UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS, MOTION TO DISMISS, AND MOTION TO STAY DISCOVERY

Plaintiffs Joseph Farah, Jerome Corsi, WorldNetDaily.com and WND Books, have filed a complaint seeking compensatory and punitive damages as a result of Defendants' willful, wanton, and malicious conduct. Defendants' deliberate conduct has given rise to Plaintiffs' claims of defamation, false light, tortious interference with business relations, and violations of the Lanham Act. Plaintiffs are world-renowned authors and publishers who have consistently and comprehensively covered the issues related to President Obama's eligibility to be president and the validity of his birth certificate. Just as Plaintiff's highly anticipated book was released, Defendants engaged in deliberate and malevolent acts, seeking not only to sabotage the success of the publication but also severely harm the reputation of the Plaintiffs. As commercial competitors of Plaintiffs, Defendants had one goal: to damage the commercial enterprise and success of Plaintiffs' newly released book. In a strategic manner, Defendants engaged in ruthless, outrageous, and atrocious conduct, seeking only to damage the commercial success of their competitors' publication. After causing extensive harm, crippling Plaintiffs' commercial expectations, and impairing Plaintiffs' credibility in a manner that would impede on Plaintiffs' ability to regain commercial success, Defendants cowardly seek to hide behind D.C.'s newly anti-SLAPP act. Unfortunately for Defendants, such Special Motions to Dismiss under the anti-SLAPP act are rarely granted, particularly in cases such as this. After all, if the statute protected Defendants, essentially allowing them to engage in such malicious conduct to achieve their commercial goals, then public figures would never have causes of action to redress their

grievances since all claims would fall under a bogus "public policy" exception, inapplicable here in any event under these extreme facts.

In their effort to harm Plaintiffs, Defendants engaged in a tirade of defamatory statements, seeking to destroy Plaintiffs' commercial publication and reputation. Specifically, after alleging that Plaintiffs' book contained inaccuracies, Defendants also falsely stated that Plaintiffs were planning to recall and pulp the entire 200,000 first print run of their book. Compl. ¶12. More damaging is Defendants' false statements that such action was being taken because Plaintiffs acknowledged the inaccuracies of their book. *Id*. In falsely and inappropriately misusing Plaintiffs' names, Defendants also falsely attributed statements to Plaintiff, claiming that Plaintiff Farah had confirmed the book "contains what I now belief to be factual inaccuracies…I cannot in good conscience publish it and belief it." *Id*. This manufactured alleged quote could not be further from the truth, as Plaintiffs continue to remain steadfast in their belief of the books' propositions.

Only after the damage had been done did Defendants falsely claim that their attack was just satire. However, Defendants did not seek to neutralize the damage they caused, but instead sought to insulate themselves from the inevitable liability. In issuing a bogus so-called disclaimer, Defendants unjustifiably claimed that their defamatory publication was merely a satire. However, it is clear that purchasers, distributors, and readers of Plaintiffs' book, as well as readers of the Defendants' publication, had absolutely no indication that the defamatory statements were meant to be satire. What is indicated, however, is Defendants' desperate attempt to avoid liability for their culpable conduct after intentionally publishing defamatory statements. Increasing the damage, Defendants strategically attempted to disguise additional defamatory statements as "opinions," failing to realize that alleging a book is not based on reality, that Plaintiffs were liars, and that Plaintiffs' audience were "terribly gullible," were all objectively verifiable facts. A simple read of the complaint shows the egregiousness of Defendants' acts.

As commercial competitors of Plaintiffs, there is no doubt that the course of action Defendants engaged in was aimed at maliciously damaging Plaintiffs' commercial enterprise. The focus of Defendants' publication, after all, focused on the commercial aspect of Plaintiff's book: that the books were being recalled (specifically 200,000 first run prints), that the author and publisher were refunding the purchase price to all buyers of the book, and that bookstores were pulling the books from their shelves. Defendants' publication was void of any public interest. Rather, in aiming to deter further purchases of Plaintiffs' book and in seeking to cripple their competitor, Defendants sought only to damage Plaintiffs commercial enterprise. After the extensive damage had been done to the success of Plaintiffs' book, and after Defendant Warren had the opportunity to call Plaintiffs an "execrable piece of shit," it is no wonder that Defendants

had "no regrets" in their publication. Compl. ¶14. Their acts were intended to be malicious, cause exteme harm and in fact did so.

Defendants' defamatory statements not only resulted in tortious interference with business relations but also, in acting with malice, further perpetuated the economic and reputational harm Plaintiffs incurred. Defendants, aware of Plaintiffs' position in the community as credible authors and publisher, have also placed Plaintiffs in a false light in a manner that is highly offensive to a reasonable person. Furthermore, through their intentional misrepresentation and deception, Defendants are in violation of the Lanham Act. Despite the apparent malicious conduct on the part of the Defendants, Defendants have unjustifiably moved to dismiss Plaintiffs' complaint on various grounds.

Specifically, Defendants are seeking to dismiss Plaintiffs' complaint based on the District of Columbia's ("D.C.") newly enacted anti-SLAPP statute as well as under Federal Rule 12(b)(6). As demonstrated below, Defendants' motion cannot survive the application of the relevant standards, particularly given the rarity in granting Special Motions to Dismiss under the anti-SLAPP act and the extreme facts of this case, where even quotes were manufactured out of wholecloth.

I. DEFENDANTS' ANTI-SLAPP SPECIAL MOTION TO DISMISS SHOULD BE DENIED

Defendants inappropriately rely on the newly enacted Anti-SLAPP act of 2010 in their effort to dismiss Plaintiffs' claims. D.C's Anti-SLAPP act of 2010 ("Act"), requires that the party filing a special motion to dismiss under this section make 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. D.C. Code § 16-5502(a). If the movant makes such a showing, the motion is granted unless the responding party demonstrates that the claim is likely to succeed on the merits. D.C. Code §16-5502(b). Defendants' Special Motion to Dismiss brought under the Act should be denied for several reasons. The speech in issue does not involve a matter of public but rather a commercial interest and application of the Act to the case at hand would be contrary to public policy. Even if the Act were applicable, Plaintiffs' meet their burden of showing that the claims are likely to succeed on the merits.

A. Defendants' Special Motion to Dismiss Should Be Denied Since the Speech at Issue Does Not Constitute an Act in Furtherance of the Right of Advocacy on Issues of Public Interest.

The Act states "a party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code §16-5502. To fall within the scope of the Act, a defendant must make a prima facie showing that action arises from an activity protected by the statute. *Flores v. Emerich & Fike*, 416 F.Supp.2d 885, 897 (E.D.Cal. 2006). The simple fact that a cause of action arguably may have been triggered by protected activity does not necessarily mean that it arises from such activity. *Id*. The additional fact that a protected activity may lurk in the background and may explain why the rift between the parties arose in the first place, does not transform a non-protected dispute into a SLAPP suit. *Doe v. Gangland Production, Inc*. 2011 WL 3447214 at 5 (C.D. Cal. 2011). The critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right to free speech. *Flores,* 416 F. Supp.2d at 897. The court must focus on the substance of the plaintiff's lawsuit in determining whether a cause of action arises from protected activity. *Id*.

