

Circuit Court for Montgomery County  
Case No. 465781V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 0733

September Term, 2020

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ALFASIGMA USA, INC.,

v.

EXEGI PHARMA, LLC AND  
CLAUDIO DE SIMONE,

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Fader, C.J.  
Shaw Geter,  
Harrell, Jr., Glenn T.  
(Senior Judge, Specially Assigned),  
JJ.

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Opinion by Shaw Geter, J.

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Filed: June 11, 2021

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This is an appeal from the grant of summary judgment by the Circuit Court for Montgomery County. Appellant, Alfasigma USA, Inc., filed a lawsuit against appellees, ExeGi Pharma, LLC and Claudio De Simone, claiming: tortious interference with business relations, tortious interference with contract, injurious falsehood, libel per se, and, against ExeGi only, common law unfair competition. Appellees filed a Motion for Summary Judgment, and, following a hearing, the court entered a memorandum and order, granting the motion. Appellant timely appealed and presents the following questions for our review:

1. Did the circuit court err in denying Alfasigma an opportunity to take any discovery?
2. Did the circuit court err in granting summary judgment to the Appellees?
3. Did the circuit court err in finding that the common law litigation privilege barred Alfasigma's claims even though there were questions of fact as to whether Appellees' communications were related to a legal proceeding actually contemplated in good faith and under serious consideration?

For the reasons set forth below, we affirm the judgment of the circuit court.

### **BACKGROUND**

Appellant, Alfasigma USA, Inc. (“Alfasigma”) and appellees, ExeGi Pharma, LLC (“ExeGi”) and Claudio De Simone (“De Simone”), both sell probiotic products: Italian VSL#3 and Visbiome, respectively. In the 1990’s, De Simone, along with two other scientists, invented a bacterial eight-strain probiotic, commonly known as “the De Simone Formulation.” In 1999, De Simone and the Sigma-Tau Group, an Italian pharmaceutical conglomerate, entered an agreement acknowledging De Simone’s ownership in the eight-

strain probiotic patent and the “Know-How” for the probiotic.<sup>1</sup> The agreement also gave the Sigma-Tau Group “an exclusive option for an exclusive license related to” De Simone’s rights, with the objective of commercializing the probiotic patent in the U.S. In 2000, De Simone, along with Claudio and Paolo Cavazza, who owned the Sigma-Tau Group, incorporated VSL, Pharmaceuticals, Inc. (“VSL”) and agreed to bring products patented by De Simone to the U.S. market as nutritional supplements. In September 2000, De Simone transferred the trademark, VSL#3, to VSL. De Simone and VSL then entered into a patent license agreement, which granted VSL an exclusive license to De Simone’s rights in the probiotic patent “for the production and for the commercialization” in the U.S. of any product “marketed as dietary supplement or functional food” containing the bacteria specified in the patent.

From 2002 until January 2016, the De Simone Formulation was sold under the brand name VSL#3. In January 2016, De Simone terminated VSL’s license to sell the De Simone Formulation.<sup>2</sup> That year, De Simone partnered with ExeGi to create the new brand, Visbiome, using the original De Simone Formulation. In May 2015, ExeGi began to market Visbiome. Since June 2016, VSL#3 has contained a new seven-strain formula, which is produced in Italy (“Italian VSL#3”). Since then, Alfasigma has been the exclusive distributor of Italian VSL#3.

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<sup>1</sup> “Know-How” for the probiotic includes its unique biochemical profile, processes, data, formulae, and additional technical and non-technical information.

<sup>2</sup> VSL, the owner of the trademark, VSL#3, is not a party to this case.

