IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH FARAH, JEROME CORSI, WORLDNETDAILY.COM, and WND BOOKS, Plaintiffs, vs. ESQUIRE MAGAZINE, INC., HEARST COMMUNICATIONS, INC. and MARK WARREN, Defendants.	Civil Action No. 1:11-cv-001179 (RMC)

DEFENDANTS HEARST COMMUNICATIONS, INC.'S AND MARK WARREN'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS THE PLAINTIFFS' COMPLAINT

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INTRODUCTION

This case takes aim at a posting on Esquire's Politics Blog, which satirized the unwavering stance of a group at the center of the national public controversy over President Obama's birthplace. Plaintiffs are architects of what has been called the "Birther Movement," a group of highly vocal critics of the President who assert that he is not eligible to hold office because he is not a naturally-born citizen of the United States. The speech they challenge is political commentary, which is fully protected by the First Amendment and privileged at common law. Specifically, it is a satirical mock news report that poked fun at Plaintiffs' book, "Where's the Birth Certificate? The Case that Barack Hussein Obama is Not Eligible to be President," which was published several weeks ***after*** President Obama released his long-form birth certificate establishing that he was born in Hawaii. Esquire poked fun by "reporting" that Plaintiffs were recalling and "pulping" the entire printing of their book – released just the day before – and offering refunds to customers. While this would have been a reasonable (if extreme) step by a publisher who considered the evidence, Esquire's point was that Plaintiffs are *not* reasonable when it comes to the President. Anyone familiar with Plaintiffs' very public, unyielding, adamant insistence that the President's birth certificate is a fake and proves nothing other than his role in a claimed forgery would understand in an instant that Esquire's "report" did not convey actual facts about Plaintiffs. If that were not enough, the report was expressly *labeled* as "Humor" on a "Politics Blog" described as "opinion." Plaintiffs nevertheless filed this suit against Hearst Communications, Inc., the publisher of Esquire.com, and Mark Warren, the Esquire journalist who posted the blog entry (collectively, "Esquire"),[1] seeking to punish them for their satirical critique, to publicize Plaintiffs' own views (and their book) and to raise

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[1] Plaintiffs also named as a defendant Esquire Magazine, Inc., which is not a legal entity, has not been (and cannot be) served, and so makes no appearance.

money, purportedly to "take ownership of the magazine."

Plaintiffs' suit is entirely without merit and should be dismissed. Where, as here, the statements on their face are not actionable because they are incapable of being understood as actual statements of fact or because they are expressions of opinion, courts in this Circuit have not hesitated to grant motions to dismiss under F. R. Civ. P. 12(b)(6). Indeed, this Circuit has long prescribed that, "[i]n the First Amendment area, summary procedures are even more essential." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

Consistent with this mandate, the District of Columbia recently enacted an anti-SLAPP statute to protect against this very sort of frivolous, retaliatory litigation targeting speech on public issues. "[D]ebate on public issues should be uninhibited, robust, and wide-open," the Supreme Court held long ago, *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), and the anti-SLAPP statute ensures that it is. It requires plaintiffs to show by admissible evidence at the very outset of a case a likelihood of success on the merits, before subjecting defendants to burdensome and harassing discovery.

The anti-SLAPP statute clearly applies here. Whatever one thinks of Esquire's views or how they were expressed, its satiric "report" and subsequent statements are part of a national political debate centered on the President's eligibility to hold office. Esquire's commentary on Plaintiffs' political extremism lies at the very core of the First Amendment, and this suit strikes at that core. The United States Supreme Court, federal Circuit Courts, state Supreme Courts, and lower courts have consistently cited the value of satire as a form of political expression. Satire's use in political discourse is as old as democracy itself, tracing its roots to ancient times. Sometimes it is thought to be in poor taste or "not funny," or not recognized as satire at all. But this does not diminish its power as a literary genre. Subtle and suggestive, political satire takes

real people and real issues or events but employs fictional "facts" and "quotations" to lampoon its targets, while embedding clues to signal reasonable readers that what may at first blush appear true indeed is not.

Plaintiffs cannot state a claim under Rule 12(b)(6), and they cannot meet their burden under the anti-SLAPP statute. ***First***, their defamation claim against Esquire is legally barred because no reasonable reader of Esquire's satirical "report" could believe that it asserted actual facts. It was an "opinion" blog explicitly tagged as "Humor" by a magazine with a rich tradition of satire and contained a hyperbolic headline, a fabricated non-sensical book title (suggesting Plaintiffs' fascination with conspiracy theory), wildly unbelievable quotations (suggesting Plaintiffs' irrational hatred of the President) muddled chronology of events (suggesting Plaintiffs withdrew the book the day after they released it), and a counter-factual thesis that would be discredited by anyone familiar with the Birther Movement and Plaintiffs' steadfast position – even in the weeks after the release of President Obama's birth certificate and before the book's release – that he had no constitutional right to hold office. Plaintiff Joseph Farah's immediate reaction proves the point. Taking to the airwaves the same day the blog entry was published, Farah said he "assume[d] it was a parody," and laughingly mocked those calling him for comment saying, "are you guys serious? . . . You think I'm gonna pull a best-selling book off the shelves? (laughing) What's the matter with you?" Whether some readers might misunderstand the satiric nature of Esquire's mock news report is of no consequence under the law. The law holds that the reasonable reader is capable of perceiving the nuances of satire, is fully acquainted with the context in which it is published, and misses no detail.

Second, Esquire's post-publication speech is the classic case of fully-protected non-actionable opinion. Although Plaintiffs do not elucidate what they believe was defamatory about

the "Update" to the satiric report, any reading of the text makes clear that it was Esquire's opinion about the book and the Birthers' position. So too was journalist Mark Warren's alleged statement to the Daily Caller, referring to Plaintiff Corsi as an "execrable piece of shit," which is a textbook example of rhetorical hyperbole – not nice, but not actionable.

Finally, Plaintiffs' other claims are merely an attempt to end-run the constitutional limitations on defamation claims and fail both for the same reasons and because they are wholly deficient as a matter of law. Under District of Columbia law, Plaintiffs' false light claim fails on the same basis as their defamation claim. Their misappropriation invasion of privacy claim fails because Esquire's use of Plaintiffs' names was purely editorial and non-commercial. Plaintiffs' claim for tortious interference with business relationships fails for several reasons – because they have not alleged the material terms of their purported business relationships, cannot plausibly allege that Esquire's specific and primary purpose in publishing its satiric commentary was to disrupt those business relationships, and cannot plausibly allege that any alleged lack of interest in the Book was proximately caused by Esquire's conduct. Plaintiffs cannot state a claim, much less meet their burden to show that they are likely to succeed on any of these "tag-along" claims.

Similarly, Plaintiffs fail to state a claim as a matter of law under the Lanham Act. Plaintiffs' conclusory allegations fail to specify the basis for their claim and do not even begin to approach the standard of pleading required by the Federal Rules, the Supreme Court and this District. Moreover, leave to replead would be futile, as Plaintiff's Lanham Act claim is doomed to fail as a matter of law, no matter how specific the allegations, because all of the speech at issue is fully protected non-commercial speech entirely outside the reach of the Lanham Act, and the requirements of the statutory sections cited by Plaintiffs could not be met in any event.

Plaintiffs' claims are utterly without merit and the entirety of the Complaint should be

dismissed with prejudice. This action is exactly the kind of case targeted by D.C.'s anti-SLAPP law – a case designed to burden and harass political speech with which a plaintiff disagrees. The anti-SLAPP law's heightened protection for just such speech should, and indeed must, be applied in this diversity action as the substantive law of D.C. But because the law is so new, Esquire has also moved under Fed. R. Civ. P. 12(b)(6), and Esquire respectfully requests that both motions be granted simultaneously.

FACTUAL BACKGROUND

The Plaintiffs and Their Central Role in the "Birther Movement." Plaintiffs Farah, Corsi, as well as the corporate plaintiffs WorldNetDaily.com (hereafter, "WND") and WND Books, have been key players in the so-called Birther Movement since its inception in the spring of 2008. To date, WND has been the source of over 780 "news" posts on the subject of Obama's eligibility to hold office, with Farah contributing over 150 more in his daily column on the site. (Declaration of Kristina E. Findikyan (hereinafter "Findikyan Decl."), Exs. 1-2)[2]

Joseph Farah is the founder, Editor and CEO of defendant WND, a conservative website on which he writes his daily column. (Compl. ¶ 2; Findikyan Decl., Ex. 2) This summer alone, Farah's column has included pieces entitled, "Obamageddon" (in which he asks, "why does anyone take this maniac seriously?"), "Hitler was ineligible for presidency, too" (denying he is comparing Obama to Hitler but then comparing how Germany "bent the rules" to allow Hitler to be chancellor just as he claims the United States is bending the eligibility rules for Obama), and "Strange political bedfellows" (arguing that same-sex marriage, hate-crime legislation and "open

[2] The materials attached to the Findikyan Declaration are proper evidence for the purpose of the anti-SLAPP analysis, and are also appropriate for judicial notice pursuant to Federal Rule of Evidence 201(b). *See, e.g., Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (judicial notice of newspaper articles); *Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) (judicial notice of a speech); *Hamilton v. Paulson*, 542 F.Supp.2d 37, 52 n.15 (D.D.C. 2008) (Walton, J.) (judicial notice of website).

homosexual activity in the U.S. armed forces" support the Islamist long-term agenda). (Findikyan Decl., Exs. 3-5) Farah is an author of more than a dozen books, the founder and co-publisher of defendant WND Books, and a former host of his own nationally-syndicated talk show. (*Id.*, Ex. 6) Using WND as his platform, Farah is one of the most vocal proponents of what has been called the "Birther Movement," a group of Americans who believe that Barack Obama is not eligible to be President because he is not a natural-born citizen of the United States and who claim that his birth certificate to the contrary is a fake. (Findikyan Decl., Ex. 7)