In this respect, Defendants' application of the Act fails. First, Defendants argue that Esquire's speech clearly falls within the scope of D.C. Code §16-5501(1)(A)(i), which applies to statements made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." Def.'s Special Motion to Dismiss at 16. Second, Defendants allege that the claims fall within the Act's scope as a matter of public interest. Def.'s Special Motion to Dismiss at 17. In supporting this claim, Defendants argue that the speech focused specifically on the controversy stoked by Plaintiffs' allegation that the President may be foreign-born and thus barred from serving as President. *Id*. at 16. Defendants further state "There is no doubt that the controversy over the President's qualifications for office is a matter of the highest public interest." *Id*. at 17. However, in their vain attempt to circumvent the Act's public interest requirement, Defendants refuse to acknowledge that the speech in issue was not focused on this public concern. Defendants disregard the fact that the substance underlying Plaintiffs' causes of action do not arise from protected activity, but a desire to harm Plaintiffs commercially as well as their reputations.

Defendants are merely attempting to use some fact "lurking in the background" to transform Plaintiffs' meritorious claims into a SLAPP suit. Specifically, the defamatory speech concerned the business aspect of Plaintiffs' publication. Defendants falsely accused Plaintiffs of planning to recall and pulp the entire 200,000 first printing run of their book. Compl. ¶ 12. This is not a matter of public interest. Defendants further alleged that the Plaintiffs had announced an offer to refund the purchase price to anyone who had already bought either a hard copy or electronic download of the book. *Id*. This is not a matter of public interest. Defendants continued their engagement of unprotected activity by falsely imputing statements to Plaintiffs, falsey

alleging, with a manufactured quote, that Plaintiff Farah had stated the book "contains what I now believe to be factual inaccuracies…I cannot in good conscience publish it and expect anyone to believe it." *Id*. Despite Defendants' contrary belief, Plaintiffs' opinion on the accuracy of the book's content is not a matter of public interest. Defendants' speech did not discuss the President's qualifications nor did it consider the validity of the President's birth certificate. In fact, Defendants' speech did not even address the substance of what was written in Plaintiffs' book; i.e. it was not a "book review." In their attempt to try to argue the public interest requirements, Defendants disingenuously now seek to use the subject matter of Plaintiffs' book as an inappropriate means to create anti-Slapp defenses when they have none.

Moreover, the substance giving rise to Plaintiffs' claims are commercial issues and not a matter of public interest. As many courts have indicated, disputes that are predominantly commercial were not intended to come within the scope of Anti-SLAPP statutes. See *TYR Sports Inc. v. Warnaco Swimwear*, 679 F.Supp.2d 1120, 1140 (C.D. Cal. 2009). See Also *Welland Sliding Doors and Windows, Inc. v. Panda Windows and Doors, LLC*., 2011 WL 3812695 at 2 (S.D.Cal. 2011). Such is the case at hand. Seeking to halt and impede sales, Defendants made false statements as to the accuracy of the book. Defendants' speech did not discuss the validity of the President's qualifications. Defendants' speech did not focus on the legitimacy of the President's birth certificate. Defendants' speech did not even dispute the accuracy of Plaintiffs' book. Instead, the defamatory speech was greared to the commercial aspects of the publication, focusing on recalling the book, refunding its purchase price, and imputing false statements to Plaintiffs to impede sales. While it is true that Plaintiffs' book related to the President's qualification, this is merely a fact lurking in the background as indicated by that fact that the defamatory speech did not refer to the legitimacy of the book's content. Despite this, Defendants' now seek to use this underlying fact, which has nothing to do with Plaintiffs' causes of actions, as a means to thrust Plaintiffs' claims into a SLAPP defense. As such, Esquire's claim that the speech involved an act in furtherance of public interest is unwarranted. Rather, Esquire's focus on the commercial aspect renders their speech to be unprotected.

B. Given the Purpose of the Anti-SLAPP Statute as well as Public Policy Concerns, the Anti-SLAPP Statute Should and Does
C. Not Apply to this Case.

Defendants urge the court to use California's anti-SLAPP law as an instructive guide in applying the statute to the case at hand. Defs.' Special Motion to Dismiss at 16. In fact, California's anti-SLAPP law is alleged to be the model for the Act. *Id*. at 16. In examining

California's anti-SLAPP law, it is important to evaluate the Legislative intent in its enactment. SLAPP suits are often brought for "purely political purposes" in order to obtain an "economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." *Blumenthal v. Drudge*, 2001 WL 587860 at 3 (D.D.C. Feb. 13, 2001), citing *Rogers v. Home Network Inc.,* 57 F.Supp.2d 973, 974 (C.D.Cal.1999). As one court pointed out, "One of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective…Thus, while SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPPs are that they are generally meritless suits by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so. " *Id*. citing *Wilcox v. Superior Court*, 27 Cal.App. 4th 809, 817 (1994). Certainly, this rings true here.

Moreover, in *Blumenthal v. Drudge*, the Court held that even though the law of defamation as applied to public figures would make it difficult for the plaintiffs to ultimately prevail, the court cannot characterize the suit as meritless. *Blumenthal*, WL 587860, at 4. The court further reasoned that at this stage in the case, it could not be concluded whether the plaintiffs have not been injured in their reputations or that winning is not their primary motivation. *Id*. While the court must be sensitive to the chilling effect that a defamation suit has on exercise of First Amendment Rights, the Court held that the defendant's exercise of his free speech rights were not chilled given his continued publication of stories in much the same manner as before the lawsuit. *Id*. As such, the Court refused to grant defendant's Special Motion to Dismiss under the Anti-SLAPP act. *Id*.

Through examining the legislative intent of enacting such anti-SLAPP laws, it is evident that it the case at hand is not the type of case that the legislatures intended to prevent. Specifically, Plaintiffs' motives are not to obtain an "economic advantage over the defendant," but rather to vindicate a legally cognizable right. The facts are simple. Esquire published an article that presented false information as true, well aware of the falsity of the information. Esquire, aware of the number of readers of its publications, knew that this publication would not only damage the credibility of Corsi and Farah but would also cause economic damage. After all, Defendant Esquire is a print and internet publication that directly competes with Plaintiffs. Compl. ¶ 5. Esquire's intent to damage these individuals is evident. Nothing more prominently expresses Defendants' malicious mindset towards Plaintiffs as Defendant Warren, on behalf of himself and Esquire, calling Plaintiffs an "execrable piece of shit." Compl. ¶ 15. Given the

damage caused by the false information, it is no wonder that Defendant Warren would also state that he had "no regrets" in posting the subject stories, that is he does not "regret" acting with malice. *Id*.

Corsi and Farah have a legally cognizable right to protect their reputations as well as their economic interest. This is the quintessential purpose, after all, of a defamation action. While Defendants argue that Plaintiffs' claims lack merit, this could not be further from the truth. Given the number of purchasers that contacted Defendants and Plaintiffs asking for refunds and the number of distributors and readers inquiring into Plaintiffs' actions, Defendants clearly did not intend "satire' in their publication, and in fact gave no indication of this in their initial publication. Compl. ¶ ¶ 13, 14. Acknowledging the ramification of their defamatory statements, Defendants issued a false disclaimer that the article was satire. Compl.¶14. However, the damage to Plaintiffs was already done, suffering economic and reputational harm. It is clear that Plaintiffs' intent is not to bring a meritless claim but to vindicate their legal rights as a result of the damages caused from Defendants' actions.

