defense (under law of the case) and on the other hand Plaintiff contends Defendant failed to raise it. Certainly by raising the statute of limitations defense at the September 2017 oral argument on the Motion for Summary Judgment and Motion for Reconsideration, Defendant put Plaintiff on notice. A defense that was thoroughly litigated between the parties cannot be said to have been waived. See Stafford v. E.I. Dupont De Nemours, 27 F. App'x 137, 140 (3d Cir. 2002)(holding that when one party met the other's "statute of limitations defense head-on in the District Court,

without objection. He had a full and fair opportunity to present his arguments, and he will not now be heard to raise an objection"); see also Balter, 172 F. App'x at 403 (holding that district court had properly considered statute of limitations defense even though it had not been raised in initial motion to dismiss or summary judgment motion, where "defendants raised the statute of limitations defense in their objections to the Magistrate Judge's first Report and Recommendation, and again on remand from the District Court in their answer and second motion to dismiss and for summary judgment" and "[plaintiff] was afforded an opportunity to meet that defense and to present his arguments").

Although Defendant would have been prudent to raise this issue to the Court before trial, this Court is somewhat reluctant to fault Defendant for failing to do so when Judge Harrington had previously ruled the issue was to be tried before a jury. See Superior Court Transcript, at 36:24-37:1 (Judge Harrington stating that he "may not let the jury consider" the defamation claim, but that he was "not preventing them from putting together a case to bring to the jury on defamation"). Indeed, it seems that Defendant operated under the belief that Judge Harrington's ruling prevented it from raising the statute of limitations defense again until Plaintiff rested her case at trial. To that end, Defendant repeatedly emphasized to this Court that it was moving for judgment as a matter of law on statute of limitations grounds "now that the record is closed." See Trial Tr., Mar. 7, 2019, at 681:23-684:17 (Defendant arguing that "your Honor is ruling a closed record in this court. Judge Harrington did not rule on a Rule 50 motion. The record is now closed,

your Honor is not bound by law of the case"). These factors all lead this Court to conclude that Defendant interpreted Judge Harrington's decision to preclude Defendant from reasserting the statute of limitations defense until a Rule 50 motion at trial.

In this Court's final analysis**,** it would be perverse to allow Plaintiff to benefit from her own misstatements of the law that caused this legal debacle in the first place. The law could not be clearer: there is no discovery rule exception for defamation claims. The party who was prejudiced was Defendant who was forced to litigate a time-barred claim for two additional years.[5] Therefore, this Court exercises its discretion to rule upon Defendant's statute of limitations affirmative defense.

**D.** ***Absolute Immunity***

Throughout the course of this litigation, Defendant has leaned heavily on an absolute immunity defense to the defamation claim. Specifically, Defendant argued that the defamation claim fails because MSE is entitled to absolute immunity for statements made in the JPAS Report. As noted by Defendant, "courts have granted official immunity to private actors in defamation actions resulting from reports prepared by private industry for government agencies." Gulati v. Zuckerman, 723 F. Supp. 353, 356 (E.D. Pa. 1989)(internal citations omitted). To this point, MSE

[5] With the benefit of hindsight, of course it is easy to criticize Defendant for not raising the statute of limitations defense before this Court well before trial. However, the Court sees little point in doing so now.

argues that government regulations obligated MSE to report "adverse information" about Plaintiff's fitness to hold a security clearance, and that it had no choice but to put the relevant information in the JPAS Report. For that reason, Defendant claims that any information provided in the JPAS Report is entirely privileged. Perplexingly, Defendant viewed a finding of absolute immunity as a forgone conclusion. This Court, however, disagrees.

Without binding support from the Third Circuit, Defendant cites to the Fourth Circuit's decision in Becker v. Philco Corp., 372 F.2d 771 (4th Cir. 1967). In Becker, two individuals sued their former employer, a defense contractor, for submitting an allegedly defamatory report to DoD officials, under regulations which required the contractor to submit a report "of any loss, compromise, or suspected compromise of classified information." Id. at 773. Ultimately, the Fourth Circuit held that the employer was absolutely immune from liability for the alleged defamation in the report. The Fourth Circuit stated:

> "[T]he company has no discretion and is mandatorily ordered to report the suspicion immediately. There is no question but that the system of reporting was valid. The obligation could scarcely be couched in more imperious or exacting language. It embraces both true and false accusations, both substantial and insubstantial suggestions, perhaps encompassing even rumors. It demands investigation of them by the company and a report of it to the Defense Department. That is

> precisely what Philco did. Faithful to the contract, it could have done no less."