Plaintiff Jerome Corsi is, by his own description, a "world renowned author of several New York Times bestsellers" and the author of "Where's the Birth Certificate? The Case that Barack Obama is Not Eligible to be President," published by defendant WND Books (hereinafter, the "Book"). (Compl. ¶ 3)

The so-called Birther Movement began during the 2008 presidential campaign, when rumors concerning the location of Barack Obama's birthplace began circulating. (Findikyan Decl., Ex. 8)

- WND kicked off their coverage of the controversy, asking "Is Obama's candidacy constitutional? Secrecy over birth certificate, demand for 'natural-born' citizenship cited." (*Id.*)

In June 2008, then-Senator Obama released his "Certificate of Live Birth," indicating that he was born in Hawaii. (*Id.*, Ex. 9) Farah claims that he then paid a dozen private detectives in Hawaii to investigate the certificate and find information to refute it. (*Id.*, Ex. 7)

- At the time, WND posted, "Obama birth certificate: Real or phony baloney? Authenticity of crucial document staked on Daily Kos-derived image." (*Id.*, Ex. 10) From June – December 2008, WND published more than 60 "news" posts on the

birth certificate. (*Id*., Ex. 1)

Lawsuits challenging Obama's citizenship began springing up across the country, including a petition to the United States Supreme Court seeking to suspend the presidential election. (Findikyan Decl., Ex. 11)

- In late 2008, WND started an online petition demanding to see the birth certificate, and called on readers to "FedEx Supremes about Obama's eligibility." (*Id*., Exs. 12-13). Farah penned a column entitled, "Where Was Obama Born?" (*Id*., Ex. 14)

In the one year period from January 2009 through January 2010, WND posted approximately 280 entries on its website that in some form questioned the legitimacy of President Obama's Certificate of Live Birth. (*Id*., Ex. 1, and Exs. 15-16, examples including questioning what President Obama told the Supreme Court in "secret discussions" or whether a Supreme Court clerk "torpedo[ed]" the eligibility cases) It sponsored a billboard campaign asking "Where's The Birth Certificate?," and billboards popped up across the country. (*Id*., Ex.17) WND's discourse continued, and the White House responded. From February 2010– March 2011, WND published another approximately 266 posts on the birth certificate (*Id*., Ex. 1), while White House Press Secretary Robert Gibbs's stated that "rational people" had long since concluded that President Obama is a citizen of the United States. (*Id*., Ex. 18)

Beginning in April 2011, Farah began a major publicity campaign in support of Corsi's upcoming book on President Obama's birth certificate. On or about April 20, 2011, Farah and WND were featured on the Drudge Report, allegedly causing Corsi's soon-to-be-released book to, as they claimed, "rocket" to the number one position on Amazon. (*Id*., Ex. 19)

The Release of President Obama's Long-Form Birth Certificate. In reaction to what President Obama called "silliness" that had gone on for more than two years, on April 27, 2011,

he posted his long-form birth certificate on the White House's web page, re-confirming that he was indeed born on August 4, 1961, in Hawaii in Kapiolani Hospital. (Findikyan Decl., Ex. 20) In a press conference that same day, President Obama urged the nation to end the baseless conjecture on the long-established fact of his birth and come together to solve serious problems like unemployment, high gas prices, our deficit and debt, continuing that:

> [W]e're not going to be able to do it if we are distracted. We're not going to be able to do it if we spend time vilifying each other. We're not going to be able to do it if we just make stuff up and pretend that facts are not facts. We're not going to be able to solve our problems if we get distracted by sideshows and carnival barkers.
>
> . . .
>
> I know that there's going to be a segment of people for which, no matter what we put out, this issue will not be put to rest. But I'm speaking to the vast majority of the American people, as well as to the press. We do not have time for this kind of silliness. We've got better stuff to do. I've got better stuff to do. . . . (*Id.*)

Plaintiffs' Insistence that the Long-Form Birth Certificate is a Fake and Publication of Corsi's Book. Plaintiffs were that "segment of people" for whom the release of the long-form birth certificate did not resolve the issue. That day, Farah went on national television to defend the steadfast Birther position, with WND noting on its website the "fireworks" that ensued. (Findikyan Decl., Ex. 21) Two days after President Obama's release, Farah posted on WND's website a piece entitled, "It's settled! He's ineligible." (Findikyan Decl., Ex. 22) The post claimed an "Exclusive: Joseph Farah notes birth certificate of Obama proves opposite of what media think" and that he "for the first time, can report with confidence that there is no way on earth Obama is eligible to be sitting in the White House." (*Id.*)

Over the course of the next three weeks, Farah promoted Corsi's Book, reiterating his belief that the birth certificate is not legitimate, and citing the Book as forcing Obama's hand to release the long-form birth certificate. (*Id.*, Ex. 7 (stating that Farah "has no intention of standing down," despite the release of the long-form birth certificate)). In that same timeframe,

WND published approximately 47 articles questioning the validity of the long-form birth certificate and supporting the soon-to-be-released Book, including:

- "'Obama blinked. Now game begins.' Author suggests disputed presidency won't survive publication of book;" (*Id*., Ex. 23)
- "Guess what prompted Obama to release birth certificate! Request to Hawaii came day after Corsi book hit No. 1;" (*Id*., Ex. 24)
- "Farah: It's not a valid birth certificate. Listen as WND editor explains how Obama not qualified to be prez." (*Id*., Ex. 25)

Corsi's Book was published on May 17, 2011, and was heralded on WND's website with an article entitled, "It's out! The book that proves Obama's ineligible. Today's the day Corsi is unleashed to tell all about that 'birth certificate'." (*Id*., Ex. 26)

The Satiric Blog Post, Post-Publication Speech, and Esquire's Satirical History. The next day, at 10:50 a.m. on May 18, 2011, Esquire.com published in "The Politics Blog" section of its website Mark Warren's satirical blog post (hereafter, the "Blog Post"), hyperbolically headlined "BREAKING: Jerome Corsi's Birther Book Pulled from Shelves!" (Findikyan Decl., Ex. 27)[3] "The Politics Blog" explicitly notes that it is a place for opinion. (*Id*.) Tongue-in-cheek descriptions accompany the names of each of the Esquire contributors, such as: "Skeptic;" "Big Rolodex;" and "Reads other blogs and watches Fox News so you don't have to." (*Id*.)

The Blog Post was expressly tagged as "Humor" and, mimicking Matt Drudge's conservative website (drudgereport.com), where Farah was featured heralding his anti-Obama views, the Blog Post contained a "Drudge Siren." The Blog Post read in its entirety as follows:

> In a stunning development one day after the release of *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President*, by Dr.

[3] The Blog Post was never published in Esquire magazine.

> Jerome Corsi, World Net Daily Editor and Chief Executive Officer Joseph Farah has announced plans to recall and pulp the entire 200,000 first printing run of the book, as well as announcing an offer to refund the purchase price to anyone who has already bought either a hard copy or electronic download of the book.
>
> In an exclusive interview, a reflective Farah, who wrote the book's forward and also published Corsi's earlier best-selling work, *Unfit for Command: Swift Boat Veterans Speak out Against John Kerry* and *Capricorn One: NASA, JFK, and the Great "Moon Landing" Cover-Up*, said that after much serious reflection, he could not go forward with the project. "I believe with all my heart that Barack Obama is destroying this country, and I will continue to stand against his administration at every turn, but in light of recent events, this book has become problematic, and contains what I now believe to be factual inaccuracies," he said this morning. "I cannot in good conscience publish it and expect anyone to believe it."
>
> When asked if he had any plans to publish a corrected version of the book, he said cryptically, "There is no book," Farah declined to comment on his discussions of the matter with Corsi.
>
> A source at WND, who requested that his name be withheld, said that Farah was "rip-shit" when, on April 27, President Obama took the extraordinary step of personally releasing his "long-form" birth certificate, thus resolving the matter of Obama's legitimacy for "anybody with a brain."
>
> "He called up Corsi and really tore him a new one," says the source. "I mean, we'll do anything to hurt Obama, and erase his memory, but we don't want to look like fucking idiots, you know? Look, at the end of the day, bullshit is bullshit."
>
> Corsi, who graduated from Harvard and is a professional journalist, could not be reached for comment.

(*Id.*)

Significantly, only an hour-and-a-half later, Esquire added an update to the Blog Post expressly stating that it was satire:

> ***Update, 12:25 p.m.,*** *for those who didn't figure it out yet, and the many on Twitter for whom it took a while*: We committed satire this morning to point out the problems with selling and marketing a book that has had its core premise and reason to exist gutted by the news cycle, several weeks in advance of publication. Are its author and publisher chastened? Well, no. They double down, and accuse the President of the United States of perpetrating a fraud on the world by having released a forged birth certificate. Not because this claim is in any way based on reality, but to hold their terribly gullible audience captive to their lies, and to sell

> books. This is despicable, and deserves only ridicule. That's why we committed satire in the matter of the Corsi book. Hell, even the president has a sense of humor about it all. Some more serious reporting from us on this whole 'birther' phenomenon here, here, and here.

(*Id.*) When contacted by the *Daily Caller*, Mark Warren opined that defendant Corsi is "an execrable piece of shit." (Findikyan Decl., Ex. 28)

The satirical Blog Post followed in a decades-old tradition of satire and humor at Esquire about national issues and public figures and officials. To name only a few examples, the magazine famously published in the 1960s a series of articles by Harvard economist John Kenneth Galbraith (writing under the pseudonym Mark Epernay) involving public figures and officials in made-up contexts.[4] 1966's "Joy To the World And Especially To Pickens, S.C." pokes fun at President Lyndon B. Johnson, purporting to be a campaign "speech." (*Id.*, Ex. 33) In 1995's "Learning New Steps," Senator Bob Dole has a fictional conversation with Senator Alfonse D'Amato, while President Bill Clinton has a fictional meeting in the Oval Office with Leon Panetta and George Stephanopoulus. (*Id.*., Ex. 34) In "Sex Tips From Donald Rumsfeld," the former Secretary of Defense ineptly responds to readers' sex questions. (*Id.*, Ex. 35)

Esquire's Politics Blog followed in this grand tradition. In "EXCLUSIVE: Bernie Kerik's Prison To-Do List Leaked!," which contains a headline similar to the Blog Post at issue in this litigation, Esquire fictionally "reported" that it had come into possession of Mr. Kerik's

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[4] *See* Findikyan Decl., Exs. 29 ("Introducing the McLandress Dimension" "reported" the results of a fake experiment that tested the longest time span various public figures' and officials' thoughts remained on something other than his or her own personality), 30 ("The Confidence Box," discussed a fictional patented box by Dr. McLandress designed to help President Kennedy retain and/or restore the confidence of American business executives, which was tested using speeches of various public figures and officials), 31 ("The Sad State of the Department of State: Part II The Hog-Wild Machine" told of a fictionalized world where American foreign policy was conducted by computer), and 32 ("Let Us Now Appraise Famous Men" rated various public figures' social positions by applying a fictionalized mathematical equation).