Moreover, similar to *Blumenthal*, the Court cannot at this stage conclude that Plaintiffs' suit is meritless. To the contrary, the evidence clearly provides more than a sufficient basis for Plaintiffs' claims. Further, it is clear that Defendants' free speech rights have not been chilled. Defendant Esquire continues to publish articles in the same manner and continues the "Blog Post" in which the article in issue was published. Further evidencing the absence of a chilling effect on Defendants' speech is Defendants' unnecessary, highly offensive, and inappropriate comment that Plaintiffs are an "execrable piece of shit." Compl. ¶ 15. While free speech rights are important, they are not absolute. It would be contrary to public policy to allow a defendant to so broadly invoke the Anti-SLAPP statute after clearly using the First amendment to maliciously harm Plaintiffs and cause damage to Plaintiffs' reputations and economic interests. Given legislative intent, Plaintiffs' quest to vindicate their legally cognizable right, as well as the absence of a chilling effect on Defendants' free speech rights, the Anti-SLAPP act simply does not apply to this case.

D. The Act is Procedural in Nature and is Inapplicable in Federal Court Under Erie.

The Erie doctrine requires federal courts sitting in diversity to apply state substantive law and federal procedural law. *New.Net, Inc., v. Lavasoft*, 356 F.Supp.2d 1090, 1099 (C.D.Cal. 2004). It has been argued that classification of the anti-SLAPP statute as procedural rather than substantive is "generally a straightforward exercise." *Turkowitz v. Town of Provincetown*, 2010

WL 5583119 at 2 (D.Mass. Dec.1, 2010), citing *Correia v. Fitzgerald*, 354 F.3d 47, 53-54 (1st Cir. 2003). In essence, the anti-SLAPP law creates procedures for certain kinds of litigation. *Turkowitz,* 2010 WL 5583119 at 2. Thus, the anti-SLAPP statute is procedural in nature and does not apply in federal court. *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2008 WL 4595368 at 9 (D.Mass. Sept. 30, 2008). In fact, a great number of courts have held anti-SLAPP statutes to be procedural in nature, and therefore, not applicable in federal court proceedings. See *Turkowitz*, 2010 WL 5583119 at 2. See Also *The Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D.Mass. July 19, 2010).

Moreover, other federal courts have compared the anti-SLAPP procedures and federal procedure and have declined to apply the state statute when in conflict with the Federal rules. Massachusetts, for example, has declined to apply the Massachusetts anti-SLAPP statute in federal court, ruling that burden-shifting directly conflicts with Federal Rule of Civil Procedure 12(b)(6). *South Middlesex Opportunity Council, Inc.,* 2008 WL 4595369 at 9. For these reasons, the Act is inapplicable to this case in any event.

First, Defendants argue that D.C.'s anti-SLAPP act is substantive in nature and thus, is applicable to this case. Def.'s Special Motion to Dismiss at 19. Supporting their argument, Defendants claim that many courts have held the anti-SLAPP statute to be compatible with federal rules. *Id*. However, Defendants intentionally sidestep the majority of courts which hold anti-SLAPP statutes to be procedural in nature and therefore, not applicable in federal court proceedings. After all, the purpose of the Act is to provide *procedures* for certain types of litigation, namely frivolous suits based on citizens' petition activities. Specifically, the Act creates a process for filing a special motion to dismiss that consists of a burden-shifting framework. *Torkowitz*, 2010 WL 5583119 at 2. As such, the Act is clearly procedural in nature and inapplicable to the current case.

Secondly, the burden-shifting required and the additional fact-finding mandated by the Act directly conflicts with the Federal Rules of Civil Procedure, making the Act inapplicable. This is the situation at hand. The Act directly conflicts with the Federal Rules of Civil Procedure in that it shifts the burden on the plaintiff in a manner that is at odds with Federal Rule 12(b)(6). The federal rules merely require plaintiff, at the earliest stage of litigation, to state a claim upon which relief may be granted. Contrary to this, the anti-SLAPP procedure "incorporates additional fact-finding beyond the facts alleged in the pleadings, which is fundamentally different from a Rule 12 motion." *Id*. Simply put, the Act imposes the burden on the plaintiff to demonstrate that their claims are likely to succeed before discovery even begins. This is contrary to federal practice.

In fact, the exact argument was recently made in *Sherrod v. Breitbart*. In *Sherrod*, the defendant invoked D.C.'s anti-SLAPP act. Plaintiff argued that the act was in conflict with the Federal Rules and thus inapplicable. *Sherrod v. Breitbart*, 2011- CA-00115711 (D.C. Super.Ct. filed Feb. 11, 2011). U.S. District Judge Richard Leon issued a series of orders denying the defendant's Motion to Dismiss as well denying the defendant's Special Motion to Dismiss under the Act. It is thus clear that the Anti-SLAPP act does not apply to cases such as this given the procedural nature and the direct conflict with Federal Rules. As such, Defendants' Special Motion to Dismiss should be dismissed.[1]

II. DEFENDANTS' SPECIAL MOTION TO DISMISS SHOULD BE DENIED GIVEN THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THE CLAIMS.

While this does not fall within the scope of D.C.'s anti-SLAPP statute, even if the Act were applicable – which it is not -- Defendants' Special Motion to Dismiss should still be denied. In a state court, if the Defendants were to make the requisite showing, the motion is granted unless the responding party demonstrates that the claim is likely to succeed on the merits. D.C. Code §16-5502(b). Even if Defendants were to make such an unlikely showing, particularly considering the legislative intent and public policy concerns, Plaintiffs would be able to meet their burden of showing their claims are likely to succeed on the merits. Moreover, the anti-SLAPP statute provides no protection against a federal Lanham Act claim, further supporting denial of Defendants' Special Motion to Dismiss.[2]

A. Plaintiffs are Likely to Succeed on the Merits of their Defamation Claim.

Even in the unlikely event that Defendants have met the requisite showing that a matter of public interest is involved, Plaintiffs can more than satisfy their burden of establishing they are likely to succeed on the merits of their defamation claim. Primarily, Plaintiffs can clearly satisfy

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[1] As Defendants concede, 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 has been opposed claiming that the D.C. Act violates the District of Columbia's "Home Rule Act." To quote from the complaint: "just as sure as 'Congress shall make no law…prohibiting the freedom of speech,' so too, the D.C. Council may make no law with respect to the manner in which the D.C. Superior Court conducts its affairs." Further, the complaint invokes Article 1, Section 8 of the Constitution, which gives Congress the power to "Exercise exclusive legislation" over the District of Columbia. Additionally, Congress has expressly prohibited the District from effecting "any act, resolution, or rule with respect to any provision of Title 11 of the District of Columbia Code." http://www.washingtonpost.com/blogs/erik-wemple/post/daniel-snyder-v-city-paper-the-next-round/2011/08/02/gIQATgyLpI_blog.html