Id. at 774 (emphasis added). Although the Becker decision sets a precedent for absolute immunity, even when the information reported includes rumors, this Court finds that the regulation at issue in this case is substantially different from the one examined by the Becker court over fifty years ago. As outlined in Section 3 of the National Industrial Security Program Operating Manual, titled "Reporting Requirements," MSE is bound to abide by the following guidelines:

> **1-302 Reports to be Submitted to the CSA**
>
> **a. Adverse Information.** Contractors shall report adverse information coming to their attention concerning any of their cleared employees. Reports based on rumor or innuendo should not be made. The subsequent termination of employment of an employee does not obviate the requirement to submit this report. If the individual is employed on a Federal installation, the contractor shall furnish a copy of the report and its final disposition to the commander or head of the installation.
>
> NOTE: In two court cases, Becker v. Philco and Taglia v. Philco (389 U.S. 979, 88 S.Ct. 408, 19 L.Ed.2d 473), the U.S. Court of Appeals for the 4th Circuit decided on February 6, 1967, that a contractor is not liable for defamation of an employee because of reports made to the Government under the requirements of this Manual and its previous versions.

NISPOM, Section 3, at 1-302(a)(emphasis added). As further clarified in Appendix C of NISPOM, "Adverse Information" is defined as "any information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, or that his or her access to classified information clearly may not be in the best interests of national security."

Whereas the Becker court dealt with a reporting requirement that embraced "both true and false accusations," NISPOM clearly instructs not to report information "based on rumor or innuendo." Therefore, to the extent reports within JPAS are immune from suit, an issue this Court need not decide, that immunity is qualified, rather than absolute: it does not cover reports based on rumor or innuendo. To that end, whether a report is based on rumor or innuendo would be a factual finding for a jury.[6]

Following the verdict, this Court asked the parties if they wished to ask the jury a special interrogatory about this issue. Unfortunately, as outlined in the exchange below, the parties precluded the Court from

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[6] The Court notes that Defendant relies upon Mission1st Grp., Inc. v. Filak, 2010 WL 4974549, at *2 (D.N.J. Dec. 2, 2010) to supports its absolute immunity defense. Indeed, in that case, the court found that an allegedly false report about a cleared employee was entitled to absolute privilege because it was made pursuant to a governmentally imposed duty. Id. However, this Court declines to follow that decision, as it did not consider whether the allegedly false report was premised upon "rumor or innuendo," as instructed by the plain text of NISPOM.

asking the jury if they found that the JPAS Report was based on rumor or innuendo:

> **THE COURT:** The only question is that the legal -- let me just -- I want to make sure I'm not excusing the jury and then regret it later. The legal argument that the defendant is making is that they have a legal obligation to report a threat. Right?
>
> **MR. LEAHY:** Correct, your Honor.
>
> **THE COURT:** If the jury found that a threat was never made does your legal position stand? And should I ask the jury whether they found -- should I issue a special interrogatory asking them whether or not they found that a threat was a made?
>
> (Short pause.)
>
> **MR. LEAHY:** I was -- what we have just discussed, your Honor, is I don't know that it would change the defense because --
>
> **THE COURT:** Because?
>
> **MR. LEAHY:** -- as you said, anything that is reported to JPAS is absolutely privileged. At the same time if they found that the threat was -- if they found that a threat was in the made --
>
> **THE COURT:** But if it were false -- if they found that a threat was never made and MSE made it up that would not be privileged, would it?

**MR. LEAHY:** It would still be privileged, your Honor, based on the Mission First case. I mean, the privilege is absolute and holds regardless of whether the information was rightly reported. And that's quoting from Mission First which was quoting from Becker. So that is the law of the land, your Honor.

**THE COURT:** If it was made reckless does that matter?

**MR. LEAHY:** It does not matter, your Honor, it is absolute privilege.

**MS. BLAND-TULL:** Your Honor, the NISPOM regulations upon which the case is based specifically say that the immunity does not apply to rumor, innuendo and -- and I forget the other language, but language to the effect of statements that have not been corroborated or don't have a trustworthiness.

**THE COURT:** So do I present the issue of qualified immunity to the jury? Is it not a jury's finding whether or not it was --

**MR. LEAHY:** It is not, your Honor, because this is not a qualified immunity issue, this is absolute privilege issue and so that is a strict legal one, not a jury issue.

**THE COURT:** Well, I guess what I would say is the following: If the parties are incorrect and there should be a question that I should be posing to the jury and I find that my failure to pose the question to the jury prevents me from

> deciding the issue of this privilege and I have to order a new trial, I will. I just am not going to lose the jury -- so I guess the parties need to be confident about it. Neither one of you want me to issue a special interrogatory, I'm just cautiously saying to the parties that if in the end I determine I should have and I haven't it would necessitate a new trial. But that will be what it will be I guess.