"to-do" list while imprisoned, which included: "[p]repare for routine visits from Rudy Giuliani and other 'friends for life;'" and "[s]tockpile sunscreen for head at yard-time with cigarette trades." (Findikyan Decl., Ex. 36) In "From the White House Transcription Department," President Obama and the First Lady conduct a fictionalized book club session with author Jonathan Franzen about his book *Freedom*. (*Id*., Ex. 37) In "Bin Laden Home-Video Leak Continues with Osama's DVR," Esquire reported that Osama bin Laden's DVR cache, which, like the Blog Post at issue here, was purportedly "released exclusively to The Politics Blog," indicated that bin Laden watched shows called, among others, "Dubai's Got Talent," "That Yemeni Show," and "So You Think You Can Dance: Gaza." (*Id*., Ex. 38) The list goes on.[5]

WND's Reaction to the Publications. Immediately following publication of the Blog Post, Farah told media that the book was "selling briskly" and that he "assume[d]" the Politics Blog was just "a very poorly executed parody." (Findikyan Decl., Ex. 28) On New York's WOR Radio, Farah referenced the Blog Post as satire and laughed at the absurdity of the calls he received for comment after the publication of the Blog Post, responding to them, "are you guys serious? . . .You think I'm gonna pull a best-selling book off the shelves? (laughing) What's the matter with you?" When discussing the Blog Post in detail, he said, "you have to look really closely . . . they named one of Jerry's books after a phony moon landing or something like that. I quickly responded on WND and in other venues." (Findikyan Decl., Ex. 43) However, the next day, Farah "vow[ed] to sue Esquire" and started a campaign to "take ownership of the magazine," even seeking donations from loyalists to support his legal cause. (*Id*., Ex. 44)

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[5] For additional examples of humor or satire on Esquire.com, *see* Findikyan Decl., Exs. 39 – 42 ("The State of the Union Drinking Game, 2011 Edition;" "Behind the Kagan Whisper Campaign: A Brief (but Very Insightful) Investigative Analysis;" "Seven New Jobs for Which Tony Hayward Would Qualify;" and "Why I'm Supporting Trump 2012").

The Allegations of the Complaint. On June 29, 2011, Plaintiffs held a press conference to announce the filing of their Complaint against Defendants, seeking in excess of $100 million in actual and compensatory damages and in excess of $20 million in punitive damages. (Compl. ¶ 38) They used the press conference as a platform to restate their views that the President is complicit in forgery and ineligible to hold office, and to promote their book. (Findikyan Decl., Ex. 45) The complaint, filed that same day, alleges defamation (Count I), false light invasion of privacy (Count II), tortious interference with business relations (Count III), violations under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and (B) (Count IV) and misappropriation invasion of privacy (Count V). Plaintiffs attempted but failed to serve defendants Hearst Communications, Inc. and Mark Warren.[6] On July 25, 2011, Defendants accepted service in exchange for an extension of time to answer or otherwise respond to the Complaint to and including September 6, 2011. The extension was granted by the Court on August 4, 2011. These motions follow.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE SUBJECT TO AN ANTI-SLAPP MOTION AS WELL AS A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. The District of Columbia Anti-SLAPP Statute Broadly Applies to Claims that Target the Exercise of Free Speech About Issues of Public Interest.

The District of Columbia's Anti-SLAPP Act of 2010 (the "Act"), D.C. Code § 16-5501 *et seq*., was enacted earlier this year to combat "Strategic Lawsuits Against Public Participation" – frivolous actions, like this one, filed "not to win the lawsuit but punish the opponent and

[6] Plaintiffs failed to serve a Summons on Hearst Communications, a requisite to proper service under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 4(c). Plaintiffs also failed to serve Mark Warren properly. Plaintiffs sent a copy of the Summons and Complaint to Mr. Warren via certified mail, however, he never signed for nor received it when it was delivered to Hearst Corporation's New York address on July 14, 2011.

intimidate them into silence."[7] The Act allows defendants to "file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Code § 16-5502(a).

The Act is informed by similar, longstanding anti-SLAPP statutes in California and other jurisdictions, and its language and purpose mirror those models. *See* Committee Report at 1 (the Act "follows the model set forth in a number of other jurisdictions"); *id.* at 4 (the Act follows "the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions"). It requires that "[i]f a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion *shall* be granted unless the responding party demonstrates that the claim is *likely* to succeed on the merits." D.C. Code § 16-5502(b) (emphasis added). The statute further provides that "[t]he court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing." *Id.* § 16-5502(d).[8]

The Act applies to claims based on statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and also to "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in

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[7] Report of the D.C. Committee on Public Safety and the Judiciary, Nov. 19, 2010 ("Committee Report") at 4, *available at* www.dccouncil.washington.dc.us/images/00001/20110120184936.pdf. The Act became effective on March 31, 2011, after being signed by the Mayor and transmitted to both Houses of Congress for review. D.C. Code § 16-5501.

[8] The Act also provides for a stay of discovery while the special motion is pending. D.C. Code § 16-5502(c)(1). Accordingly, Defendants are separately moving for a stay pursuant to the Act and Fed. R. Civ. P. 26. A stay is particularly warranted here where the motion is directed to matters of law and no discovery is required in order to oppose the motion.

connection with an issue of public interest." *Id.* § 16-5501(1)(A). An "issue of public interest" is defined broadly as one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).

The law applies to *any* claim that "arises from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). Indeed, the Committee Report expressly recognized that SLAPP cases come in all forms, not just defamation, including "such business torts as interference with contract." Committee Report at 2. Courts regularly apply state anti-SLAPP laws to each of the claims alleged by Plaintiffs. *See*, *e.g.*, *Gardner v. Martino*, 563 F.3d 981, 983 (9th Cir. 2009) (affirming dismissal of "defamation, false light invasion of privacy, intentional interference with economic relations, and intentional interference with prospective economic advantage" claims under Oregon's anti-SLAPP statute); *Mefford v. Cameron Park Cmty. Servs. Dist.*, 2010 WL 2816877 (E.D. Cal. July 16, 2010) (granting anti-SLAPP motions under California law as to claims for, *inter alia*, false light invasion of privacy and defamation).[9] So too should the Act apply here.

B. Plaintiffs' Claims Fall Within the Scope of the Anti-SLAPP Statute.

Once movants show that the claims are covered by the Act, the burden shifts to Plaintiffs, requiring them to demonstrate that they are likely to succeed on the merits of each of their

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[9] While the issue has yet to be decided in this Circuit, federal courts in California do not apply that state's anti-SLAPP statute to Lanham Act claims. *See, e.g.*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 901 (9th Cir. 2010) (California's anti-SLAPP statute gives no protection against a federal Lanham Act claim). While Esquire does not concede that the District of Columbia's anti-SLAPP statue does not apply to such claims, because the Lanham Act claim here clearly has no merit and can be summarily dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) (see *infra*, Section III), this Court need not reach that issue in this case.

claims.[10] Movants' burden is easily met here. This is a classic SLAPP case, not least because Plaintiffs *admit* it is intended to chill speech and punish their (perceived) political enemies, rather than redress any legitimate grievance. Plaintiffs even established a "Justice From Esquire Fund," where they ask for donations to fund the lawsuit in order to "teach arrogant media establishment figures like Warren that they are not unaccountable to the rule of law just because they work for billion-dollar corporate giants."[11]

Here, Esquire's speech clearly falls within the scope of D.C. Code § 16-5501(1)(A)(i), which applies to statements "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Esquire's speech focused specifically on the controversy stoked by Plaintiffs' claims that the President may be foreign-born and thus barred from serving as president. This controversy involves an issue under consideration by the judicial as well as the executive branch. It is the subject of numerous lawsuits in this Circuit alone. *See, e.g., Cohen v. Obama*, 2008 WL 5191864, at *1 (D.D.C. Dec. 11, 2008) (dismissing challenge to President Obama's eligibility), *aff'd*, 332 F. App'x 640 (D.C. Cir. 2009); *Strunk v. U.S. Dep't of State*, 770 F. Supp. 2d 10 (D.D.C. 2011) (FOIA suit regarding travel records of President's mother); *Hollister v. Soetoro*, 258 F.R.D. 1 (D.D.C. 2009) (imposing Rule 11 sanctions for filing a legally frivolous "birther"

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[10] California's anti-SLAPP law – the model for the Act – is particularly instructive. The California Supreme Court has outlined a "two-step process for determining whether an action" must be dismissed. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). First, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." To make this showing, the defendant must demonstrate that the alleged conduct "underlying the plaintiff's cause [of action] fits one of the categories spelled out" in the law. *Id.* Second, if the claim arises from protected conduct, the court "must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." If the plaintiff cannot meet this burden, then the claim must be dismissed. *Id.* at 88-89.