[2] See *Hilton v. Hallmark Cards*, 599 F.3d 894 (9th Cir. 2009), holding that California's state Anti-SLAPP statute did not apply to Federal law causes of action, such as the Lanham Act.

the necessary elements of a defamation cause of action. In addition to the inapplicability of the fair comment privilege, the evidence undoubtedly supports the fact that Defendants' publication was not satire.

i. Plaintiff has satisfied the elements of a defamation claim and thus, Plaintiffs are likely to succeed on the Merits of their Defamation Claim

"To prevail in a defamation suit, Plaintiff need show 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 5) 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). A statement is "defamatory" if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community. *Jankovic v. International Crisis Group,* 494 F.3d 1080, 1091 (D.C. 2007), citing *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990). Generally, a publication may convey a defamatory meaning if it "tends to lower [the] plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or plaintiff's associates." *White v. Fraternal Order of Police,* 909 F.2d 512, 518 (D.C. 2008), citing *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 654 (D.C.1966). If it appears that statements are at least capable of defamatory meaning, then whether they are defamatory and false are questions of fact to be resolved by the jury. *Wallace v. Skadden, Arps, Slate, Meagher, & Flom,* 715 A.2d 873, 878 (1998). Plaintiffs have clearly met their burden in establishing these elements for defamation, particularly at a Rule 12 (b)(6) motion to dismiss stage of the litigation.

1. Defendants' Statements are Defamatory.

The statements made by Defendants are clearly defamatory, lowering Plaintiffs' reputation in their respective community and injuring them in their profession as authors and publishers. Plaintiffs have at all material times covered the issue regarding the eligibility of President Obama to hold the presidential office. Compl. ¶ 8. Moreover, about 25% of the American people believe that President Obama is ineligible to be president. Compl. ¶ 10. Plaintiffs, through continuously covering this issue, have not only become "world-renowned" but have also become the "go-to" source for information regarding the President's qualifications and the release of a potentially fraudulent birth certificate. Despite the President's release of his birth certificate, Plaintiffs continue to believe in the accuracy of their book and continue to advertise it as such. Compl. ¶17.

However, through Defendants' conduct, Plaintiffs' credibility as well as their book was more than questioned, but instead falsely attacked. Alleging that Plaintiffs were recalling 200,000 books, planning to refund purchaser's money, and making up false quotes of Plaintiffs questioning the accuracy of their own book, while bookstores were pulling the book from their shelves, raised doubt as to and destroyed the public perception of the accuracy of Plaintiffs' publication. Compl. ¶ 12. In fact, Defendants went as far as to impute manufactured false statements to Plaintiffs that further tarnished Plaintiffs own credibility and the accuracy of their book. *Id*. Contrary to Defendants' allegations, however, not only did Plaintiffs still believe in the accuracy of their book but had every intention to continue with its publication. Compl. ¶ 17. The results of Defendants' statements were severely harmful. No longer did those who continue to question the President's birth certificate and qualifications know Plaintiffs as the "go-to" people. Consumers began requesting refunds and book supporters began inquiring into Plaintiffs' credibility. Compl. ¶ 13. Bookstores even began pulling the book from their shelves, and some went as far as not offering it for sale at all. *Id*. In addition to being bombarded with accusations and questions regarding the falsity of their book, Plaintiffs' reputations were shattered. Alleging that Plaintiffs doubted the validity and accuracy of their book caused not only reputational damage but also economic harm. Their reputation and credibility, particularly among the 25% that held similar views, was irreparably damaged. As such, the statements were capable of being understood as defamatory, lowering the reputations of Plaintiffs in their respective communities, and also damaging their credibility in their trade as authors and publishers. See Also, *Wallace v. Skadden, Arps, Slate, Meagher, & Flom,* 715 A.2d 873, 878 (1998), (holding that a false representation that a client is sufficiently dissatisfied with an attorney's work to seek the attorney's removal is patently defamatory).

2. Defendants' False Statements are 'Of and Concerning' Plaintiffs and are Capable of Being Proved as True or False.

In addition to establishing these statements are capable of being proved as true or false, the required showing that the statements are false and 'of and concerning' the plaintiff are also satisfied. Through Defendants' own concession, the falsity of the article is apparent. Following publication, Defendant Esquire issued a disclaimer stating that the article was, in fact, not true. Compl. ¶ 14. Moreover, the facts presented in Defendants' article are clearly capable of being proven as true or false, particularly given that Defendants presented the material in a factual matter, with no indication of opinions. Specifically, the allegation that Plaintiffs' were recalling 200,000 books, the statement that Plaintiffs were refunding the purchase price to buyers of the

book, and that Plaintiffs were halting further publication as a result of the book's inaccuracy are sufficiently factual to be receptive of being proved as true or false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990) (holding that the connotation that petitioner committed perjury is sufficiently factual to be susceptible as true or false). See Also *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055 (9th Cir. 1996), (finding the statement "It didn't work" made during Andy Rooney's satirical broadcast could reasonably be viewed as asserting an objective fact, capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness).

3. Defendants Have Acted with the Requisite Degree of Fault.

Generally, in a defamation action, plaintiff must show that the defendant's fault in publishing the statement amounts to at least negligence. *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001). However, a public official seeking recovery of damages for a defamatory falsehood must show that the statement was made with "actual malice." *Id.* Actual malice requires that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*

The Court in *Gertz v. Welch* pointed out that designation of the plaintiff as a public figure could rest on either of two alternative bases: whether an individual has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contests or whether an individual voluntarily injects himself in a particular controversy and thereby becomes a public figure for a limited range of issues. *Gertz v. Welch*, 418 U.S. 323, 351 (1974). In this case, the mere publication of a book does not thrust the Plaintiffs into a position as public officials. See *Straw v. Chase Revel, Inc.*, 813 F2d. 356 (11th Cir. 1987) (where the court held that the plaintiff in a defamation action was not a public figure in the business community by virtue of his being the publisher of a business newsletter). See Also *Harris v. Tomczak,* 94 F.R.D. 687 (E.D.Cal. 1982), (where the court held that there was insufficient evidence to resolve the issue of whether a psychiatrist who had written a well-known book was a public figure for purposes of a defamation action).

Defendants cannot legitimately contend that Plaintiffs are public figures through achievement of pervasive fame or notoriety. The mere publication of Plaintiffs' book, particularly with regard to a subject matter that approximately 25% of the American people follow and believe , is insufficient to conclude that Plaintiffs have achieved such notoriety that they are public figures for all purposes. While Plaintiffs are involved in a particular controversy,

specifically the validity of President Obama's birth certificate and his eligibility to hold the presidential office, the defamatory statements were predominately unrelated to this matter. Defendants alleged that Plaintiff Farah wrote the book's forward and also published Corsi's earlier Best selling work, "Unfit for Command: Swift Boat Veterans Speak out Against Kerry" and "Capricorn One: NASA, JFK, and the Great "Moon Landing" cover-up." Compl. ¶ 12. This is blatantly false and defamatory, lowering Plaintiffs' credibility through inferring that Plaintiffs pursue illegitimate causes and conspiracy theories rather than issues with a factual basis. Such defamatory statements are unrelated to Plaintiffs involvement in a particular controversy, specifically the President's qualifications. Rather, these statements involve completely unrelated matters in which Plaintiffs have no involvement. Thus, Plaintiffs have not voluntarily thrust themselves in these controversies in a manner that would make them public figures for these limited purposes.