Trial Tr., Mar. 7, 2019, at 784:16-786:20.

Although the jury's verdict on the defamation claim indicates that the jury found that information in the JPAS Report was false, it does not tell the Court whether the jury viewed the information as "based on rumor or innuendo." There are many reasons why the jury could have found that Defendant's report was false, without being based on rumor or innuendo. For example, the jury could have believed that the JPAS Report contained false information about Plaintiff, but that Defendant had a good faith reason for mistakenly accepting the information as factual. However, this Court cannot speculate as to the jury's state of mind. With the parties unwilling to send a special interrogatory to the jury, this Court is unable to reach that issue. If this Court did not set aside the defamation verdict on statute of limitations grounds, a new trial would have been necessary to properly address the immunity issue. Therefore, in accordance with Fed. R. Civ. P. 50(c)(1), the Court will conditionally grant Defendant's alternative motion for a new trial.

## V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment as a Matter of Law shall be **GRANTED** and the jury verdict on the defamation claim will be set aside. The Court will direct the entry of (1) judgment on the jury's verdict on the NJLAD retaliation claim and (2) judgment as a matter of law in favor of Defendant on the defamation claim.

DATED: July 9, 2019

s/Renee Marie Bumb
RENÉE MARIE BUMB
United States District Judge

## APPENDIX C

[Dkt. No. 60]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

**Civil No. 17-7425 (RMB/JS)**

**[Filed July 9, 2019]**

| | |
|---|---|
| ANNA BARAN, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| ASRC FEDERAL, MISSION SOLUTIONS, ROSE WELLS, FRANCIS MCKENNA, SUSAN GOLDBERG, | ) |
| | ) |
| Defendants. | ) |

### ORDER

On March 7, 2019, a jury reached a verdict that Defendant Mission Solutions, LLC ("Defendant" or "MSE") owed Plaintiff Anna Baran ("Plaintiff") $3.5 million in compensatory damages for defaming her by falsely reporting that she had threatened workplace violence. Now, this matter comes before the Court upon

Defendant's Renewed Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b) [Dkt. No. 60], and an alternative Motion for a New Trial pursuant to Fed. R. Civ. P. 59(a)(1) or a Remittitur of the Jury Award.

For the reasons set forth in the accompanying Opinion of the same date,

**IT IS** on this **9th** day of **July 2019**, hereby **ORDERED** that:

(1) Defendant's Renewed Motion for Judgment as a Matter of Law [Dkt. No. 60] is **GRANTED**; and

(2) the jury's verdict on Plaintiff's defamation claims (as addressed in questions 4 and 5 of the Jury Verdict Sheet [Dkt. Nos. 65, 66]) is **SET ASIDE**; and

(3) the Clerk of the Court is directed to **ENTER JUDGMENT AS A MATTER OF LAW** in favor of Defendant on Plaintiff's defamation claims; and

(4) the Clerk of the Court is directed to **ENTER JUDGMENT** in favor of Defendant on the NJLAD retaliation claim, pursuant to the jury's verdict (as addressed in questions 1 and 2 of the Jury Verdict Sheet [Dkt. Nos. 65, 66]); and

(5) in accordance with Fed. R. Civ. P. 50(c)(1), Defendant's alternative Motion for a New

Trial is **CONDITIONALLY GRANTED**; and

(6) Defendant's alternative Motion for Remittitur of the Jury Award is **DENIED AS MOOT**; and

(7) the adjourned trial on punitive damages is **CANCELLED**; and

(8) the Clerk of the Court is directed to **CLOSE** this case.

s/Renee Marie Bumb
RENÉE MARIE BUMB
United States District Judge

## APPENDIX D

[Dkt. No. 13]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

**Civil No. 17-7425(RMB/JS)**

**[Filed June 20, 2018]**

| | |
|---|---|
| ANNA BARAN, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| ASRC FEDERAL MISSION SOLUTIONS, ROSE WELLS, FRANCES McKENNA, SUE GOLDBERG, and ABC BUSINESS ENTITIES 1-100, | ) |
| | ) |
| Defendants. | ) |

**OPINION**

APPEARANCES:

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*Counsel for Defendants*

**BUMB**, United States District Judge:

This matter comes before the Court upon the filing of a motion to remand this matter to the Superior Court of New Jersey, Camden County and for payment of costs and attorney's fees, by Plaintiff Anna Baran (the "Plaintiff"). For the reasons stated below, Plaintiff's motion will be DENIED.[1]