[11] *See* WND Superstore, http://superstore.wnd.com/justice-from-esquire-fund (last visited Aug. 25, 2011).

complaint), *aff'd*, 368 F. App'x 154 (D.C. Cir. 2010) (*per curiam*). Thus, the speech at issue here plainly concerned an issue that was the subject of "official" and "judicial" proceedings, as well as review by an executive body. In addition, Esquire's speech is protected under D.C. Code § 16-5501(1)(B), which extends the statute's protection to any statement made "in connection with … an issue of public interest." *See Berg v. Obama*, 586 F.3d 234, 239 & n.4 (3d Cir. 2009) (collecting cases and noting "the public's interest in the final resolution of" the "'birther' cases.").[12] *See also McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983) (adopting the "general rule of statutory construction" that a "remedial statute should be construed liberally in order to effectuate the purposes for which it was enacted").

There is no doubt that the controversy over the President's qualifications for office is a matter of the highest public interest. Plaintiffs' Complaint concedes as much. *See* Compl. ¶¶ 8, 10 (describing the presidential "controversy," where 25% of Americans believe Obama is ineligible). The statements are also "related to … public figure[s]" – the President of the United States and two media personalities who question his eligibility for office and concede in their Complaint they are public figures. *See id.* at ¶¶ 2-3 (Corsi allegedly is "a world renowned author of several New York Times bestsellers," while Farah is described as "Editor and Chief Executive Officer of WorldNetDaily.com, a news and commentary Internet publication"); *see*

[12] This same language has been broadly interpreted by California courts. In *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042 (2008), the court defined an issue of public interest as "any issue in which the public is interested," which in that case was held to include an article about a Finnish businessman's vacation home. "In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute – it is enough that it is one in which the public takes an interest." *Id.* And in *Hilton*, the Ninth Circuit instructed that courts "must construe … 'issue of public interest' … broadly" to include any "topic of widespread, public interest" or "person … in the public eye." *Hilton v. Hallmark Cards*, 599 F.3d 894, 906-07 (9th Cir. 2010). Applying those definitions, the court held that a greeting card poking fun at Paris Hilton's reality-television persona met the statute's public-interest requirement. *Id.*

also Findikyan Decl., Exs. 6 and 46 (Farah is a self-described "nationally syndicated columnist" while Corsi is a frequent speaker and guest on national radio and television news programs). Moreover, with respect to the Birther controversy, Plaintiffs have been leading proponents. *See* discussion at p. 5-13, *supra*. In this Circuit, corporations are deemed "public figures" as a matter of law. *See Metastorm, Inc. v. Gartner Grp., Inc.*, 28 F. Supp. 2d 665, 669-70 (D.D.C. 1998) (corporation is appropriately deemed "public figure" in context of "defamation case brought by a corporation against a member of the mass media where the publication in issue concerned matters of legitimate public interest").

In short, the challenged speech concerned matters of public interest involving high profile public figures, including official proceedings involving the executive and judicial branches. Accordingly, Plaintiffs' claims are subject to a special motion to dismiss under the Act.[13]

C. The Act Offers Substantive Protections That Apply in a Diversity Action.

Courts across the country are clear that anti-SLAPP statutes provide substantive protections that can be invoked in federal diversity cases. Indeed, those "federal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must." *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010).

The District of Columbia explicitly intended to create "*substantive rights* with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view," a substantive "immunity to individuals engaging in protected actions." Committee Report at 1, 4 (emphasis added); *see also id.* at 6 ("the legislation provides a defendant to a SLAPP with substantive rights to have a

[13] D.C. Code § 16-5504(a) provides that "[t]he court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees." If this Court grants Esquire's Special Motion to Dismiss, it will file a separate motion setting forth the fees and costs incurred.

motion to dismiss heard expeditiously"). As such, the Act clearly comes within the *Erie* doctrine as a state substantive law applicable in diversity cases in federal court. *See Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360-61 (D.C. Cir. 1983) (*Erie* doctrine does not strictly apply to diversity cases in the District of Columbia, but federal courts apply it by analogy).

Every Circuit Court to face the question has concluded that state anti-SLAPP statutes apply in federal diversity cases. In *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999), the Ninth Circuit held that the anti-SLAPP statute "can exist side by side" with the Federal Rules, "each controlling its own intended sphere of coverage without conflict." The court illustrated its point with an example, explaining that a *qui tam* plaintiff "after being served in federal court with counterclaims … may bring" an anti-SLAPP motion and recover fees if successful. *Id*. "If unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Id*. The court "fail[ed] to see how the prior application of the anti-SLAPP provisions will directly interfere with the operation of Rule 8, 12, or 56," leading it to conclude that there is no "direct collision" between the laws. *Id.* It noted that the appellee had not "identified any federal interests that would be undermined by application of the anti-SLAPP provisions," while "California has articulated the important, substantive state interests furthered by the Anti-SLAPP statute." *Id.* at 973. The court further concluded that "the twin purposes of the *Erie* rule – discouragement of forum-shopping and avoidance of inequitable administration of the law – favor application of California's Anti-SLAPP statute in federal cases." *Id*. (internal quotations marks omitted).

The Ninth Circuit has reaffirmed *Newsham* time and again over a dozen years. *See*, *e.g.*, *Hilton*, 599 F.3d at 900 n.2; *Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003); *Northon v. Rule*, 637 F.3d 937, 938-39 (9th Cir. 2011). And in this District, Judge Friedman has applied the

California Anti-SLAPP statute *arguendo* in a diversity action governed by California law, noting that the law's provisions have been applied by "both federal and state courts in California." *Blumenthal v. Drudge*, 2001 WL 587860, at *2 (D.D.C. Feb. 13, 2001) (denying the motion on its merits and because it was untimely).[14] The First and Fifth Circuits and numerous other courts across the country have reached the same conclusion based on the same reasoning.[15]

This Court should follow the First, Fifth, and Ninth Circuits and numerous district courts and apply the Act, which is modeled after statutes universally found to apply in federal courts. The Act's substantive protections *supplement* federal rules, rather than supplant them. Its application would serve the "twin purposes of the *Erie* rule" – discouragement of forum-shopping and avoidance of inequitable administration of the law. It should be applied here.[16]

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[14] *Blumenthal* described the California Anti-SLAPP statute in passing as "a procedural rule," but does not suggest that it is "procedural" in the sense that it cannot apply in federal court. *Id*. at *1. To the contrary, Judge Friedman noted, without any apparent disapproval, that "both federal and state courts in California" apply the statute. *Id*. at *2. In fact, as the Ninth Circuit later noted, "California law recognizes the protection of the anti-SLAPP statute as a *substantive immunity* from suit." *Batzel*, 333 F.3d at 1025 (emphasis added).

[15] *See, e.g*., *Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (applying Maine statute and effectively overturning *Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D. Mass. July 19, 2010) and *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 (D. Mass. Dec. 1, 2010)); *Henry v. Lake Charles Am. Press, L.L.C*., 566 F.3d 164, 168-69 (5th Cir. 2009) (Louisiana statute); *see also Buckley v. DIRECTV, Inc*., 276 F. Supp. 2d 1271, 1275 n.5 (N.D. Ga. 2003) (Georgia statute); *Bible & Gospel Trust v. Twinam*, 2008 WL 5245644 (D. Vt. Dec. 12, 2008) (Vermont statute); *Kentner v. Timothy R. Downey Ins., Inc*., 430 F. Supp. 2d 844, 845-46 (S.D. Ind. 2006) (Indiana statute); *Nguyen v. County of Clark*, 732 F. Supp. 2d 1190, 1192 (W.D. Wash. 2010) (Washington statute).

[16] The Act, although brand new, has already been invoked. A special notice to dismiss was raised in *Sherrod v. Breitbart et al*., No. 1:11-cv-00477-RJL (D.D.C. filed Mar. 4, 2011). The defendants filed both a motion to dismiss pursuant to Rules 12(b)(3) and (6) or, in the alternative, transfer venue, and a special motion to dismiss under the anti-SLAPP Act. Judge Leon denied all motions without comment on July 28, 2011. The minute orders do not reveal whether Judge Leon denied the special motion because he found the Act did not apply or because he found that the plaintiff satisfied the Act's required showing of likely prevailing on the claim sufficient to survive the special motion to strike. The defendants have asked that the Rule 12 motion be certified for interlocutory appeal.

D. Even Outside the Anti-SLAPP Context, Dismissal for Failure to State a Claim is "Particularly Appropriate" for Suits that Target Protected Speech.

Whether or not the Court is inclined to grant Esquire's anti-SLAPP motion, the case can and should be dismissed for failure to state a claim. "A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim." *Molina-Aviles v. Dist. of Columbia*, 2011 WL 2783853, at *2 (D.D.C. June 23, 2011) (Collyer, J.). "Federal Rule of Civil Procedure 8(a) requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)). "A complaint must be sufficient 'to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Rule 8(a) requires an actual showing and not just a blanket assertion of a right to relief." *Id.* (citing *Twombly*, 550 U.S. at 555 n. 3). In addition, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is 'plausible on its face.'" *Id.* at *3 (quoting *Twombly*, 550 U.S. at 570). In determining that issue, "a court need not accept as true legal conclusions set forth in a complaint;" "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.'" *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)).

A SLAPP motion is pending in the D.C. Superior Court in the libel action brought by Dan Snyder. *Snyder v. Creative Loafing, Inc.*, 2011-CA-003168-B (filed Apr. 26, 2011). The motion is not yet fully briefed. The motion has been opposed, claiming that the Act violates the District of Columbia's "Home Rule Act," arguing that the Act is procedural in nature – a ground that is flawed for two reasons discussed in Section IC *supra.*

The D.C. Circuit has long instructed that "[i]n the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). Although *Keogh* involved summary judgment, its reasoning is equally relevant when applied to motions to dismiss. *See also Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995) ("Given the threat to the first amendment posed by nonmeritorious defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted."); *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983) ("In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function.").

Dismissing the case pursuant to the anti-SLAPP Act will best honor the District of Columbia's intent to create a substantive "immunity [for] individuals engaging in protected actions," Committee Report at 4, as well as ensure that Esquire can recover the cost of defending against this meritless lawsuit. But, because the Act is new, Esquire respectfully suggests that the most prudent course is to simultaneously dismiss *both* pursuant to the anti-SLAPP act *and* for failure to state a claim.