Given that Plaintiffs would likely not be considered public figures, the requisite intent is mere negligence. Defendants were clearly – at the very least -- negligent in their publication of the defamatory article. Defendants were well aware of the falsity of their statements, trying, once exposed, to cover it up with later bogus claims of satire. Even if they intended the article to be a parody, Defendants' poor attempt at satire undoubtedly establishes their negligence. Defendants published this article without even a reference to satire, aware of the recent release of Plaintiffs' books while knowing that this article would lead many to question the accuracy of the book. The article was published in a factual manner, even alleging that Plaintiffs had made certain statements and imputing to Plaintiffs such comments as "I cannot in good conscience publish it and expect anyone to believe it." Compl. ¶ 12. Further evidencing Defendants' negligence is the fact that recent to the books publication, President Obama had in fact released his birth certificate. Compl. ¶ 11. One can soundly resolve that, because of Defendants' publication and the surrounding circumstances, potential readers would accept and believe the allegations of the books' inaccuracies without ever inquiring into the foundation for the author's arguments.

Even if Defendants were attempting satire, the clues that would indicate such parody were absent from the article. In addition to the Plaintiffs being bombarded by consumers requesting refunds and questioning the accuracy of the book, Defendants were also met with similar reactions. In fact, Defendants acknowledged that a great number of people did not recognize the satire, motivating Defendants to later issue a disclaimer. Compl. ¶ 14. Thus, it is clear that defendants have acted negligently, satisfying the requirements of defamation.

Even if it were determined that Plaintiffs are public figures, the actual malice requirement is also satisfied. Actual malice requires that the statement was made with knowledge that it was

false or with reckless disregard of whether it was false or not. *Beeton,* 779 A.2d at 923. There is no doubt that this requirement is satisfied. Defendants were clearly aware of the falsity of the article and yet, continued to publish it. Additionally, knowing that the publication caused harm to Plaintiffs, Defendant Warren announced publicly on the Daily Caller that he had "no regrets" in posting the subject stories. Compl. ¶ 15. Further evidence of the malice towards Plaintiffs is Defendants outrageous and unfounded comment that Plaintiffs are an "execrable piece of shit." *Id*. Rather than removing the false and defamatory comments, particularly after knowing that these statements caused harm to Plaintiffs and after receiving reactions from readers indicating their belief in the false article, Defendants continue to allow these actionable statements to remain on the Internet. Compl. ¶ 16. Defendants have clearly acted with knowledge of the falsity, and at minimum reckless disregard for the truth. As a result, the requirements of defamation are clearly met and Plaintiffs are likely to succeed on the merits of their defamation claim.

ii. The Blog Post Does Not Constitute Satire Since Reasonable Readers Would Understand That Actual Facts Were Stated and is Not Protected by the First Amendment.

Defendants inappropriately claim that Plaintiffs are unlikely to succeed in their defamation claim, unjustifiably alleging that the blog post is satire and thus, protected by the First Amendment. Def.'s Special Motion to Dismiss at 23. However, merely stating – in this case ex post facto well after publication -- that the publication was satirical, does not, in fact, make it satire, even if it was made to provoke laughter. (In this case, there was nothing funny). *See Robinson v. Radio One, Inc*. 695 F.Supp.2d 425, 429 (N.D. Tex. 2010), (holding that airport security guard's allegations that radio broadcast of references to "Henry the gay security guard" were sufficient to state a defamation claim against the radio station, despite the station's contention that the broadcast was satirical).

In order to invoke this First Amendment's protection, Defendants must show that a reasonable reader would understand that the satire does not state actual facts. *Hoppe v. Hearst Corp*., 770 P.2d 203, 206 (Wash. Ct. App. 1989). Further, "…even where the general tenor of a work is humorous and satirical, defamation still may lie where…the specific statement could reasonably be viewed as an assertion of objective fact." *Chapman v. Journal Concepts*, 2008 WL 5381353 at 12 (D.Haw. 2008). See Also *Unelko Corp. v. Rooney*, 912 F.2d at 1055 (9th Cir. 1996) (finding the statement "It didn't work" made during Andy Rooney's satirical broadcast could reasonably be viewed as asserting an objective fact, capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness). After all, "the principle

is clear that a person shall not be allowed to murder another's reputation in jest. If a man in jest conveys a serious imputation, he jests at his peril."

Defendant unsatisfactorily argues that the Blog Post had "numerous clues" that would give a reasonable reader notice that the post was not conveying statements of actual facts. Def.'s Special Motion to Dismiss at 31. These purported "clues" include the fact that the headline claimed "BREAKING" news, complete with an exclamation point. *Id*. According to Defendants, a reasonable reader would be put on notice since exclamations points are not typically seen in real "news" headlines. *Id*. Moreover, according to Defendants, a reasonable reader would know that "breaking" news has never been used by Esquire. *Id*. Defendants make continued references to these so-called clues that supposedly would alert a reasonable reader that the article is satire. However, Defendants' allegation is nothing more than a far-fetched attempt to remedy the damage caused by the intentional defamatory statements found in the post.

Rather, given the nature of the article, the publication could reasonably be viewed as asserting an objective fact. In addition to alleging, as fact, that Plaintiffs were recalling 200,000 books, Defendants falsely indicated that purchasers would be refunded the book's purchase price. Compl. ¶ 12. Further, the article falsely stated that Plaintiff Farah commented that the book contained factual inaccuracies and that he could no longer publish it. Compl. ¶ 12. Consistent with *Unelko*, such statements were capable of being understood as an assertion that the book failed to meet certain objective indicia of accuracy. As such, these statements can clearly be viewed as asserting an objective fact.

Further evidencing this obvious "fact," is the circumstances surrounding Defendant's publication. Defendants post was published on May 18, 2011 only a couple of weeks after President Obama released his birth certificate, which had raised much controversy. Compl. ¶ ¶ 11, 12. It is plausible that a publisher would discontinue publication of a book, questioning the accuracies of the content, especially when the book still questions the validity of the presidency after the release of the President's birth certificate. It is also reasonable that readers would demand refunds after the credibility and accuracy of the book have been attacked. Working in conjunction with the recently released President's birth certificate, Defendants belated attempt to avoid liability by claiming "satire" ex post facto, could reasonably be viewed as asserting an objective fact, failing in qualifying for First Amendment protection.

Moreover, the conduct that ensued after Defendants' publication further indicates that a reasonable reader would conclude that the statements were actual facts. News organizations, readers of WorldNetDaily, purchasers and distributors of WND Books and others began contacting Plaintiff for confirmation of the story. Consumers also began requesting refunds while

book supporters began attacking Farah and Corsi. Compl. ¶ ¶ 13, 17. Bookstores began pulling the books from their shelves or and some went as far as not offering it for sale at all. Compl. ¶ 17. The conduct of such people indicate that the article was anything but satirical, reasonably viewed as asserting objective facts. It was simply defamatory.