The parties have an extensive history of litigation, which commenced in federal court. The outcome of the parties’ initial judicial proceedings were in appellant’s favor. However, on November 20, 2018, after a fourteen-day trial, a jury returned a verdict in favor of appellees in a case against Alfasigma, VSL, and Leadiant Biosciences, Inc.<sup>3</sup> The jury found Alfasigma liable for false advertising in violation of the Lanham Act, 15 U.S.C. § 1125(a) (2012), and awarded damages totaling \$15 million against Alfasigma.<sup>4</sup> The outcome of the federal litigation is contained in several opinions: *De Simone v. VSL Pharmaceuticals, Inc.*, 352 F. Supp. 3d 471, 477, 483 (D. Md. 2018) (concluding that “De Simone owns the Know-How” associated with the De Simone Formulation, which “consist[s] of a unique biochemical profile, formulae, processes, data, and other technical and non-technical information”); *De Simone v. VSL Pharmaceuticals, Inc.*, 395 F. Supp. 3d 617 (D. Md. 2019) *aff’d sub nom. De Simone v. Alfasigma USA, Inc.*, 2021 WL 613697 (4th Cir. Feb. 17, 2021) (denying defendant’s post-trial motions); *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574 (D. Md. June 20, 2019), *aff’d in part, vacated in part sub nom. De Simone v. Alfasigma USA, Inc.*, 2021 WL 613697 (4th Cir. Feb. 17, 2021) (granting a permanent injunction against Alfasigma, among other defendants, as an additional remedy for false advertising); and *De Simone v. Alfasigma USA, Inc.*, 2021 WL

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<sup>3</sup> Leadiant Biosciences, Inc. (“Leadiant”), a VSL licensee, was a defendant in the federal litigation, but is not a party to this case.

<sup>4</sup> The Lanham Act provides that a party engaged in false advertising “shall be liable in a civil action by a person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1).

613697 (4th Cir. Feb. 17, 2021) (affirming the verdict on the false advertising claim and unjust enrichment claim, but vacating the permanent injunction as “overbroad as written”).

The parties filed multiple post-trial motions and the district court rejected many of Alfasigma’s challenges to the false advertisement claim. The court concluded:

the evidence was sufficient to establish that at a minimum, the VSL#3 Webpage . . . satisfies all of the elements of false advertising as to Alfasigma. The VSL#3 Webpage included a statement by Ocnean that “[m]oving VSL#3 back to the original manufacturing facility in Italy allowed the brand to revert back to an established process that removes all dairy while maintaining the original proprietary mix of eight strains of live bacteria.”

*De Simone v. VSL Pharmaceuticals, Inc.*, 395 F. Supp. 3d 617, 624 (D. Md. 2019), *aff’d sub nom. De Simone v. Alfasigma USA, Inc.*, 2021 WL 613697 (4th Cir. Feb. 17, 2021).

The court also found “that the evidence was sufficient to support the conclusion that . . . the VSL#3 Webpage . . . contained literally false statements.” *Id.* at 625. Specifically, the court determined that the statement in the VSL#3 Webpage that VSL#3 “maintain[s] the original proprietary mix of eight strains of live bacteria” was false. *Id.* The court explained:

the heart of ExeGi’s claim is that the falsity of Alfasigma’s advertising is the representation that, in essence, its product is the exact same product, with the exact same formulation, as ExeGi’s product, where it is undisputed that the De Simone Formulation is otherwise available only through ExeGi in the form of Visbiome.

*Id.* at 631.

On June 20, 2019, the district court granted a permanent injunction to appellees under the Lanham Act upon finding that “the De Simone Parties have suffered an irreparable injury.” *De Simone v. VSL Pharmaceuticals, Inc.*, 2019 WL 2569574, at \*2 (D. Md. June 20, 2019), *aff’d in part, vacated in part sub nom.* The court continued: “[i]n

passing off Italian VSL#3 as the De Simone Formulation, Alfasigma and Leadiant deprived the De Simone Parties ‘of a legitimate competitive advantage and reduced consumers’ incentive’ to purchase Visbiome, which actually contains the De Simone Formulation, rather than Italian VSL#3.” *Id.* (citation omitted). The permanent injunction enjoined Alfasigma from:

making any claims in VSL#3 promotional materials that state or suggest a false continuity between Italian VSL#3 and the De Simone Formulation, including but not limited to statements claiming that VSL#3 continues to contain the “original proprietary blend” or the “same mix in the same proportions” [and] citing any clinical study performed on the De Simone Formulation or implying that any such study was conducted on Italian VSL#3.

*Id.* at \*4.

On July 30, 2020, the district court found Alfasigma in civil contempt for violating the permanent injunction because of three online promotional statements for VSL#3 that were false. To purge themselves of contempt, the district court ordered Alfasigma to remove all noncompliant statements from applicable media and required them to pay appellees’ legal fees for the contempt motion.