II. PLAINTIFFS FAIL TO STATE A CLAIM AND CANNOT ESTABLISH THAT THEIR CLAIMS ARE *LIKELY* TO SUCCEED ON THE MERITS.

Because Esquire has made a prima facie showing that the claims here arise from its acts "in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b), the burden shifts to Plaintiffs to demonstrate they are "likely" to succeed on the merits of each and every claim. *Id*. Even if the Act did not apply, Plaintiffs' claims nonetheless fail to state a claim. For each of the independent reasons set forth below, Plaintiffs cannot prevail on their

claims as a matter of law.

A. Plaintiffs Have No Cognizable Defamation Claim

"To prevail in a defamation suit, Plaintiff must prove that the statements complained of are i) defamatory; ii) capable of being proven true or false; iii) 'of and concerning' the Plaintiff; iv) false and v) made with the requisite degree of intent or fault." *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996). Plaintiffs cannot carry his burden with respect to each of these elements as a matter of law because, as explained below: (a) the Blog Post is satire, which is fully protected by the First Amendment to the United States Constitution; and (b) the post-publication speech (the "Update" and alleged statement by Mark Warren to the *Daily Caller* (the "Warren Statement")) is pure opinion, incapable of being proven true or false, and fair comment.[17]

1. The Blog Post Is Satire, Which Is Fully Protected By the First Amendment

Esquire's political critique of the Book and Birther Movement is "realistic" satire, a literary technique used since ancient times to convey opinions on matters of public concern. Courts have properly treated such satire as fully protected by the First Amendment, recognizing its essential role in a well-functioning democracy. It is immune from liability because a hypothetical reasonable reader, fully acquainted with the genre and the context in which it is employed, would understand satire for what it is and not mistake it for reality.[18] Shielding satiric speech from liability provides "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the

[17] Plaintiffs are incapable of satisfying the other requirements as well, including proof of fault, but those issues are not raised by this motion.

[18] It is immune for other reasons as well, such as lack of fault where the intent was to convey a satiric message, and because it is not defamatory. Those grounds are not raised in this motion, but are reserved for later review, if necessary.

discourse of our Nation." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990).

a. The history and function of satire

"Satire, particularly realistic satire, is . . . a distortion of the familiar with the pretense of reality in order to convey an underlying critical message." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 151 (Tex. 2004). It is "a literary form that employs such devices as sarcasm, irony and ridicule to deride prevailing vices or follies." Leslie Kim Treiger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 Yale L. J. 1215, 1215 (1989). Satire takes real people and events and fictionally alters them to convey the author's critical perspective. The genre is written in a "straight" style, which might fool some people into believing it is true, particularly at first glance, but contains clues to the reasonable reader that it is not. Indeed:

> Satire typically works through subtlety and suggestion rather than through bluntness and plain statement. It avoids the direct approach of propaganda and sermon in favor of the indirect method of art. Choosing a subject such as politics or pedantry, satirists set out to attack with moral fervor. But instead of slashing and decrying, they express themselves in a complex and often witty way. The object is ridicule, not simple invective.

Ashley Brown and John L. Kimmey, Satire, An Anthology 1 (1977). Satire is "particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy . . . . Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed." *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting), *rev'd on other grounds sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Originating in ancient Greece, satire is one of the oldest literary modes, with a long and rich history of addressing social and political issues. *See* Brown & Kimmey, at 1-3. The most famous example of satire, perhaps, is "A Modest Proposal," the 1729 essay by Jonathan Swift, one of the first practitioners of modern journalistic satire. *See id*. at 196. Swift's essay attacks

repressive English taxes imposed on the Irish poor by proposing an alternative means to raise revenue, by slaughtering Irish children and selling them for meat. At the time of its publication, many people read Swift's "Modest Proposal" as a serious recommendation of economically motivated cannibalism. Benjamin Franklin, another skilled political satirist, used the journalistic form repeatedly to criticize, among other things, England's treatment of the American colonies.[19] In "The Speech of Miss Polly Baker" (1747), Franklin critiqued the double standards towards marriage and illegitimacy by recounting the (fictitious) speech of a woman reportedly prosecuted for the fifth time for having a bastard child, who pleads her case to the judges, inducing one of them to marry her the next day.[20] The piece caused significant controversy when first published in the *Maryland Gazette* (also known as *The Baltimore General Advertiser*) because many people reading the newspaper believed the story to be true.[21] That political satiric tradition has carried on throughout history to today, with many examples of how a skilled satirist can and does deceive even those considered to be the most sophisticated members of the public.[22]

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[19] *See* The Papers of Benjamin Franklin, http://franklinpapers.org (digital editions of Yale University's Franklin Papers) (last visited Aug. 25, 2011), including Franklin's "Rules By Which a Great Empire May Be Reduced to a Small One" (1773) (published in *The Public Advertiser*, Franklin posed as a how-to book author, using reverse logic to lay out the American case against England's policies towards America); "An Edict by the King of Prussia" (1773) (printed in *The Advertiser*, criticizing English tax policy, Franklin used a German persona to argue that Prussia had a right to tax England and America because England was colonized by Germans, the English then colonized America, and Prussia defended both in the Seven Years War); "Felons and Rattlesnakes" (1751) (published in *The Pennsylvania Gazette*, proposing that America should export rattlesnakes to England, just as England exported felons to the colonies).

[20] *See id*.

[21] Max Hall, Benjamin Franklin & Polly Baker: The History of a Literary Deception 16-24, 33, 61 (1960).

[22] *See, e.g*., Maureen Dowd, *Is You Wicked?*, N.Y. Times, May 7, 2003, at www.nytimes.com/2003/05/07/opinion/07DOWDD.html (highlighting comedian Sasha Baron Cohen's Ali G character's deception of former Secretary of State James Baker, former CIA

b. The long history of protection for satire

Constitutional protection for satire and other forms of humor is well-established. "'Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalist expose, or the religious tract.'" *New Times, Inc. v. Isaacks*, 146 S.W.2d 144, 151 (Tex. 2004) (quotation omitted); *see also* Hon. Robert D. Sack, Sack on Defamation § 5.5.2 (G)(1) (4th ed. 2011) ("Despite its typical literal 'falsity,' any effort to control [humor] runs severe risks to free expression as dangerous as those addressed to more 'serious forms of communication.'"). It can come in the form of "'sheer nonsense, biting satire, practical jokes, puns (clever and otherwise), one-liners, ethnic jokes, incongruities and rollicking parodies, among others.'" *New Times*, 146 S.W.2d at 151 (quotation omitted).

First Amendment protection for parody is well-established. *See Hustler v. Falwell*, 485 U.S. at 53; *Mattel Inc. v. Walking Mountain Prods*., 353 F.3d 792, 801 (9th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996); *Groucho Marx Prod., Inc. v. Day and Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir.1982). Moreover, in *Hustler v. Falwell*, the Supreme Court noted that satirists in particular required strong First Amendment protection to shield them from liability for defamation and related claims. 485 U.S. at 53.

The primary line of defense is the First Amendment's protection for expressions of opinion, as a reasonable reader would understand that satire does not state actual facts. *See, e.g., Pring v. Penthouse Int'l, Ltd.,* 695 F.2d 438, 442 (10th Cir. 1982) ("The test is not whether the

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Director James Woolsey, former U.S. Attorney General Richard Thornburgh, and former National Security Advisor and Air Force General Brent Scowcroft) (last visited Aug. 25, 2011).

story is or is not characterized as 'fiction,' 'humor,' or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated"); *New Times*, 146 S.W.3d at 157; *Garvelink v. Detroit News*, 522 N.W.2d 883, 886 (Mich. App. 1994) ("it is the function of this Court to review the column to determine whether it could reasonably be understood as describing actual facts about plaintiff"); *Hoppe v. Hearst Corp.*, 770 P.2d 203, 206 (Wash. Ct. App. 1989) ("the court should consider whether the allegedly defamatory expression, in context, could reasonably be understood as describing actual facts about the plaintiff").[23]

The "reasonable reader" is one who is sufficiently sophisticated to recognize the nuances of satire. "[T]he hypothetical reasonable person – the mythic Cheshire cat who darts about the pages of the tort law – is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity." *New Times*, 146 S.W.3d at 157 (quoting *Patrick v. Superior Court*, 27 Cal.Rptr.2d 883, 887 (Cal. Ct. App. 1994)). The reasonable reader is also fully familiar with the broader context in which the satire is set, and the more immediate context of the publication, including all of its details. *See Moldea v. New York Times Co*., 22 F.3d 310, 317 (D.C. Cir. 1994); *Lane v. Arkansas Valley Publ'g Co*., 675 P.2d 747, 752 (Colo. Ct. App. 1983) ("in the context of a heated recall campaign, the trial court correctly concluded that the comments of a fictional character with an unlikely background cannot be taken as serious allegations of illegal use of county funds or other illegal activity and were protected opinions"); *Myers v. Boston Magazine Co*., 403 N.E.2d 376, 379 (Mass. 1980) (courts must "examine the statement in its totality in the context in which it was uttered," including "the medium by which the statement is

[23] The Blog Post is also fully protected by the common law doctrine of fair comment, discussed in section II(A)(2), *infra*.

disseminated and the audience to which it is published") (quotations omitted); *Hoppe v. Hearst*, 770 P.2d at 206. For example, when Rev. Jerry Falwell sued Hustler Magazine over a satirical advertisement depicting Falwell discussing having sex with his mother, it was found that "the ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'" *Falwell*, 485 U.S. at 49.