Even Defendants own conduct further supports the fact that a reasonable reader would conclude actual facts were stated. Adding "insult to injury," Defendants later published the following information: "…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…" Compl. ¶ 14. The inference is simple. The reasonable reader (including the *many* on Twitter) believed that actual, objective facts were stated. Despite Defendants allegation, the supposed clues were not sufficient to allow a reasonable reader to understand that the post did not state actual facts. Thus, Defendants' claim that the post was merely satirical is unfounded, clearly failing in providing indication of its satirical intent. Rather, the only thing that is indicated is Defendants' desperate attempt to insulate themselves from liability by claiming that the publication was satire. After all, Defendants seek the best of both worlds: causing extensive damage to their competitors' commercial publication and then insulation from liability by later falsely claiming their damaging statements constituted satire.

iii. The Update and Warren Statements Do Not Constitute Opinion and Fair Comment.

It is true that statements of opinion that do "not contain a provable 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) 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. However, a statement of opinion may become actionable if it has an explicit or implicit factual foundation and is, therefore, objectively verifiable. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 596 (2000). See also, ("*Moldea* II") (statements of opinion actionable only "if they imply a provable false fact, or rely upon stated facts that are provably false"). In this case, Defendants statements can objectively be verified as false, both in its explicit as well as implicit reliance in a factual foundation.

Defendants' subsequent comments, while attempting to brand their initial publication as satire, continued to make further defamatory statements while still failing to amount to mere opinion. Specifically, Defendants allege that despite the recent release of the President's birth

certificate, Plaintiffs continue their position in their book "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." Compl. ¶ 14. Defendants falsely claim that Plaintiffs' book is not based on reality, but rather based on lies and inaccuracies. *Id*. Defendants even go as far as claiming that Plaintiffs, in keeping their "terribly gullible audience" captive, are simply attempting to sell books. *Id*.

Despite Defendants' malicious, malevolent and poor attempt at trying to deflect the obvious, Defendants only compounded the damage to Plaintiffs by continuing to make false, objectively verifiable statements. Simply put, it is objectively verifiable that Plaintiffs' book has a basis in reality, establishing the falsity of Defendants' statement. Defendants ignored the fact that it took the President many years before releasing his birth certificate, releasing the document without ever providing an adequate justification for the long delay in its production. Def.'s Special Motion to Dismiss at 7-8. In fact, it took the President more than two years before producing his long-form birth certificate. Def.'s Special Motion to Dismiss at 7. As many continue to believe, it is plausible that the birth certificate may, in fact, be fraudulent – and many oher than Plaintiffs have so stated with objective analysis of the document. Considering the context in which the publication arose, it is clear that a reasonable reader could conclude that Defendants' statements expressed a verifiable false fact regarding Plaintiffs. See *Weyrich*, 235 F.3d at 624, (stating that the court must consider the statement in context). Regardless of whether Defendants wish to continue their tenuous claim that the post-publication statements were merely opinion, they were based on objectively verifiable facts, explicitly and, at a minimum, implicitly and thus, deemed to be defamatory.

For the same reasons, Defendants' claim that the common law privilege of fair comment applies is invalid. Under the fair comment principle, comment was generally privileged when it concerned a matter of public concern, was based upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. *Milkovich*, 497 U.S. at 14, citing Restatement of Torts, Sec. 606. Moreover, as the court in *Milkovich* held, "It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Milkovich*, 497 U.S. at 19, citing Restatement (Second) of Torts, Sec. 566. Conclusions based on a misstatement of fact is not protected by the Fair Comment Privilege. *Jankovic v. International Crisis Group*, 593 F.3d 22, 29 (D.C. Cir. 2010). Additionally, where readers would understand a defamatory meaning, liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation, or even a question. *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 655 (D.C.Cir. 1966).

While Defendants may strain to contend that their post-publication speech is subject to the Fair Comment Privilege, it is clear that Defendants' assertions constituted nothing more than a false statement of an verifiable fact strategically disguised as an expression of opinion. Defendants alleged that Plaintiffs' book was not at all based on reality and simply relied on lies in an effort for Plaintiffs to sell their book. Compl. ¶ 14. This is the standard example of a conclusion reached based on a misstatement of fact, and thus, precluded from protection under the Fair Comment Privilege. Despite Defendants questionable contention, there are factual bases for Plaintiffs' position, including the length of time it took the President to produce the birth-certificate, the lack of adequate justification by the President for the lengthy delay, and the possibility that the birth-certificate may, in fact, be fraudulent. Defendants ignore these arguments. Rather, Defendants rely on the misstatement of fact that Plaintiffs' book is, in fact, not based on reality, and use this as a means to further defame Plaintiffs by concluding that Plaintiffs, in their desire to sell books, are attempting to hold their "terribly gullible audience" captive.

Further evidencing the absence of an opinion is Defendants' allegation that Plaintiffs seek to hold their audience captive through their lies. The obvious defamation is found in Defendants accusation that Plaintiffs are liars. While Defendants may argue this is merely an opinion, this too is an objectively verifiable fact. Defendants, continuing to act with malice, further sought to disgrace Plaintiffs and their credibility as authors and publishers. Using whatever means possible, including resorting to crafting defamatory statements, Defendants sought to compound the harm to Plaintiffs through couching misstatements of facts as expressions of opinions. However, it is clear that Defendants attempt is meritless, given that the false allegations of fact intending to disgrace another is not privileged. *Washington Times Co. v. Bonner*, 66 App. D.C. 280, 286 (1936), (stating that "…false allegations of fact, as, for instance, that the candidate had committed disgraceful acts, were not privileged, and that, if the charges were false, good faith, and probably causes were no defense…"). As such, Defendants' misstatement of facts, particularly in their attempt to disgrace Plaintiffs by labeling them as liars, fail to qualify for the Fair Comment Privilege. Plaintiffs' book is based on reasonable, objective facts and inferences drawn from such basis and Defendants' statement is nothing more than a false statement of fact disguised as an expression of opinion. Therefore, the Fair Comment Privilege does not protect Defendants' post-publication speech.

B. Plaintiffs' False Light Claim is Likely to Succeed on its Merits and Thus, Defendants' Special Motion to Dismiss Should be Denied.

To prevail on a false light claim, it must be shown that the published material places plaintiff in a false light that would be highly offensive to a reasonable person and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Weyrich,* 235 F.3d at 628. Restatement of Torts 625E makes clear that it is only when there is "…such a representation of his character, history, activities or beliefs that serious offense may be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." *Mchleder v. Diaz*, 801 F.2d 46, 58 (2nd Cir. 1986). The same constitutional limitations on defamation claims apply with equal force to false light claims. *Weyrich*, 235 F. 3d at 627-28. However, as discussed, Defendants speech fails to qualify as non-actionable opinion that is protected by the First Amendment and, for similar reasons, the Fair Comment privilege is inapplicable. Moreover, Plaintiffs clearly satisfy the requirements for a false light claim and thus, are likely to succeed on the merits of the claim. As such, Defendants' Special Motion to Dismiss should be denied.