In February 2021, the Fourth Circuit vacated a portion of the permanent injunction holding “that the district court acted within its discretion in issuing a permanent injunction to prevent the VSL Parties from continuing their false advertising, [but] that the injunction is overbroad as written.” *De Simone v. Alfasigma USA, Inc.*, 2021 WL 613697, at \*6 (4th Cir. Feb. 17, 2021). The court stated:

the language prohibiting the VSL Parties from “citing to or referring to any clinical studies performed on the De Simone Formulation or earlier versions of VSL#3 as relevant or applicable to Italian VSL#3” is too broad. To the

extent that this language is intended to prohibit the VSL Parties from citing or referring to the clinical studies as though they were performed on Italian VSL#3 (rather than on the Danisco-made version), it's superfluous to prohibiting claims of continuity between the products. But prohibiting the VSL Parties from citing or referring to the clinical studies as even relevant to Italian VSL#3 goes too far, as they could feasibly do so without claiming continuity between their old product and their new one.

*Id.*

Approximately a month after the November 2018 jury verdict, at appellees' directive, "cease and desist" letters were sent to various companies that distributed or sold Italian VSL#3 in the United States. Alfasigma contended, *inter alia*, that the letters contained multiple false or misleading statements. They alleged the letters falsely stated that Alfasigma was selling "counterfeit VSL#3" and that they were "in breach of its agreements with its distributor or business partner." They claimed that appellees "threatened to commence litigation against Alfasigma's distributors and business partners, which [appellees] know to be baseless and made in bad faith . . ." According to them, due to the letters, "several of Alfasigma's key distributors and business partners have ceased purchasing and selling Alfasigma VSL#3 products, notwithstanding the tremendous consumer demand for these products."

Appellees filed an answer on December 10, 2019, asserting absolute litigation privilege. On January 31, 2020, Alfasigma served appellees with interrogatories and requests for production of documents. Appellees moved for summary judgment on March 20, 2020, arguing that the statements contained within the cease and desist letters were protected by the litigation privilege because they were related to and in anticipation of litigation. Appellees also argued that no statements contained in the cease and desist letters

were false and, therefore, they were not tortious. Appellees then filed a motion to stay discovery pending resolution of the motion for summary judgment, which the court granted.

On July 13, 2020, Alfasigma filed an opposition to appellees' motion for summary judgment, arguing that summary judgment was not appropriate, and that discovery was needed because there were material facts in dispute. They argued the cease and desist letters contained false statements including that the recipients were selling or distributing "counterfeit products" and "counterfeit VSL#3" because Alfasigma is authorized to sell VSL#3 and there were no counterfeiting claims pled in the federal case. They contended the statements in the letters were potentially defamatory, and thus, raised a question for the factfinder. Finally, they asserted that the "litigation privilege is not a defense to a tortious interference claim based on a defendant's institution and threats of groundless litigation."

A hearing on the summary judgment motion was held on July 31, 2020, and the court issued its memorandum and order on August 24, 2020, granting appellees' motion. In its memorandum, the court discussed, as a preliminary matter, Alfasigma's assertion that discovery was necessary. The judge concluded "the court ha[d] sufficient information to rule on the legal issues that have been presented and the discovery sought would unduly delay the resolution of the pertinent issues." The judge also added, in a footnote, that, in his view, the documents requested by Alfasigma were "extremely broad." The judge carefully analyzed the absolute litigation privilege under Maryland common law and concluded that the privilege applied to the statements made in the cease and desist letters. We shall discuss the court's analysis in further detail below.

## STANDARD OF REVIEW

Maryland Rule 2-501(f) provides: “[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.” “The question of whether a trial court’s grant of summary judgment was proper is a question of law subject to *de novo* review on appeal.” *Myers v. Kayhoe*, 391 Md. 188, 203 (2006). Appellate courts “review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party.” *Id.* “In reviewing a grant of summary judgment under Md. Rule 2-501, we independently review the record to determine whether the parties properly generated a dispute of material fact and, if not, whether the moving party is entitled to judgment as a matter of law.” *Livesay v. Baltimore County*, 384 Md. 1, 9–10 (2004).

“The timing of a summary judgment ruling, *i.e.*, whether it is to be postponed pending completion of discovery or denied in favor of submission to the fact-finder, falls within the trial court’s discretion and will be reviewed only for abuse.” *Piney Orchard Cmty. Ass’n, Inc. v. Piney Pad A, LLC*, 221 Md. App. 196, 220 (2015) (citations and internal quotation marks omitted).