Thus, while some readers may be misled by satire, that is irrelevant to the legal analysis – the only relevant measure is the understanding of the hypothetical reasonable reader. *See New Times*, 146 S.W.3d at 157 ("The fact that real party furnished declarations of a few people who stated that they did not recognize the letter as a joke does not raise a question of fact as to the view of the average reader. The question is not one that is to be answered by taking a poll of readers but is to be answered by considering the entire context in which the offending material appears.") (quoting *San Francisco Bay Guardian, Inc. v. Superior Court*, 21 Cal.Rptr.2d 464, 467 (1993)); *Klayman v. Segal*, 783 A.2d 607, 618 (D.C. 2001) (dismissing claim because, "when read in context, a reasonable person of ordinary intelligence would not understand the fair and natural meaning of the statement in question to be that Mr. Klayman is insensitive to the murder of innocent children").

Accordingly, Plaintiffs' allegation that some people were confused by the satiric Blog Post is of no moment. It is neither necessary nor appropriate to analyze whether all readers understood the satiric Blog Post. "Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reader, for purposes of defamation law, does not." *New Times*, 146 S.W.3d at 158. If a hypothetical reasonable reader is incapable of recognizing that an over-the-top piece containing outlandish quotations, labeled as humor, in an opinion section, is not a straight news story, then the concept is meaningless. *See Carpenter v. King*, 2011 WL 2432910,

at *4 (D.D.C. June 17, 2011) ("The reasonable reader who peruses [a] column on the editorial or Op–Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper.") (quotation marks and citation omitted).

Courts across the country analyzing satiric speech have concluded that publications similar to Esquire's Blog Post are fully protected by the First Amendment. In *New Times, Inc. v. Isaacks*, 146 S.W.3d 144 (2004), the Texas Supreme Court dismissed a defamation claim by a district attorney and judge, who challenged a satiric newspaper article that attributed false quotations to them in connection with a fictional incident. The article was a reaction to a real incident that attracted immense local and national news coverage – plaintiffs' arrest and detainment of a seventh grader for the content of a school assignment. The newspaper penned a satiric article entitled "Stop the Madness," which related the story of a six-year-old child that was arrested and detained by plaintiffs for writing a cannibalistic book report about the Maurice Sendak classic, *Where the Wild Things Are*. The article contained false quotations and "facts," reporting that the child was shackled and had a school record for spraying a boy with pineapple juice. It "quoted" then-Governor George W. Bush as claiming that the Sendak book had "deviant, violent sexual overtones," the district attorney as considering, but rejecting, trying the girl as an adult, and the judge as stating that any implication of violence in a school "is reason enough for panic and overreaction." The article included reference to a faith-based organization named GOOF (God Fearing Opponents of Freedom) and ended with the six-year old referring to the authors "Salinger and Twain." *See id.* at 147-149. The article was published in the "News" section of the newspaper and had no overt indicia, such as a humor tag or "opinion" label, to signal the reader that it was satire. *See id.* at 159-60. Nevertheless, considering the totality of

the circumstances, which included the fact that the alternative weekly newspaper had published satire before, the Texas Supreme Court found the article could not reasonably be understood to be stating actual facts and therefore it was protected opinion. *See id*. at 159-61.

Similarly, in *Patrick v. Superior Court*, 27 Cal. Rptr. 2d 883 (Cal. Ct. App. 1994) (unpublished), a case relied on by the *New Times* court, the California Court of Appeal found that a phony memo on judicial letterhead penned by a local newspaper (but appearing as if written by a judge with whom it was embroiled in a feud) and distributed to other judges in the courthouse, was satire and that no reasonable person could conclude otherwise. *Id*. at 883. The memo, among other things, announced a ban on copies of the newspaper within the courthouse, warned judges that there would be off-hours searches to ensure compliance and, as a consequence, advised judges and court employees to conduct their "amorous escapades" at "off-site locations" to avoid embarrassment. The alleged author ended by declaring a "court emergency" and suspended the election of his successor judge. *Id*. at 884. Considering the context of the very public feud between the newspaper and judge, the internal references to searches, romantic liaisons and the like, the *Patrick* court found the memo to be satiric parody and "simply unreasonable to believe that anyone, and particularly the *audience actually intended*, could conclude that [the judge] wrote *this* memo." *Id*. at 890 (emphasis in original).[24]

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[24] *See also Pring*, 695 F.2d 443 (finding article describing acts of fellatio at Miss America contest that caused recipients to levitate were "no more than rhetorical hyperbole" and not actionable); *Myers v. Boston Magazine Co*., 403 N.E.2d 376, 376-77 (finding statement that sportscaster was "enrolled in a course for remedial speaking" to be opinion); *Garvelink*, 522 N.W.2d 883 (finding editorial column relaying fictional interview with school superintendent to be satire); *San Francisco Bay Guardian, Inc. v. Superior Court*, 21 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1993) (finding phony letter to the editor in newspaper's April Fool's edition to be parody); *Lane v. Arkansas Valley Pub'g Co*., 675 P.2d 747 (finding newspaper article conveying conversation with fictional character with unlikely background was protected opinion); *Hoppe*, 770 P.2d 203 (columnist's parody of Raymond Chandler detective novel was protected speech).

c. Esquire's Blog Post clearly is protected satire

Here, consideration of the totality of the circumstances warrants the same conclusion. The Blog Post's thesis was completely antithetical to the position consistently and very publicly espoused by Plaintiffs, even after President Obama's release of his birth certificate. This broader context made the challenged Blog Post patently absurd to anyone who was aware of the controversy. Even so, the immediate context of the publication gave a reasonable reader numerous additional clues that the Blog Post was not conveying statements of actual facts. Specifically, the Blog Post:

- was expressly tagged as "Humor" on a "Politics Blog" described as "opinion";
- began with a hyperbolic headline, breathlessly claiming "BREAKING" news (in a blog dedicated to opinion), complete with an exclamation point, which is not typically seen in real "news" headlines;
- contained a copy of the "Drudge Siren," which is the symbol Matt Drudge – a self-described conservative – uses when "breaking" news to his readers, but has never been used by Esquire before or since;
- claimed Farah planned to "pulp" the entire "200,000 first printing run" of the Book (by any standard, an enormous first printing of a book) and refund the purchase price to those who had already purchased it, which is an extreme, if not unprecedented, reaction by a book publisher;
- referenced a ridiculous and imaginative book title: *Capricorn One: NASA, JFK, and the Great "Moon Landing" Cover-Up*, suggesting the author's fascination with conspiracy theories (an allusion to Plaintiffs' claim that the President's birth certificate is fake and that he is complicit in forgery) and referencing the 1978 movie

Capricorn One (starring, among others, O.J. Simpson) about a government-inspired Mars landing hoax; and

- fabricated absurd quotes, attributing to a WorldNetDaily.com source the fake information that Plaintiff Farah was seeking to "erase [Obama's] memory" and saying, with respect to Plaintiffs' own "birther" position that "bullshit is bullshit."

(Findikyan Decl., Ex. 27) The Blog Post also claimed to have the "exclusive interview" with Plaintiff Farah, implying that Esquire was the mouthpiece of a dubious right-wing cause, a position no reasonable reader would believe. These clues, combined with the fact that a reasonable reader of Esquire would be well acquainted with its history of political satire, and the overall absurdity that Farah and the Plaintiffs would suddenly, for no reason, reverse their very public position that Obama's birth certificate was a fake the day after their much-touted Book was released, told the reasonable reader that the Blog Post was satire. *See New Times*, 146 S.W.3d 159 ("The comic effect is achieved because the reader sees the words as the absurd expression of positions or ideas associated with the purported author.") (quoting *Patrick*, 27 Cal.Rptr.2d at 886). Additionally, the Blog Post was posted on the Internet, where a reader with any doubt of whether the Blog Post conveyed actual facts could instantaneously search the web for Plaintiffs and their position and learn that the Blog Post made no sense at all. Readers of blogs are familiar with the Internet's "freewheeling, anything-goes writing style." *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011) (internal quotation omitted). Because no reasonable reader would believe that the Blog Post was conveying actual facts, the satire is fully protected opinion under the First Amendment and the defamation claim should be dismissed.

2. The Update and Warren Statement Are Opinion and Fair Comment

Esquire's post-publication speech – the Update and the Warren Statement – are textbook examples of fully-protected opinion, and the Update is also independently protected by the common law fair comment privilege.

Statements of opinion that do "not contain a provably false factual connotation" are fully protected under the First Amendment. *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990); *Moldea v. New York Times Co*., 22 F.3d 310, 313 (D.C. Cir. 1994) ("*Moldea II"*) (statements of opinion actionable only "if they imply a provably false fact, or rely upon stated facts that are provably false"). In addition, an opinion is not actionable if it cannot be objectively verified as false or cannot "reasonably be interpreted as stating actual facts" about the plaintiff. *Milkovich*, 497 U.S. at 18-20; *Washington v. Smith*, 80 F.3d 555, 556-57 (D.C. Cir. 1996). Rhetorical language that is "loose, figurative [and] hyperbolic" tends to negate that a statement contains an assertion of verifiable fact. *Milkovich*, 497 U.S. at 21.

Whether the allegedly defamatory statements are non-actionable opinion is a question of law for the court. *Moldea v. New York Times Co*., 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("*Moldea I*"). The court must analyze the challenged statements in their entirety, taking into account both the immediate context and the larger social context in which they appeared. *See Moldea II*, 22 F.3d at 314 ("it is in part the *settings* of the speech in question that makes their hyperbolic nature apparent, and which helps determine the way in which the intended audience will receive them") (emphasis in original); *see also Weyrich v. New Republic, Inc.*, 235 F.3d 617 (D.C. Cir. 2001); *Thomas v. News World Commc'ns*, 681 F. Supp. 55, 64 (D.D.C. 1988) ("the newspaper's espousal of its position [on its editorial page], and of its opposition to plaintiffs', partakes of a longstanding tradition of vigorous social and political criticism in the press").

As a separate but related defense, "[t]he common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Lane v. Random House*, *Inc*., 985 F. Supp. 141, 150 (D.D.C. 1995) (Lamberth, J.) "Fair comments are not actionable in defamation '[b]ecause the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts.'" *Id*. (quoting *Moldea I*, 15 F.3d at 1144). The privilege "'afford[s] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Coles*, 881 F. Supp. at 32 (citation omitted). The fair comment privilege applies "'even if the facts upon which [the statement] is based are not included along with the opinion.'" *Id*. (citation omitted); *see also Lane*, 985 F. Supp. at 150.