As previously mentioned, the requirement that Defendants acted with reckless disregard as to the falsity of the matter is clearly satisfied. The issue is whether Defendants placed Plaintiffs in a false light that would be highly offensive to a reasonable person. Plaintiff Farah is the Editor and Chief Executive officer of WorldNetDaily.com and WND Books. Compl. ¶ 2. Plaintiff Corsi is a world-renowned author of several New York Times bestsellers. Compl. ¶ 3. Plaintiffs, as journalist who have consistently and comprehensively covered the issues pertaining to the validity of President Obama's presidency, sought to publish a book questioning such eligibility. Compl. ¶ 8. The success of the book depended in great deal on the credibility and reputation of the authors. However, Defendants' statements alleged that even Plaintiffs themselves did not believe the content of the book. Compl. ¶ 12. Defendants continued to perpetuate such notions by alleging that Plaintiffs' book was not based on reality, that Plaintiffs were lying in order to hold "their terribly gullible audience captive," and Plaintiffs' motive was simply to sell their books. Compl. ¶ 14. This placed Plaintiffs in a false light, questioning their credibility and honesty as authors and publishers, and subjecting them to extreme ridicule in their respective community.

After all, given Plaintiffs positions and reliance on their careers as authors, credibility and honesty are fundamental aspects to journalism. Thus, falsely accusing journalists, such as Plaintiffs, of being liars who questioned the accuracy of their own book would be highly offensive to a reasonable person. Defendants clearly placed Plaintiffs in a position where their honesty, credibility and motive were questioned. As authors, this placed their livelihood in jeopardy. In fact, consumers did request refunds and booksellers did remove the books from their shelves. Some went as far as to refuse to sell the books at all. Compl. ¶ ¶ 13, 17. The statements

were not only false but outrageous and caused Plaintiffs to be subject to extreme ridicule in their respective communities, particularly where their works are viewed and read. Compl. ¶ 22. Given Plaintiffs' position as authors, their continued coverage of the eligibility of President Obama to hold office, as well as Defendants' jeopardizing Plaintiffs' livelihood, Defendants clearly placed Plaintiffs in a false light that would be highly offensive to a reasonable person.

C. Plaintiffs are Likely to Succeed on the Merits of the Claim for Tortious Interference with a Business Relationship and thus, Defendants' Special Motion to Dismiss Should be Denied.

Plaintiffs are likely to succeed in their claim for tortious interference. As Defendants note, in such a claim, a Plaintiff must prove the existence of a valid business relationship or expectancy, knowledge of the expectancy on the part of the interferer, intentional interference inducing or causing a breach or termination or expectancy, and damages. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The business expectancy must be commercially reasonable to anticipate. *Id*. Under District of Columbia law, a legally recognizable business expectancy may include the opportunity of obtaining customers that is commercially reasonable to anticipate. *National R.R. Passenger Corp. v. Veolia Transp. Services, Inc.*, 592 F.Supp.2d 86, 98 (2009). In evaluating these elements, it is evident that Plaintiffs are likely to satisfy the requirements for their claim of tortious interference and First Amendment protection is inapplicable. Thus, Defendants' Special Motion to Dismiss should be denied.

1. A Valid Business Expectancy Existed that was Commercially Reasonable to Anticipate.

While a business expectancy must be commercially reasonable to anticipate, a legally recognizable business expectancy may include the opportunity of obtaining customers. *Id*. See Also *Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002) (holding that it was commercially reasonable for an author to anticipate selling her book, given allegations regarding encouragement that she received from her editor and regarding favorable press that the book received). Given the controversy surrounding the President's qualification, it was commercially reasonable for Plaintiffs to anticipate selling their book and the opportunity of obtaining customers.

Defendants Esquire Magazine and Hearst Communications are both greatly involved in print and internet publications. Comp. ¶ ¶ 5, 6. More importantly, Defendants are well aware of the commercial stakes involved in publications. After all, with regard to newly released books, it

is commercially reasonable for Plaintiffs to have business relationships not only with bookstores but other media outlets to promote the publication and to advance the sales of the books. Compl. ¶ 12. Given the book's topic as well as the interest in the subject matter, the business expectancy was commercially reasonable to anticipate. After all, 25% of the American people believe that President Obama's newly released birth certificate is fraudulent and that President Obama is ineligible to hold the presidential office. Compl. ¶ 10. As a result, it was commercially reasonable to anticipate that there would be interest in the book and that booksellers and consumers would be interested in the publication.

2. Defendants, Knowing of the Valid Business Expectancy, Intentionally Sought to Interfere and Terminate the Anticipated Business Relations.

Defendants, knowing about the recent publication, should have known (and likely did know) that Plaintiffs would be seeking business relationships with such entities. Defendants, knowing that such business expectancy existed, intentionally sought to induce termination of such expectancy. After all, "an interferer's knowledge of a plaintiff's relationship or expectancy may be shown by the interferer's conduct or spiteful or threatening words. *National R.R. Passenger Corp*., 592 F.Supp.2d at 99. Defendants' article explicitly sets-out such intent through inducing consumers who purchased Plaintiffs' books to contact Plaintiffs for refunds. Compl. ¶ 12. Furthermore, through Defendants statements, the accuracy of the book came into question, leading many prospective buyers to refrain from purchasing the book as well as causing purchasers and distributors of the book to contact Plaintiff for confirmation and comment. Compl. ¶ ¶ 13, 17. Through perpetuating the allegation of inaccuracies in the book, even alleging that Plaintiffs believed the book to be inaccurate, Defendants knew that business relationships and expectancy would be terminated. Compl. ¶ 12. Specifically, purchases that were commercially reasonable to anticipate would decline and booksellers would be reluctant to sell the book given the lack of interest that would ensue over the alleged inaccuracies. It is no coincidence that Defendants' article was published at the exact time of Plaintiffs' book publication. Compl. ¶12. Defendants' malicious intent is further evidenced by the callous remarks made by Defendant Warren, a direct competitor of Plaintiffs, claiming he had "no regrets" in publishing the article even after Plaintiffs informed Defendants that legal action may be taken given the damage they suffered. Compl. ¶15. Given the spiteful conduct of Defendants, it is clear that Defendants not only had knowledge of the business relations but also sought to terminate such expectancy.

3. As a Result of Defendants' Tortious Interference of Plaintiffs' Commercially Reasonable Business Expectancy, Plaintiffs Suffered Extensive Damages.

Through Defendants' tortious interference of Plaintiffs' commercially reasonable business expectancy, Plaintiffs suffered damages. Not only did purchasers of the book contact Plaintiffs demanding refunds, purchasers and distributors of WND Books also began questioning Plaintiffs. Compl. ¶ 13, 17. Booksellers removed Plaintiffs' books from their shelves and some even refused to sell the books at all. Compl. ¶ 17. Not only did Plaintiffs' expected sales decline dramatically (and they had invested in a large intitial run of the book), the damage to Plaintiffs' credibility interfere with their potential to sell books in the future. Tarnishing their reputation as world-renowned authors through challenging their credibility, Defendants have effectively impeded on Plaintiffs' future earnings. There is no doubt that Plaintiffs have suffered extensive damages as a result of Defendants' willful, intentional, and malicious conduct.