We review the denial of discovery under the abuse of discretion standard and will only conclude that the trial court abused its discretion where no reasonable person would take the view adopted by the [trial] court [ ] . . . or when the court acts without reference to any guiding principles, and the ruling under consideration is clearly against the logic and effect of facts and inferences before the court[ ] . . . or when the ruling is violative of fact and logic.

*Bacon v. Arey*, 203 Md. App. 606, 671 (2012) (quoting *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005)) (alterations in original).

## DISCUSSION

### I. Discovery

Appellant argues summary judgment was inappropriate because the circuit court did not give them “any opportunity to develop a factual record.” They contend the court “turned well-settled principles and procedures on their head by placing the burden on Alfasigma to establish the need for discovery rather than on [a]ppellees to show good cause for why discovery was not warranted.” They cite this Court in *Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, where we stated:

[t]he person seeking a protective order “has the burden of making a particular and specific demonstration of fact, as distinguished from general, conclusory statements, revealing some injustice, prejudice, or consequential harm that will result if protection is denied.” *Tanis v. Crocker*, 110 Md. App. 559, 574, 678 A.2d 88 (1996). Even if the court agrees that some protection is necessary, a protective order “is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes.” *Id.* at 575, 678 A.2d 88.

170 Md. App. 520, 530–31 (2006). They claim their discovery requests were calculated and tailored to the allegations in the complaint and the “circuit court’s comment that Alfasigma’s initial—and only—discovery requests were overly broad is wildly misplaced.”

Appellees counter that appellant’s contention is undermined by the court’s order, granting appellees’ motion to stay discovery, where the court stated: “good cause for the

requested relief has been shown.” They contend that good cause for a stay of discovery exists where a motion for summary judgment, “if granted, would dispose of the case,” and the requested discovery “is not relevant to the opposition of the motion.” *Tilley v. United States*, 270 F. Supp. 2d 731, 734 (M.D.N.C. 2003), *aff’d*, 85 F. App’x 333 (4th Cir. 2004) (collecting cases). They argue Alfasigma’s discovery requests were not related to the legal issues contained in the summary judgment motion, and cite *Bacon v. Arey*, where this Court stated:

[t]he circuit court “appropriately exercised its discretion by resolving [ ] legal questions presented in the preliminary motions prior to resolving the discovery motions.” . . . the circuit court properly resolved the preliminary motions to strike and dismiss, rather than permit discovery as to factual matters not related to the legal issues raised by the preliminary motions. Given that the completion of discovery had no bearing on the legal issues before the court . . . .

203 Md. App. at 673. They point to various exemplar document requests, including appellant’s request for agreements “related to the marketing and promotion of Visbiome” and “communications between [ExeGi] and any public relations firm.”

Maryland Rule 2-501 (d) provides:

[i]f the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.

In its memorandum and order, the court stated:

Md. Rule 2-501 (d) does give the court the discretion to deny or continue a summary judgment motion if the court is satisfied that the “facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit” submitted under the Rule. Alfasigma has submitted such an affidavit, signed by its general counsel. Although the affidavit does recite reasons why

discovery is sought, it does not, in this court’s view, state with clarity why the information sought to be discovered is necessary to the court’s consideration of the pending summary judgment motion, why the information sought would raise a genuine factual issue regarding the application of the litigation privilege, or specify the reasons for the non-moving party’s failure, to date, and particularly in light of the contentious litigation history among the parties, to obtain such information directly from the recipients of [appellees’] “cease and desist” letters.[] *See Brown v. Suburban Cadillac, Inc.*, 260 Md. 251, 256–57 (1971); *Channel Master Satellite v. JFD Electronics Corp.*, 748 F. Supp. 373, 395 (E.D.N.C. 1990). The court has sufficient information to rule on the legal issues that have been presented and the discovery sought would unduly delay the resolution of the pertinent issues. *See Chaires v. Chevy Chase Bank, F.S.B.*, 131 Md. App. 64, 87–89 (2000). Further, any factual disputes that do exist are simply not material to the outcome, much less to the application of the litigation privilege under the particular circumstances of this case.