Here, the Update is protected speech both as opinion and fair comment. While the conclusory allegations of the Complaint fail to make clear what exactly Plaintiffs believe is defamatory about the Update, a simple read of the text make plain that it contains Esquire's opinion about Plaintiffs' Book and the Birthers' position on President Obama's presidency. The Update lays out (again) the factual predicate for the satire: Plaintiffs' continued allegiance to their position even though the Book's "core premise and reason to exist" was usurped by President Obama's release of the long-form birth certificate, or stated differently, "gutted by the news cycle, several weeks in advance of publication." (Findikyan Decl., Ex. 27) The Update opines that their actions are "despicable" and deserving of satiric "ridicule." Such statements, in the context of a highly charged political issue of national importance, are classic examples of opinion and fair comment and deserving of immunity from liability.

The Warren Statement is classic rhetorical hyperbole. Whether or not someone is an "execrable piece of shit" is exactly the type of loose, figurative, hyperbolic language about a public figure that is not actionable under the First Amendment.[25] *See, e.g., Lund v. Chicago & NW. Transp. Co*., 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (finding use of the word "shitheads" opinion as not suggesting verifiably false facts); *Silk v. City of Chicago*, 1996 WL 312074, at *35 (N.D. Ill. 1996) (finding that calling another a "useless piece of shit" was non-actionable opinion as it cannot be objectively verified); *see also Yeagle v. Collegiate Times*, 255 Va. 293 (1998) ("Director of Butt Licking" under name of a college official not actionable). For all of these reasons, Plaintiffs' defamation claim fails as a matter of law and must be dismissed pursuant to the Anti-SLAPP statute.

B. Plaintiffs' Other Claims Fail As A Matter of Law

1. Plaintiffs' False Light Claim Fails for the Same Reasons as Their Defamation Claim

"[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion." *Klayman v. Segal*, 783 A.2d 607, 619 (D.C. 2001) (quoting *Moldea II*, 22 F.3d at 319). Plaintiffs' defamation and false light invasion of privacy claims seek recovery for the exact same statements, complain of the same alleged injury and are in no way distinguishable. *Compare* Complaint ¶¶ 18-20 *with* ¶¶ 21-24. Plaintiffs' cannot state a false light claim or meet their Anti-SLAPP burden of establishing that they are likely to succeed on the merits of their false light claim, which should fail for the same reasons as their defamation claim.

[25] It is also a nod to the excremental theme in the writings of Swift and other leading satirists, which literary critics have cited as being of central importance to their works and a core part of the satiric tradition. Norman O. Brown, "The Excremental Vision," in The Writings of Jonathan Swift 611 (Robert A. Greenberg & William B. Piper eds. 1973).

The same constitutional limitations on defamation claims apply with equal force to false light invasion of privacy claims. *See Weyrich,* 235 F.3d at 627-28; *Lane v. Random House, Inc*., 985 F. Supp. at 148. A claim that fails the rigors of the burdens of proof under defamation cannot succeed under the doctrine of false light. *Moldea II,* 22 F.3d at 319-20; *see also Clawson v. St. Louis Post-Dispatch, L.L.C*., 906 A.2d 308, 317 (D.C. 2006) (affirming trial court's dismissal of false light claim where defamation claim failed). Because the challenged statements cannot reasonably be viewed as false statements of fact about Plaintiffs, much less proven false, they are non-actionable opinion protected by the First Amendment and the fair comment privilege (*see* Point I(A), *supra*).

Moreover, no fact-finder could rationally conclude that any of the speech at issue is highly offensive, a necessary element to state a false light claim. *See Klayman*, 783 A.2d at 619 (claim of insensitivity to school shootings did not place plaintiff in a highly offensive false light and thus not actionable); *Lane*, 985 F. Supp. at 149 ("[a] conspiracy theory warrior outfitted with [plaintiff's] acerbic tongue and pen should not expect immunity from an occasional, constrained chastisement"). "Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments." *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (Bork, J., concurring). Plaintiffs cannot meet their burden on their false light claim, which must be dismissed.

2. Plaintiffs' Invasion of Privacy (Misappropriation) Claim Is Barred By the First Amendment

The First Amendment provides a stalwart privilege against misappropriation invasion of privacy claims, allowing "'the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern.'" *Raymen v. United Senior Ass'n, Inc*., 409 F. Supp. 2d 15, 22-23

(D.D.C. 2006) (citation omitted); *see also Lane*, 985 F. Supp. at 146; *Winter v. DC Comics*, 69 P.3d 473, 478 (Cal. 2003) ("the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity image must be given broad scope"). Whether the First Amendment privilege applies is a question of law. *See, e.g.*, *Raymen*, 409 F. Supp. 2d at 23; *Armstrong v. Eagle Rock Entm't, Inc.*, 655 F. Supp. 2d 779, 786 (E.D. Mich. 2009). There is no actionable misappropriation where, as here, Plaintiffs' names were used in a non-commercial, newsworthy Blog Post about the very movement at the heart of their cause.[26]

First, the Blog Post is a non-commercial commentary on the Birther movement, and in turn President Obama's birth certificate and eligibility for office, which are all highly newsworthy issues. "Determining whether a communication warrants First Amendment protection under the newsworthy or legitimate public concern exception requires the Court first to examine whether the communication is primarily commercial or noncommercial in nature." *Raymen*, 409 F. Supp. 2d at 23. Speech is not commercial "simply because it concerns economic subjects or is sold for a profit." *Taucher v. Born*, 53 F. Supp. 2d 464, 480 (D.D.C. 1999) (quotations omitted). Here, as political commentary published by Esquire, the speech is the epitome of non-commercial in nature. Even if the speech had "commercial undertones" (which it does not), the First Amendment applies "if it concerns a legitimate matter of public concern.'" *Raymen*, 409 F. Supp. 2d at 23.

There can be no question that the subject of the Blog Post is of legitimate public concern. President Obama called a press conference specifically to address the claims made by those in

[26] As an initial matter, courts have held that corporations and other business entities have no claim for invasion of privacy. *See Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 (Ind. 2001); *Warner-Lambert Co. v. Execuquest Corp.*, 691 N.E.2d 545 (Mass. 1998). Accordingly, Plaintiffs WorldNetDaily.com's and WND Books's claims for invasion of privacy must be dismissed.

the Birther movement and to try to put to rest the speculation that his Hawaiian birth certificate was somehow not legitimate. Plaintiffs themselves claim that "[a]bout 25 percent of the American people believe . . . that the newly released birth certificate is fraudulent and that [Obama] is not eligible to be President of the United States." (Compl. ¶ 10) As a commentary on the highly newsworthy topic, the Blog Post falls squarely within the First Amendment's broad protection. *See, e.g.*, *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 318 (D.D.C. 2011) (applying First Amendment privilege to misappropriation claim arising out of publication of book making widely publicized allegations relating to purported drug use and sexual activity of then-candidate Barack Obama); *Raymen*, 409 F. Supp. 2d at 23 (holding that First Amendment privilege applied to mailing distributed by advocacy group characterizing political views of AARP relating to support of same-sex marriage and opposition to the military even though mailing "lacked any substantive discussion of [those] issues").

Second, as some of the most vocal proponents of the Birther movement, Plaintiffs cannot seriously contend that they are not directly related to the subject of the Blog Post. *See Parisi*, 774 F. Supp. 2d at 318 ("A plaintiff cannot recover for misappropriation . . . unless the use has 'no real relationship' to the subject matter of the publication."). Plaintiffs' own complaint demonstrates conclusively that, far from having "no real relationship" to the purported "Birther" controversy discussed in the Blog Post, Plaintiffs were there at its genesis and have been integral throughout. (*See* Compl. ¶¶ 8, 9) Having chosen to carry the banner for those who cling to the belief that the President is somehow ineligible to serve, Plaintiffs cannot now run from their own cause. *See, e.g*., *Parisi*, 774 F. Supp. 2d at 318; *Raymen*, 409 F. Supp. 2d at 25.

Plaintiffs fail to even state a claim, much less show that they are likely to prevail on their misappropriation invasion of privacy claim. It is defective as a matter of law and should be

dismissed.

3. Plaintiffs Fail to State a Claim For Tortious Interference

As an initial matter, Plaintiffs' tortious interference claim for reputational injury is an improper attempt to plead around the rigorous First Amendment standards governing defamation, and must be dismissed for the same reasons. *See, e.g.*, *Zandford v. Nat'l Assoc. of Sec. Dealers*, 19 F. Supp. 2d 1, 3-4 (D.D.C. 1998) ("Given the Court's determination that Zandford cannot make a prima facie showing of defamation, Zandford fails to show that such defamation interferes with his business relationships."); *accord Christakis v. Mark Burnett Prod'ns*, 2009 WL 1248947, at *5 (C.D. Cal. Apr. 27, 2009) ("Similarly, Plaintiff's claim for tortious interference fails because it is grounded in the supposed defamation. '[T]he limitations that define the First Amendment's zone of protection ... apply to all claims whose gravamen is the alleged injurious falsehood of a statement.'") (citation omitted).

Independently, Plaintiffs' tortious interference claim fails on its own terms. Such a claim requires Plaintiffs to plead and prove, among other things, the existence of a valid business relationship between the plaintiff and a third party, a breach or termination of that relationship by the third party, that the breach was caused by defendant's interference, and damages. *See, e.g.*, *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1995). The Complaint fails to allege even the most basic facts regarding the alleged business relationships with which Esquire supposedly interfered or a breach of those relationships. The Complaint's conclusory allegations are on their own grounds for dismissal. *See, e.g., Sybersound Records, Inc. v. UAV Corp.,* 517 F.3d 1137, 1151 (9th Cir. 2008); *accord Government Relations Inc. v. Howe*, 2007 WL 201264, at *9 (D.D.C. 2007).