4. Despite Defendants' Claims, Plaintiffs' Claim for Intentional Interference of Business Relations is Not Barred by the Mere Fact that the Case Involves Journalism.

Defendants claim that Plaintiffs' tortious interference claim fails because of the First Amendment protection. Specifically, Defendants claim that journalism is neither improper nor intended to disrupt contractual relationships. Def.'s Motion to Dismiss at 39. However, Defendants fail to recognize that it is not to say that cases involving journalism cannot constitute a valid claim for tortious interference. See *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F.Supp.2d 514 (S.D. N.Y. 2001) (holding that an entertainment company sufficiently pled a claim for tortious interference against a media monitoring group by alleging that the group, using allegedly defamatory statements, intentionally interfered with the company's business relationships by attempting to induce third parties not to sponsor or advertise on company's programs).

Similarly, in this case, Defendants are blatantly using defamatory statements to induce consumers and booksellers not to purchase Plaintiffs' books and to discontinue further sales of the publication. Defendants, through obvious dislike and malice towards the Plaintiffs, sought to harm the Plaintiffs by prompting reduction of the books' sales. Further perpetuating the reduction of book sales and distribution, Defendants proceeded to attribute false statements to the potential readers, calling readers of Plaintiffs' book a "terribly gullible audience." Compl. ¶ 15. Holding the view that Plaintiffs' views and speech is "despicable, and deserves only ridicule," Defendants, through defamatory statements, attempted to induce third parties not to purchase or distribute

Plaintiffs' books. Compl. ¶ 14. Conducting business in the publishing arena themselves, there is no doubt that Defendants were well-aware of the impact their defamatory speech would have on Plaintiffs' business relations. Defendants cannot legitimately contend that such business relations were not commercially reasonable to anticipate. As such, despite Defendants' claim, the fact that journalism is involved does not bar Plaintiffs' claim for tortious interference with Business Relations.

III. DEFENDANTS MOTION TO DISMISS UNDER RULE 12(b)(6) SHOULD BE DENIED

Under Federal Rule 12(b)(6), the court must deny Defendant's motion to dismiss unless it appears to a certainty that Plaintiff would be entitled to no relief under any state of facts which could be proved to support a claim. *Banco Continental v. Curtiss National Bank of Miami Springs,* 406 F.2d 510, 514 (5th Cir.1969); *see also Gibson v. United States*, 781 F. 2d 1334, 1337 (9th Cir. 1986). In considering a motion to dismiss, all allegations of material facts alleged in the complaint must be taken as true and construed in the light most favorable to the nonmoving party. *Allman v. Phillip Morris, Inc.,* 865 F. Supp. 665, 667 (S.D.Cal.1994), citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). The anti-SLAPP procedure "incorporates additional fact-finding beyond the facts alleged in the pleadings, which is fundamentally different from a Rule 12 motion." *Turkowitz*, 2010 WL 5583119 at 2. Given that Plaintiffs are likely to succeed on the merits of the claims, arguably a higher pleading standard then Rule 12(b)(6), Defendants' motion should be denied.

Additionally, contrary to Defendants' allegation, Plaintiffs' Lanham Act claim is sufficiently pled and thus, Defendants' Motion to Dismiss under Rule 12(b)(6) should be denied. Lanham Act 15 U.S.C. 1125(a)(1)(A) applies when any person who uses in commerce any word, term, name, symbol or device, or any false designation of origin, false or misleading description of fact, or false or misleading misrepresentation of fact which 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 goods, services, or commercial activities by another person. Defendants' conduct is the quintessential example of actions covered within the Lanham act.

First, it is important to note that Defendants are commercial competitors of Plaintiffs. Compl. ¶31. Moreover, Defendants, through their false publication, caused public confusion as to the accuracy, nature, characteristics, and quality of Plaintiffs' book. Compl. ¶ 32. Specifically, Defendants falsely attributed statements to Plaintiffs, alleging that Plaintiffs intended to return

purchaser's money, and claimed that Plaintiffs had acknowledged that their book was inaccurate. Compl. ¶12. Thus, in causing public confusion, Defendants' forced Plaintiffs to deal with inquiries from purchasers and distributors regarding the validity of the book as well as the availability of refunds. Compl. ¶ ¶ 13, 4. Amidst the confusion, the false statements made by Defendants, in their malicious attempt to sabotage their competitors, damaged Plaintiffs' reputation, credibility, and anticipated success. In fact, Defendants were forced to issue a disclaimer in order to mitigate the confusion caused by their statements. Compl. ¶14. As such, Plaintiffs claim under the Lanham Act is more than sufficient and thus, Defendants' Motion to Dismiss should be denied.

Defendants contend that the Lanham act only applies to commercial speech and thus, does not apply to the case at hand. Def.'s Motion to Dismiss at 43. Not only was the speech here largely commercial, many courts have held the contrary and have applied the Lanham Act to cases involving non-commercial speech. See *PAM Media, Inc. v. American Research Corp.*, 889 F.Supp.1403 (D. Colo. 1995) (holding that genuine issue of material fact as to whether the name "After the Rush" for a show named "The Rush Limbaugh Show" precluded summary judgment of Lanham Act action).

Even if it is determined that the Lanham Act only applies to commercial speech, the speech involved in this case is clearly commercial. Defendant alleges that the statements are not commercial since it involves President Obama's birth certificate and eligibility for office. Def.'s Motion to Dismiss at 37. However, Defendant fails to acknowledge that the post actually involved false and misleading representations on and about Plaintiffs' book and its release. The article specifically used false and misleading statements to attack and incorrectly represent the commercial aspects of the release of Plaintiffs' book. In fact, the book focused on the alleged promise by Plaintiffs – which was never made -- to refund purchasers money and the refusal of booksellers to sell the book. Compl. ¶ 12. Thus, the speech clearly involves commercial activity, focused on the economic aspect of the release of Plaintiffs' book. For these reasons, Defendants' motion to dismiss should be denied.

IV. DEFENDANTS' MOTION TO STAY DISCOVERY SHOULD BE DENIED

The Act provides that if it appears likely that the targeted discovery will enable the plaintiff to defeat the special motion to dismiss and that the discovery will not be unduly burdensome, the court may order "specialized discovery." Even were the anti-Slapp statute to apply, which it clearly does not, the targeted discovery is necessary for Plaintiffs to establish that

they will likely succeed on the merits of their claims, particularly given the additional facts that need to be pled in the event that Plaintiffs need to overcome Defendants' anti-SLAPP Motion. Given the necessity of discovery as well as the minimal burden discovery will impose, Defendant's Motion to Stay Discovery should be denied. Moreover, there is no reason to stay discovery on any other grounds, as the time is ripe for it to begin in the ordinary course. In fact, Plaintiffs have put Defendants on notice that they intend to do so. Defendants are, as defendants are wont to do, trying to delay getting on with this simple and straightforward litigation for tactical purposes.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Special Motion to Dismiss under the anti-SLAPP law, Motion to Dismiss under the Federal Rules, and Motion to Stay Discovery.

Respectfully submitted,

_____
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