The court added, via footnote:

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

Examples of Alfasigma’s document requests are: “all documents that refer or relate to the allegations, claims, denials, and/or defenses set forth in your Answer in this matter[;]” “[a]ll documents that refer or relate to the allegations and/or claims set forth in the Complaint or that support the allegations and/or claims in the Complaint[;]” “[a]ll documents reflecting or comprising statements made by parties or non-parties related to this litigation[;]” “[a]ll documents reflecting or comprising any admissions or statements against interest that you believe to be or allege to have been made by the Plaintiff[;]” and

“[a]ll documents reflecting or comprising any admissions or statements against interest that you believe to be or allege to have been made by [appellant].”

On this record, we hold the circuit court did not abuse its discretion. Although Alfasigma submitted an affidavit supporting its opposition to appellees’ summary judgment motion, it did not, as expressed by the circuit court, “state with clarity why the information sought to be discovered is necessary to the court’s consideration of the pending summary judgment.” As we see it, Alfasigma’s discovery requests were overly broad and were not tailored to the core arguments made in appellees’ summary judgment motion. We hold the court properly exercised its discretion in granting the stay.

## II. Litigation Privilege

Appellant contends appellees’ actions are not protected as the absolute litigation privilege does not apply to this case. Appellants rely on *Gersh v. Ambrose*, 291 Md. 188 (1981), *Kennedy v. Cannon*, 229 Md. 92 (1962), *Norman v. Borison*,” 418 Md. 630, 658 (2011), and *Mixter v. Farmer*, 215 Md. App. 536 (2013) to argue, generally, that the litigation privilege can apply to out-of-court statements, but only in limited situations. They argue that “[a]lthough courts have extended the privilege to certain pre-litigation statements made by an attorney ‘in contemplation of a proceeding,’ those cases are not applicable here.”

Appellant claims that legal proceedings against the recipients of the cease and desist letters were not “actually contemplated and under serious consideration” by appellees and were “pretextual.” They contend this is evidence that “notwithstanding [a]ppellees’ threats, they did not commence a single litigation against any of the pharmaceutical

wholesalers.” They add that appellees did not commence litigation against one wholesaler, Amerisource Bergen, even after they continued to sell VSL#3 after receipt of appellees’ cease and desist letter. Appellants attempt to distinguish appellees’ lawsuit against TrueCommerce, a general internet-transaction processor. In their view, appellees filed an action against TrueCommerce because they did not use their platform for business or depend on it and therefore there was “no risk to [a]ppellees of alienating a distribution network for their product.”

Appellant also argues that

[a]ppellees’ threatened claims of false advertising against the wholesalers and distributors were baseless since the distributors did not advertise VSL#3 but merely sold VSL#3[], among numerous other pharmaceutical products manufactured by many different companies. There is no evidence that the recipients of Appellees’ communications played any role whatsoever in creating advertising or marketing of the VSL#3[] products, such that the wholesalers and distributors may be liable for contributory false advertising.

According to them, although the Court of Appeals, in *O’Brien & Gere Engineers, Inc. v. City of Salisbury*, applied the absolute litigation privilege defense to a contract claim, it only did so because application of the privilege in that case “promote[d] access to the courts, truthful testimony, and zealous advocacy.” 447 Md. 394, 414 (2016).

Appellant contends that this case is akin to *Arundel Corp. v. Green*, 75 Md. App. 77 (1988), where the circuit court erred in granting summary judgment based on the litigation privilege. Appellant attempts to make the distinction that unlike in the case *sub judice*, in *Arundel Corp.*, the circuit court “permitted plaintiff to take discovery, including a deposition, on the issue of whether the defendant’s defamatory statements were related to a legal proceeding that was contemplated in good faith.” Because the plaintiff in *Arundel*

*Corp.* was permitted to take discovery, appellant argues they should have been permitted to do so as well.

Appellees counter that although, historically, the litigation privilege immunized parties for in-court statements, the Court of Appeals has expanded the privilege beyond such statements, to include pre-litigation demand letters. They claim that the cases cited by appellee constitute “a string of dated decisions where courts declined to extend absolute privilege to statements made by non-attorneys not contemplating litigation.” They note that *Alfasigma* conceded that the litigation privilege applies to statements made by attorneys in the context of proceedings “actually contemplated in good faith and under serious consideration.”