Plaintiffs do not – and cannot – plausibly allege, much less show, that Esquire had "a

'strong showing of intent' to disrupt [plaintiff's] ongoing business relationships." *Soliman v. George Washington Univ*., 658 F. Supp. 2d 98, 104 (D.D.C. 2009) (quoting *Bennett Enterprises,* 45 F.3d at 499)). Courts considering the issue have made clear that journalism is neither improper nor intended to disrupt contractual relationships. Indeed, one court questioned "whether this common law cause of action could ever be stretched to cover a case involving news gathering and publication." *Seminole Tribe of Fla. v. Times Publ'g Co.*, 780 So. 2d 310, 318 (Fla. Dist. Ct. App. 2001); *see also Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983); *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 465 (D. Md. 2008) (dismissing tortious interference claim based on newscast because "a plaintiff must show that the defendant's conduct was directed at an existing or prospective economic relationship [and not] a mere 'incidental effect' of the allegedly wrongful conduct") (quotation omitted); *Dulgarian v. Stone*, 652 N.E.2d 603, 609 (Mass. 1995) (summary judgment granted where "[t]here is no indication that the report was broadcast for any reason other than the reporting on an issue of public concern"); *Huggins v. Povitch*, 1996 WL 515498, at *9 (N.Y. Sup. Ct. 1996) (dismissing tortious interference claim based on a broadcast, because "conduct [that] is intended to foster public awareness or debate cannot be … the wrongful or improper conduct required to sustain a claim for interference").

Nor can Plaintiffs plausibly allege, much less establish, that the alleged lack of interest in their book was proximately caused by Esquire's conduct and not by other factors. *See, e.g.*, *Connors, Fiscina, Swartz & Zimmerly v. Rees*, 599 A.2d 47, 51 (D.C. 1991). Plaintiffs' public statements following the publication of the Blog Post belie their allegation that the Blog Post proximately caused them any damage. Farah immediately took to the airwaves, laughing, and announced that the Book continued selling well. (Findikyan Decl., Exs. 28, 43) However, even

if the Book was not a success, it is simply not "plausible on its face" that the Blog Post, which was only on the Internet without the Update explicitly stating it was satire for approximately ninety (90) minutes, was the proximate cause of any alleged damage. Indeed, Plaintiffs' own Complaint sets forth the more likely explanation for why booksellers and the public at large might not have been interested in a book arguing that President Obama was not a naturally-born citizen eligible to be President: namely, the President himself had released his long-form birth certificate documenting that he was born in the State of Hawaii and obliterating the very premise of the Book. Indeed, the Update noted that very reason. *See id.*, Ex. 27 (pointing out "the problems with selling and marketing a book that has had its core premise and reason to exist gutted by the news cycle, several weeks in advance of publication").

As the Supreme Court recently has observed, "[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011). Plaintiffs' Complaint makes plain that their tortious interference claim is little more than an improper attempt to make Esquire somehow responsible for the fact the Book's core argument was mooted by the news cycle. It is precisely to foreclose such improper blame-shifting that the courts require a showing of proximate cause. Because Plaintiffs' tortious interference claim fails as a matter of law, and they cannot meet their heavy burden of establishing they are likely to succeed, their tortious interference claim should be dismissed.

III. PLAINTIFFS' LANHAM ACT CLAIM SHOULD BE DISMISSED PURSUANT TO RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

Plaintiffs purport to assert a Lanham Act claim in their complaint through conclusory allegations that fail to meaningfully identify the conduct challenged or the theory upon which the claim rests. Accordingly, the complaint fails to meet the pleading requirements set forth in the Federal Rules and as articulated by the Supreme Court. Moreover, any Lanham Act claim Plaintiffs might articulate would fail because the speech apparently targeted is protected non-commercial speech entirely outside the reach of the Lanham Act, and the requirements of the cited statutory sections could not be met in any event.

Allegations of fraud further heighten the already stringent pleading requirements for claims based on speech. "Rule 9(b) requires any party alleging fraud or mistake to 'state with particularity the circumstances constituting fraud or mistake.'" *HTC Corp. v. IPCom GmbH & Co., KG*, 671 F. Supp. 2d 146, 149 (D.D.C. 2009) (quoting Fed. R. Civ. P. 9(b)). Numerous courts have held that Rule 9(b)'s heightened pleading standards apply to Lanham Act claims grounded in fraud or misrepresentation.[27]

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[27] *See CardioNet, Inc. v. Life Watch Corp.*, 2008 WL 567031, at *2 (N.D. Ill. Feb. 27, 2008) ("Claims that allege false representation or false advertising under the Lanham Act are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b)."); *see also, e.g.*, *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010); *Vanguard Prods. Grp. v. Merch. Techs., Inc.*, 2008 WL 939041, at *4 (D. Or. April 3, 2008); *Sanderson v. Brugman*, 2001 WL 699876, at *8 (S.D. Ind. May 29, 2001) (applying Rule 9(b) to false advertising Lanham Act claim); *Max Daetwyler Corp. v. Input Graphics, Inc.*, 608 F. Supp. 1549, 1556 (E.D. Pa. 1985) ("[T]he policies which underlie Rule 9's requirement that the nature of an alleged misrepresentation be pleaded with specificity are equally applicable to the type of misrepresentation claims presented in plaintiffs' Lanham Act claim."); *cf. Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009) (applying Rule 9(b) to claim for false advertising under California Business and Professions Code § 17200); *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1311 (Fed. Cir. 2011) (holding that Rule 9(b)'s particularity requirement applied to false patent marking claims). *But see John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997) ("[A] claim of false advertising under [the Lanham Act] falls outside the ambit of Rule 9(b) and may not be subject of any heightened pleading requirement.").

Here, Plaintiffs' Lanham Act allegations do not come close to satisfying the requirements of Rules 8 or 9. The entirety of Plaintiffs' allegations regarding how the Lanham Act has allegedly been violated consists of the following:

> Defendants . . . caused confusion, mistake and deception through their publication of false and misleading information and description of fact which include but are not limited to the accuracy, motives, nature, characteristics, and qualities of the subject book, on their Internet advertising and reporting sites . . . .

(Complaint ¶ 32) While *Iqbal* requires more than a bare recitation of the legal standard underlying a claim to support that claim, Plaintiffs do not even do that. Plaintiffs do not attempt to identify the nature of the claim being asserted; instead simply citing to Lanham Act sections 43(a)(1)(A) and (B), 15 U.S.C. §§ 1125(a)(1)(A)-(B), in the heading of Count IV. This is plainly insufficient under any pleading standard. *See, e.g.*, *Champion Labs., Inc. v. Parker-Hannifin Corp.*, 2011 WL 1883832, at *13-14 (E.D. Cal. May 17, 2011) (finding allegations wholly deficient).

Even if Plaintiffs' were to attempt to allege more than conclusory allegations concerning their Lanham Act claim, the claim would inevitably fail on its merits. Plaintiffs' Lanham Act claim is grounded in publication of the Politics Blog by Esquire. But every Court of Appeals to decide the question has held that the Lanham Act only applies to commercial speech.[28] As discussed above in Section II.B.2, *supra*, there can be no dispute that the speech targeted by

[28] *See Podiatrist Ass'n, Inc. v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003); *Boule v. Hutton*, 328 F.3d 84, 90 (2d Cir. 2003); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003); *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir. 2001) (holding that the Lanham Act's requirement "commercial advertising or promotion" requirement is even narrower than the breadth of commercial-speech doctrine); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 674 (9th Cir. 2005); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1051-52 (10th Cir. 2008); *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1322-23 (11th Cir. 2010). The Fourth Circuit declined to resolve the question in *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005), because it held that the claims asserted failed on their merits.

Plaintiffs is non-commercial speech. *See Boule*, 328 F.3d at 91; *see also Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 934 (D.D.C. 1985). Accordingly, as a matter of law, Plaintiffs cannot state any claim under the Lanham Act.

Finally, the very terms of the provisions of the Lanham Act cited in the Complaint refute the possibility that Plaintiffs could state a claim. The Lanham Act sections identified in Plaintiffs' complaint provide:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(A)-(B). The first subsection is clearly inapplicable as it is beyond implausible to suggest that a reader of the Blog Post could be misled into believing that Esquire is affiliated with Plaintiffs. And, for the reasons discussed above, the second subsection is inapplicable on its face as it is limited to "commercial advertising and promotion."

In sum, Plaintiffs' cryptic Lanham Act claim fails for the independent reasons that: (1) it is insufficiently pled under Rules 8 and 9, (2) impermissibly seeks to apply the Lanham Act to non-commercial speech, and (3) cannot plausibly meet the requirements of the Lanham Act sections cited in the Complaint.

CONCLUSION

"[T]he Constitution leaves matters of taste and style . . . to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). As Judge Lamberth wrote, dismissing another suit brought by a conspiracy theorist – this one focused on President Kennedy rather than President Obama – upset by critical press coverage:

> There is … a very real risk in sanctioning recovery for libel under these circumstances. Debate about one of our important historical events could be stifled by threats of costly litigation. As Random House remarked in their motion for summary judgment, "To allow conspiracy theorists to haul book authors into court in an effort to punish written criticism is contrary to our tradition of arriving at truth through a robust exchange of views in the marketplace of ideas." [Plaintiff] is certainly entitled to his beliefs; but it is not defamatory to criticize him. Books, editorials and talk shows are more appropriate forums than courts for this type of polemic.

Lane v. Random House, Inc., 985 F. Supp. 141, 149 (D.D.C. 1995).

For the reasons set forth above, Defendants respectfully request that the Court grant the Special Motion and Motion to Dismiss Plaintiffs' Complaint, award Hearst Communications, Inc. and Mark Warren their attorney's fees and costs, and enter judgment against Plaintiffs.

Dated: August 26, 2011

Respectfully Submitted,

DAVIS WRIGHT TREMAINE LLP

_/s/ Laura R. Handman_______________

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-and-

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