## I. Factual and Procedural Background

Plaintiff Anna Baran is a former employee of Defendant Mission Solutions, LLC ("MSE")(incorrectly pled as ASRC Federal Mission Solutions), a defense

[1] Because the Court denies Plaintiff's motion to remand on the merits, it will also deny, without addressing, Plaintiff's motion for costs and attorneys fees.

contractor that supplies systems engineering, software engineering, integration services and products for mission-critical defense systems. Am. Compl. ¶ 3, Notice of Removal, Ex. C. This action arises from Plaintiff's termination from MSE in 2013 as the result of threatening comments Plaintiff allegedly made to Rose Wells, a software engineer manager at MSE. Wells reported both to the police and to Francis McKenna, a member of MSE security, that Plaintiff had threatened to bring a gun to work and shoot certain MSE employees. In addition to her unlawful termination, Plaintiff alleges, McKenna continued to disparage Plaintiff to potential employers, preventing her from finding new full-time employment by indicating to such employers that a "false report" placed on Plaintiff's "clearance record was true, that it was bad, and that [P]laintiff . . . [would] not be able to obtain clearance based on that report." Am. Compl. ¶ 43. As it turns out, the "report" which McKenna was discussing was entered into the United States Department of Defense's ("DOD") Joint Personnel Adjudication System ("JPAS"), which functions as the DOD's system of record for security clearance processing.

This case comes to the Court under somewhat unusual procedural circumstances. It had been pending in state court for almost three years and was set for a trial when MSE removed it pursuant to 28 U.S.C. § 1442 (the "Federal Officer Removal Statute"). At issue is whether MSE is entitled to the benefit of that statute and, if so, at what point in the state court proceedings it could ascertain that the statute applied. Specifically, the resolution of this motion turns on the

date that MSE could first have ascertained that Plaintiff was bringing a defamation claim against it not only on the basis of comments made by McKenna or other unnamed MSE employees, but based on the report entered into JPAS.

On January 6, 2015, Plaintiff initiated this action by filing a pro se Complaint against MSE and Wells in the Superior Court of New Jersey, Law Division, Burlington County (Docket No. L-53-15). Plaintiff's initial pro se Complaint was vague and the details included therein were sparse, but it appears that Plaintiff alleged that Wells had made false statements concerning Plaintiff's intention to "harm others" with firearms, costing Plaintiff her job. See Jan. 6, 2015 Compl., Notice of Removal Ex. A. Plaintiff brought claims for (1) negligence; (2) malicious prosecution; (3) intentional and negligent infliction of emotional distress; (4) defamation and slander; (5) tortious interference; and (6) retaliation. See id.

Plaintiff's pro se Complaint was dismissed, without prejudice, on April 24, 2015, subject to three conditions: (1) Plaintiff was required to obtain counsel by July 1, 2015, "with the understanding that she may have a claim for unlawful termination"; (2) MSE was required to "issue a neutral employment reference"; and (3) MSE was required to "use best efforts to assist Plaintiff in obtaining a security clearance, to the extent possible." Notice of Removal ¶ 3, Ex. B.

On June 27, 2015, while the case was still dismissed, Plaintiff sent a letter to the state court informing the court that Plaintiff was having a difficult time obtaining counsel. June 27, 2015 Letter,

Certification of LaTonya Bland-Tull, Ex. C. In her letter, Plaintiff also indicated that she had "objective evidence that . . . [MSE] continue[d] to slander" her. Id. Specifically, she claimed that she lost two job opportunities because the company "verbally slander[ed]" her and "put false information on . . . [her] career record." Id. She claimed to have spoken to McKenna, who told her that "he would correct the statement but then backed out of the system because he realized that it would make the company legally liable." Id.

The state court treated Plaintiff's pro se letter as a motion to enforce the conditions in the court's April 24, 2015 dismissal order. On August 12, 2015, it granted Plaintiff's request and ordered MSE's HR Department to issue Plaintiff a "neutral employment reference," without editorialization; provide neutral information if contacted about Plaintiff's future attempts to obtain a security clearance; and provide Plaintiff with a copy of her "entire personnel file." Order Granting Plaintiff's Motion to Enforce, Certification of LaTonya Bland-Tull, Ex. D.