We begin our analysis with a historical look at the application of the absolute litigation privilege in Maryland. In 1962, the Court of Appeals, in *Kennedy v. Cannon*, held that “absolute privilege will not attach to counsel’s extra-judicial publications, related to the litigation, which are made outside the purview of the judicial proceeding. Nor will the attorney be privileged for actionable words spoken before persons in no way connected with the proceeding.” 229 Md. 92, 98 (1962). Nearly two decades later, in *Gersh v. Ambrose*, the Court held that the litigation privilege can apply to out-of-court statements where “there are sufficient judicial safeguards so as to minimize the likelihood of harm to potentially defamed (or otherwise injured) individuals who would have no legal remedy.” 291 Md. 188, 192 (1981).

In *Arundel Corp.*, we stated:

the attorney who publishes defamatory matter in connection with litigation which is contemplated is entitled to an absolute privilege from action thereon only if the attorney can establish that the matter published has some relation to the anticipated proceeding. Whether the attorney has met his burden of proving the relationship between the defamatory statement and the anticipated judicial proceeding is one of law for the court unless there is a dispute as to whether or not that relationship in fact existed.

75 Md. App. 77, 85–86 (1988). There, the defendant, an attorney, sent a defamatory letter to the plaintiff’s potential customers that contained false allegations which implied that the plaintiff’s product was dangerous and caused asbestos exposure. *Id.* at 82. The defendant asserted that when he wrote the letter he was acting as an attorney whose firm was contemplating commencing a judicial proceeding against the plaintiff on behalf of his client(s) and that the letter was related to the anticipated litigation. *Id.* at 81. The defendant, however, conceded that the false statements were published “with knowledge of its falsity or with reckless disregard for the truth.” *Id.* at 82. We concluded that the defendant’s testimony contained a “*bald conclusion*” that he and his client contemplated a judicial proceeding in good faith. *Id.* at 86 (emphasis in original). We determined that his conclusion was “disputed by inferences permissible from the allegations of the complaint subsequently filed on behalf of [the defendant’s client]. In that complaint it was asserted that [the client’s] asbestosis was caused solely by products supplied by parties other than [the plaintiff].” *Id.* (emphasis removed). We held that the resolution of the issue of whether the defamatory statements were made in contemplation of a suit filed on the defendant’s behalf “was for the trier of facts” and, therefore, summary judgment was improper. *Id.* We vacated the order of the circuit court judge and remanded the case for further proceedings. *Id.*

In *Norman v. Borison*, the Court of Appeals, held that for the litigation privilege to apply to out-of-court statements made in the context of a judicial proceeding: “[t]he proceeding . . . must be ‘actually contemplated in good faith and under serious consideration . . . . The bare possibility that [a] proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.’” 418 Md. 630, 658 (2011) (quoting Restatement (Second) of Torts § 588 cmt. e (2006)). Under *Norman*, courts are directed to “assess the context of the statement by asking, among other things: what was the overall or general reason for the instrument or letter . . . what was the defendant doing when he or she made the statement; and to whom did he or she make the statement.” *Id.*

In *Mixter v. Farmer*, this Court recognized “an absolute privilege for attorneys to make potentially defamatory statements if the statements have some rational relationship to the judicial proceedings.” 215 Md. App. 536, 543 (2013). We expressed that “a broad reading of absolute privilege makes sense from a policy perspective.” *Id.* at 547. We added: “the policy behind the privilege would be severely undercut if the absolute privilege were to be regarded as less than a bar to all actions arising out of the conduct of parties and/or witnesses in connection with a judicial proceeding.” *Id.* (citations and internal quotation marks omitted).

More recently, the Court of Appeals, in *O’Brien & Gere Engineers, Inc. v. City of Salisbury*, held that the litigation privilege “can apply as a defense to claims sounding in contract.” 447 Md. 394, 414 (2016). The Court explained that the absolute litigation “privilege would be valueless or meaningless if the opposing party could bar application

of the privilege just by drafting the claim with a non-tort label.” *Id.* at 413. The Court added: “to refuse to consider applying the privilege when the claim is not labeled as a tort is to ignore the possibility that the alleged harm derives from tortious conduct.” *Id.* at 413.