On October 6, 2016, the state court reinstated Plaintiff's Complaint and granted her leave to file an amended complaint. October 18, 2016, having obtained counsel, Plaintiff filed an Amended Complaint against MSE, Wells, McKenna, Sue Goldberg, who at one time was Plaintiff's supervisor at MSE, and "ABC Business Entities 1-100." See Notice of Removal, Ex. C. Two of the four counts in Plaintiff's Amended Complaint are relevant to this motion: (1) Count One for defamation, libel, and slander, and (2) Count Two for defamation,

libel, and slander per se. In these Counts, Plaintiff alleges that McKenna[2], or another unnamed MSE employee, made slanderous statements about Plaintiff and about the nature of reports filed on Plaintiff's "record." Specifically, Plaintiff alleges that McKenna or another MSE employee spoke by phone with employees from L-3 Communications, and that as a result of statements made about Plaintiff during those conversations, L-3 refused to hire Plaintiff.

On February 10, 2017, Defendants sent their first set of interrogatories to Plaintiff. Interrogatory number 10 asked Plaintiff to identify "each communication that . . . [she] contend[ed] support[ed] . . . [her] claim(s) for defamation." For each of these communications, interrogatory 10 asked Plaintiff to identify (1) who made the statement; (2) when the statement was made; (3) to whom the statement was communicated; and (4) any witnesses to the communication. On March 6, 2017, however, the state court dismissed Plaintiff's defamation, libel, and slander (including defamation, libel, and slander per se) claims as untimely. The state court's dismissal was without prejudice, and the court granted Plaintiff leave to amend. Plaintiff did not, however, amend her Amended Complaint.

On April 28, 2017, Plaintiff submitted her responses to Defendant's first set of interrogatories. In response to interrogatory number 10, Plaintiff provided:

> McKenna admitted that in August 2014, he represented to employees of L3 Communications

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[2] It does not appear that Plaintiff ever served McKenna with process.

> that Plaintiff had threatened someone at work. McKenna admitted that he discussed a report that he created in JPAS database with L3 Communications. This report alleged that Plaintiff owns firearms.

See Pl.'s Answer to Interrogatories, Interr. 10, Cert. of LaTonya Bland-Tull, Esq., Ex. H. By this time, all of Plaintiff's defamation claims had been dismissed and the matter appeared to be moving forward as one for retaliation under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(d) ("NJLAD").

On September 8, 2017, the state court held oral argument on a motion for summary judgment filed by Wells seeking the dismissal of the NJLAD claim against her and a motion filed by Plaintiff seeking reconsideration of the dismissal of her defamation claims. At oral argument, the court granted Wells' motion for summary judgment, dismissing Wells from the case.

More relevant here, the court also granted Plaintiff's motion for reconsideration, restoring her defamation claims. As the state court's dismissal was based on the timeliness of those claims, the court inquired into the dates of the communications on which Plaintiff's defamation allegations are based. In response to a question from the court, MSE's counsel indicated that it was MSE's belief that Plaintiff's defamation claims were premised entirely on McKenna's communication with Plaintiff's prospective employer, L3. Tr. Of Sep. 8, 2017 Oral Arg. 12:20-24, Notice of Removal Ex. E. Notably, Plaintiff's counsel disputed that characterization, arguing that Plaintiff's

defamation claims were based, in part, on McKenna's conversation with L3, but were also based on two JPAS entries related to Plaintiff; one in January of 2013 and one in May of 2014. Plaintiff further argued that she did not discover these JPAS entries until being alerted to them by L3 in August of 2014. The state court granted Plaintiff's motion for reconsideration and ruled that Plaintiff's defamation claims could proceed to trial. Because Defendant had prepared only for a NJLAD trial, however, the court granted it additional time to conduct depositions of witnesses concerning Plaintiff's defamation claims.

On September 25, 2017, MSE removed the action to this Court pursuant to 28 U.S.C. § 1442. After the parties submitted premotion letters in accordance with this Court's Individual Rules and Procedures, Plaintiff timely filed the presently pending motion for remand on November 8, 2017, arguing that removal was improper and untimely.

**II. Discussion**

The Court will first address whether Defendant's removal of this case was proper, before turning to the issue of whether that removal was timely.

A. Defendant's Removal of this Action was Proper

As noted above, MSE removed this case to federal court pursuant to 28 U.S.C. § 1442, the "Federal Officer Removal Statute," which provides in relevant part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against

> or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office . . . .

28 U.S.C. § 1442(a)(1).

This statute exists to "protect[] officers of the federal government," and those acting under them, "from interference by litigation in state court while those officers [and those under their charge] are trying to carry out their duties." Papp v. Fore-Kast Sales Co., 842 F.3d 805, 811 (3d Cir. 2016)(citing Willingham v. Morgan, 395 U.S. 402, 405–06 (1969)); see also Watson v. Philip Morris Companies, Inc., 551 U.S. 142, 152 (2007) (citations omitted)(describing purpose of Federal Officer Removal Statute as including providing a federal forum in which to hear federal immunity defenses). "Section 1442(a) is an exception to the well-pleaded complaint rule, under which (absent diversity) a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case arises under federal law." Id. (quoting Kircher v. Putnam Funds Trust, 547 U.S. 633, 644 n.12 (2006) (internal quotation marks and citation omitted)). In accordance with the important purposes it serves, "[u]nlike the general removal statute, the federal officer removal statute is to be 'broadly construed' in

favor of a federal forum." Id. at 811-12 (citations omitted).

The party removing an action to federal court bears the burden of proving that subject matter jurisdiction exists and that removal is proper. See Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990). In order to remove a case under § 1442(a)(1), a defendant must meet four requirements:

> (1) [the defendant] is a "person" within the meaning of the statute; (2) the [plaintiff's] claims are based upon the [defendant's] conduct "acting under" the United States, its agencies, or its officers; (3) the [plaintiff's] claims against [the defendant] are "for, or relating to" an act under color of federal office; and (4) [the defendant] raises a colorable federal defense to the [plaintiff's] claims.

Id. at 812 (quoting In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia, 790 F.3d 457, 467 (3d Cir. 2015), as amended (June 16, 2015)); Feidt v. Owens Corning Fiberglass Corp., 153 F.3d 124, 127 (3d Cir. 1998)((citing Mesa v. California, 489 U.S. 121, 129 (1989)).

Plaintiff argues only that Defendants cannot prove their federal defense. Despite Plaintiff's apparent concession of three of the four factors required for the Federal Officer Removal Statute to apply, this Court has an obligation to satisfy itself of its subject matter jurisdiction. See Liberty Mut. Ins. Co. v. Ward Trucking Corp., 48 F.3d 742, 750 (3d Cir.1995); see also

FED R. CIV. P. 12(h); 28 U.S.C. § 1447(c). As such, the Court will address each of the four factors.

*i. MSE is a "Person" Within the Meaning of the Federal Officer Removal Statute*

Plaintiff has not disputed that MSE is a "person" as that term applies to the Federal Officer Removal Statute. § 1442(a)(1) does not itself define the term "person." As such, courts, including the Third Circuit, have looked to § 1 of Title I of the United States Code, which defines "person" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See, e.g., Papp, 842 F.3d at 812. As an LLC, MSE falls within this definition.

*ii. MSE was "Acting Under" a Federal Officer or Agency*

Plaintiff does not dispute that MSE was "acting under" a federal officer or agency. "The 'acting under' requirement, like the federal removal statute overall, is to be 'liberally construe[d]' to cover actions that involve "an effort to assist, or to help carry out," a federal officer or agency's duties or tasks. Papp, 842 F. 3d at 812 (quoting Ruppel v. CBS Corp., 701 F.3d 1176, 1181 (7th Cir. 2012) (quoting Watson 551 U.S. 142, 152, (2007)); see also Defender Ass'n,790 F.3d at 468 (construing "acting under" liberally). Although liberally construed, "acting under" a federal officer or agency requires more than simply complying with the terms of a law or regulation. Watson, 551 U.S. at 152.

In other words, where a private actor seeks the benefit of the Federal Officer removal statute, there

must be some relationship between the government and the private actor beyond that of "regulator/regulated." Id. at 157. One example of such a relationship is where "the federal government uses a private corporation"—a contractor—"to achieve an end it would have otherwise used its own agents to complete." Papp, 842 F.3d at 812 (citations omitted); see also Defender Ass'n, 790 F.3d at 468–70 (discussing different ways in which an entity might "act under" a federal officer).

MSE "acted under" the Secretary of Defense when it filed reports in JPAS about Plaintiff, an employee with security clearance. See Stephenson v. Nassif, 160 F. Supp. 3d 884, 887-89 (E.D. Va. 2015). The National Industrial Security Program Operating Manual ("NISPOM"), issued by the Secretary of Defense pursuant to Executive Order[3], requires contractors with access to classified information to report in JPAS "adverse information coming to their attention concerning any of their cleared employees." See NISPOM §1-302(a). Adverse information that defense contractors are required to report includes "any information that negatively reflects on the integrity or character of a cleared employee." This regime requires defense contractors to do more than simply behave in accordance with the law. "The plain language of NISPOM § 1-302(a) is mandatory, and by defining "adverse information" broadly the Department of

[3] Exec. Order No. 12,829, 58 Fed. Reg. 3,479 (Jan. 6, 1993).