In the case at bar, it is evident that the circuit court thoroughly reviewed the record before concluding that the absolute litigation privilege applied to the cease and desist letters. While this Court performs a *de novo* review, we believe the trial court’s analysis and ruling was not an error. We, therefore, reprint the contents of the court’s memorandum and order. The court stated:

The “cease and desist” letters in question begin by identifying the lawyer as litigation counsel to both De Simone and ExeGi.[<sup>5</sup>] The letters summarize the past business relationship between De Simone and VSL, and describe the result of the federal litigation against VSL and Alfasigma. Counsel then state: “the jury unanimously found that the distributors were liable for false advertising by misrepresenting VSL#3 to be the same as the original De Simone formulation now sold as Visbiome. The jury awarded ExeGi Pharma damages of \$15 million on its false advertising claim, which represented Alfasigma USA’s wrongfully earned profits on sales of the fake VSL#3 product.” The letters do refer to VSL#3 as a “counterfeit version” of the De Simone formulation. There is other colorful language which, for present purposes, the court assumes to be defamatory.

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

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<sup>5</sup> The court added in a footnote: “[t]he letters are identical in all material respects, apart from the ones to the internet web hosting companies which contain additional legal assertions. These differences are not germane to the court’s decisions.”

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

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

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

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

Contrary to Alfasigma’s contention, the application of the litigation privilege to the pre-litigation demand letters sent by [appellees’] counsel to Alfasigma’s distributors and re-sellers does not prop the barn door wide open for any and every sort of false or malicious pre-litigation charge or innuendo. Manifestly, under the case law and the Restatement (Second) of Torts, there must be a logical or rational connection between the pre-litigation statements and the anticipated or contemplated litigation described in the demand letters. The litigation privilege is not an open-ended invitation to defame or disparage a competitor. The facts of this case are more favorable for the application of the litigation privilege than are those found in *Arundel Corp.*, a case in which the Court of Special Appeals concluded that the litigation privilege did [sic] apply to the allegedly defamatory statements. And, unlike the

circumstance in *Arundel Corp.*, this court has a more than adequate record from which to determine there is no genuine issue of fact as to whether the allegedly tortious statements have the requisite relationship to an anticipated judicial proceeding (i.e., “contemplated in good faith and under serious consideration”). By any reasonable reading of the record before this court, they do.

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

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

There also is no genuine issue of material fact in this case that the “cease and desist” letters were sent “in good faith,” within the meaning of comment (e) of the Restatement (Second) of Torts § 586, and in connection with litigation that was “under serious consideration.” The letters not only said as much in their text, but the summary judgment record leaves no doubt [appellees] would and could, (and in one instance did) sue the recipients if certain demands were not met.

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

Here, ExeGi and De Simone were plainly looking to enforce their rights, established after the federal jury’s verdict (which was largely in their favor) and to avoid future litigation with Alfasigma’s VSL#3 distribution partners. The letters were properly targeted to the distributors and sellers of VSL#3 in the United States, clearly threatened litigation if certain demands were not met, and required that litigation holds be placed on key documents, including electronically stored information. The required nexus is manifest, and this case meets every requirement of *Norman*. There is a strong public interest in “true” advertising of products under the Lanham Act, as well as under state law. The statements that Alfasigma claims were tortious, which were contained in cease and desist letters (and related e-mails among lawyers) and the litigation hold demands, clearly contemplated impending litigation. There is no genuine issue of fact in this case as to whether the communications were related to legal proceedings that were contemplated in good faith and under serious consideration within the meaning of the Restatement (Second) of Torts § 586; by the relevant legal tests, they were.

In our view, appellant’s contention, regarding the alleged falsity of the statements made in the cease and desist letters, is not part of the good faith analysis for application of the absolute litigation privilege. As stated in the Section 586 of the Restatement, Torts, 2d, Comment e, which we recognized as “persuasive” in *Arundel Corp.*, the litigation “privilege is absolute. It protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or *even his knowledge of its falsity.*” 75 Md. App. 77, 84 (1988) (emphasis added). As expressed by the circuit court, the facts of this case are far better suited to the application of the litigation privilege than those in *Arundel Corp.* As stated by the circuit court, it “ha[d] a more than adequate record from which to determine there is no genuine issue of fact as to whether the allegedly tortious statements have the requisite relationship to an anticipated judicial proceeding.” Here, unlike in *Arundel Corp.*, appellees’ claim, that the statements contained in the cease and desist letters contemplated a judicial proceeding in

good faith, was supported by the content of the letters as well as their initiation of a legal proceeding against a recipient whom did not comply with their requests. We find no error.

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**