Defense create[d] a mandatory duty to report broadly." Stephenson, 160 F. Supp. 3d at 889.[4]

This reporting structure is the means through which the DOD requires defense contractors to "assist" it in, or help it to "carry out," its duty to protect classified information. Watson, 551 U.S. at 152. Without some mandatory reporting duty such as that created by NISPOM, the DOD would not be able to contract out classified work, and "would need to carry out all activities relating to the protection of classified

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[4] Plaintiff argues that this reporting duty excludes "reports based on rumor or innuendo," and that accordingly MSE could not have been "acting under" the DOD because the reports about her were not true. This type of on the merits attack "illustrates precisely why federal officer jurisdiction is appropriate here." Stephenson, 160 F. Supp. 3d at 889.

> If the basis for a federal contractor's decision to make a mandatory report under NISPOM § 1-302(a) is going to be open to attack on state tort law grounds, then in the absence of a federal forum the contractors subject to NISPOM might elect not to report in the first instance, which would 'disable federal officials from taking necessary action' to safeguard classified information . . . Accordingly, application of federal officer jurisdiction to the dispute at hand is consistent with the congressional policy underlying § 1442(a)(1), namely protecting the execution of federal functions in the states by ensuring that persons engaged in federal functions will have access to a federal forum in which to raise federal defenses. Plaintiff's argument essentially creates a defamation exception to federal officer removal by requiring a defendant to prove the truth of his statements before removal is appropriate. There is no basis to conclude that § 1442(a)(1) contemplates or allows such an exception.

Id. at 889 (internal citations omitted).

information internally." Stephenson, 160 F. Supp. 3d at 889. This type of relationship falls squarely within the bounds of the "acting under" requirement of the Federal Officer Removal Statute.

*iii. Plaintiff's Defamation Claim Rests on Acts Done "For of Relating to" a Federal Officer or Agency*

"[I]n order to meet the 'for or relating to' requirement, 'it is sufficient for there to be a connection or association between the act in question and the federal office.'" Papp, 842 F.3d at 813 (quoting Defender Ass'n, 790 F.3d at 471 (internal quotation marks omitted)). This requirement is met here. Plaintiff's defamation claims are based, at least in part, on reports Defendant or its employees entered into JPAS; actions which, as noted above, are required of defense contractors under NISPOM.

*iv. MSE Raises a "Colorable" Federal Defense*

Finally, MSE must raise a "colorable" federal defense to Plaintiff's defamation claims. A "colorable" defense is one that is "legitimate and [could] reasonably be asserted, given the facts presented and the current law." Papp, 842 F.3d at 815 (quoting Colorable Claim, Black's Law Dictionary (10th ed. 2014)); see also Hagen v. Benjamin Foster Co., 739 F.Supp. 2d 770, 782–83 (E.D. Pa. 2010) ("[A] defense is colorable for purposes of determining jurisdiction under Section 1442(a)(1) if the defendant asserting it identifies facts which, viewed in the light most favorable to the defendant, would establish a complete defense at trial."). MSE asserts that any report

submited by it to JPAS is absolutely privileged, citing Mission1st Group, Inc. v. Filak, Civil Action No. 09-3758, 2010 WL 4974549, *2 (D.N.J. Dec. 2, 2010).

The court in Filak recognized the principle, set forth in Becker v. Philco Corp., 372 F.2d 771, 775-76 (4th Cir.1967), that a government contractor is not liable for defamation of an employee because of reports made to the government pursuant to a governmentally imposed duty. Filak, 2010 WL 4974549, at *2. In its notice of removal, MSE avers that (1) it is a government contractor that (2) made a report to the government (3) pursuant to a duty, and that Plaintiff now seeks to hold it liable for that report. See Notice of Removal ¶ 10-17. Viewed in the light most favorable to Defendant, this is enough to raise a colorable defense.

Having been satisfied that Defendant has made a sufficient showing that it is entitled to the benefit of the Federal Officer Removal Statute, the Court now turns to the issue of timeliness.

B. Defendant's Removal of this Action was Timely

As the parties agree, nothing in Plaintiff's initial Complaint indicated that this case was removable on the basis of the Federal Officer Removal Statute. Thus, the timeliness of removal is determined pursuant to 28 U.S.C. § 1446(b)(2)(3), which provides that

> [e]xcept as provided in subsection (c)[governing removal based upon diversity jurisdiction], if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant,

> through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(emphasis added). Accordingly, in order to trigger the thirty day clock for removal, MSE must have received, "through service or otherwise," an amended pleading, motion, order, or "other paper," indicating that the case is removable. Moreover, with regard to written documents submitted to the court or "court related documents," the "relevant test is not what the defendants purportedly knew, but what the[] documents said." Foster v. Mut. Fire, Marine & Inland Ins. Co., 986 F.2d 48, 54 (3d Cir. 1993), rev'd on other grounds, Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) (noting that we look only to the "four corners of the pleading" to see if it "informs the reader, to a substantial degree of specificity, that all elements of federal jurisdiction are present," and ask "not what the defendant knew, but what the relevant document said."))

MSE argues that the clock for removal started running on September 8, 2017, at an oral argument before the state court on motions for summary judgment and reconsideration, and that as such its September 25, 2017 removal was timely. Plaintiff contends that there were at least four triggering events prior to September 8, 2017: (1) June 25, 2015 when Plaintiff, then proceeding pro se, sent a letter to the state court, a copy of which was sent to MSE; (2) October 6, 2016, the date the matter was reinstated to the state court's active docket; (3) October 18, 2016,

the date on which the Amended Complaint was filed; or (4) May 15, 2017, the latest date on which MSE may have received Plaintiff's responses to interrogatories, specifically its response to interrogatory 10, which mentions JPAS. The Court is persuaded that September 8, 2017 was the first occasion on which MSE could ascertain that it was being sued for entering a report into JPAS.

Plaintiff's arguments fail for two reasons. First, Plaintiff's defamation claims were dismissed both when she sent the June 25, 2015 letter[5], and when MSE received Plaintiff's responses to interrogatories. On June 25, 2015, Plaintiff's entire pro se Complaint had been dismissed subject to certain conditions and she was instructed by the state court to retain counsel "with the understanding that she may have a claim for unlawful termination." April 24, 2015 Order Granting Dismissal, Notice of Removal Ex. B. Likewise, when MSE received Plaintiff's responses to interrogatories, the defamation claims in Plaintiff's Amended Complaint had been dismissed, and the parties were proceeding on an NJLAD claim. Plaintiff's counsel acknowledged as much on the record at the September 8, 2017 oral argument. In response to the Judge asking "we have a . . . tort case and an [sic] LAD case, isn't that true?," counsel responded that "[c]urrently, the only issue in this case is retaliation, discrimination." It

[5] For the purposes of this discussion, the Court assumes that Plaintiff's letter was the sort of "other paper" recognized by § 1446. Because the Court finds that the letter did not provide sufficient information to put Plaintiff on notice of its federal defense, however, the Court need not decide this issue.

is difficult to—and this Court will not—say that Defendant should have ascertained that it may have had a federal defense to a defamation claim that had been dismissed in a case that was proceeding, and appeared set to proceed, under an employment discrimination theory only, and that Plaintiff should have been required to remove on that basis.

Second, while it could be ascertained from the June 25, 2017 letter, the Amended Complaint, and Plaintiff's response to interrogatory 10 that Plaintiff was complaining of McKenna's statements to Plaintiff's prospective employers about the status and merits of a JPAS report, it was not clear that Plaintiff was bringing defamation claims against MSE or anyone else for the entry of the report itself. This is an important distinction, as MSE argues that the JPAS reports themselves, as opposed to statements made about the reports to non-government entities, are privileged. It was not until the September 8, 2017 oral argument that it became ascertainable that Plaintiff was alleging defamation against MSE for the entry of JPAS reports. This is the allegedly privileged conduct for which MSE raises a colorable federal defense, and this is the basis on which the Federal Officer Removal Statute applies. Accordingly, removal on September 25, 2017 was timely.

**III. Conclusion**

For the foregoing reasons, Plaintiff's motion to remand is DENIED. An Order consistent with this Opinion shall issue on this date.

s/ Renee Marie Bumb
RENÉE MARIE BUMB
United States District Judge

DATED: June 20, 2018

## APPENDIX E

[Dkt. No. 13]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**
**CAMDEN VICINAGE**

**Civil No. 17-7425(RMB/JS)**

**[Filed June 20, 2018]**

| | |
|---|---|
| ANNA BARAN, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| ASRC FEDERAL MISSION SOLUTIONS, ROSE WELLS, FRANCES McKENNA, SUE GOLDBERG, and ABC BUSINESS ENTITIES 1-100, | ) |
| | ) |
| Defendants. | ) |

**ORDER**

This matter having come before the Court upon Plaintiff Anna Baran's Motion to Remand to the Superior Court of New Jersey [Dkt. No. 13]; and for the reasons set forth in the Opinion filed this date;

Plaintiff's Motion to Remand is **DENIED**.

s/ Renee Marie Bumb
RENÉE MARIE BUMB
United States District Judge

DATED: June 20, 2018