IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRADLEE DEAN, et. al., Plaintiffs, v. **NBC UNIVERSAL, et. al.,** Defendants.	Civil Action No: 1:12-cv-00283 (RJL)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS

I. INTRODUCTION

Defendants, MSNBC, NBC and Rachel Maddow, broadcast nationwide and internationally that Plaintiffs Bradlee Dean and You Can Run But You Cannot Hide International are, like their congresswoman, former Presidential Candidate Michele Bachmann, "bloodthirsty" evil religious right bigots that call for the killing of gays and lesbians. Plaintiffs have filed a complaint for false light and defamation against them. Compl. ¶ 10. Defendants' outrageous and maliciously-published statements have severely harmed not only Plaintiffs' reputations, but also their financial well-being. Defendants, who are anti-conservative and secular, if not anti-religious – indeed their network marketing is geared to the left of the political spectrum – maliciously used Plaintiffs as a means to tie them to Presidential candidate Michele Bachmann – also an avowed Christian conservative --in an attempt to destroy her campaign as well. Compl. ¶11. This "clever" but outrageous strategy, designed also to boost viewership, must be held to account legally. As a result of these malicious ad hominem attacks, Plaintiff Bradlee

Dean's life has been threatened by radical politicized homosexuals who even vowed to first sodomize and then kill him. Compl. ¶11.

The damage having already been done, Defendants now disingenuously seek to dismiss the complaint under the District of Columbia's (D.C.) newly enacted anti-SLAPP act as well as under Super. Ct. Civ. R. 12(B)(6). However, in their desperate attempt to summarily dismiss the complaint and deny Plaintiffs their day in court, much less discovery, Defendants not only misrepresent facts but also intentionally distort well-established law. Their motions must be denied.

II. THE FACTS

Plaintiff Bradlee Dean is an accomplished hard metal rocker who found Jesus Christ after a difficult sinful youth, resulting in part to an absent father who was imprisoned and an absent mother. Compl. ¶ 2. After overcoming the obstacles in his own life, Plaintiff sought to positively influence youth and others through restoring Judeo-Christian and family values. Compl. ¶ 2. In 2001, he founded a non-profit foundation, You Can Run But You Cannot Hide ("YCR"), as a means to instill such morals. Compl. ¶ 2. In order to further his message, he also broadcasts these principles through the radio show "Sons of Liberty." Compl. ¶ 1. In addition to discussing issues related to alcoholism, abortion and drug use, Dean has addressed the issue of homosexuality. Dean's mission has recently been the subject of a N.Y. Times profile, which spoke highly of his work. Exhibit 1.

On May 15, 2010, Plaintiff discussed the issue of homosexuality on "Sons of Liberty." In this radio broadcast, Dean sought to encourage Christians to take a stronger stance with regard to the radical gay agenda promoting homosexuality in the schools. Dean specifically rejects, as Christians do, the Islamic doctrine and actual practice of executing homosexuals.

(youcanruninternational.com). Rather, Dean's intent was to focus attention to the dangers of promoting homosexuality to young, vulnerable, and susceptible children, not to advocate harm to anyone. More inclined to experiment with the same sex, given the susceptibility of children, promoting homosexuality in school is setting children on a path ridden with emotional distress, depression, and suicidal tendencies. In fact, studies do suggest that severe emotional distress is more common among gay teenagers than straight ones. *See "Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths,"* by Brian S. Mustanski, PhD, stating "LGBT youths had higher prevalence of mental disorder diagnoses than youths in national samples." *See also* New York Times Article (http://www.nytimes.com/2011/01/04/health/04brody.html). Dean, seeking to draw attention to the issue, merely advocated that Christians recognize the problems associated with advocating homosexuality to the young and to take a firmer stance against the radical gay agenda and lobby. In this regard, to prod Christians to take the issue more seriously, "tongue in cheek" he referenced even radical Muslims taking the issue seriously, but never condoned their practices of killing homosexuals under Shariah law. (youcanruninternational.com).

On May 11, 2011 Defendants Maddow, MSNBC, and NBC broadcasted a segment on "The Rachel Maddow Show," blatantly, maliciously and falsely asserting that Plaintiffs advocated the killing of homosexuals. Even more false and outrageous were Maddow's published statements that Plaintiffs are **"part of social conservatism that is that radical and that bloodthirsty" and that Plaintiff Bradlee Dean, YCR, and Michele Bachman were calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians,"** beliefs and actions that have never been condoned, advocated, or

implied by Plaintiffs. Compl. ¶10. Noticeably absent from the broadcast, which is detailed as Exhibit 2, was any reference by Defendants that Plaintiffs had stated publicly on many occasions that they did not advocate the execution of gays but that, to the contrary, gays and lesbians should be loved as children of God. Compl. ¶9. In fact, prior to this broadcast, Plaintiffs had publicly issued a disclaimer clearly stating "We have never and will never call for the execution of homosexuals." Compl. ¶9. This broadcast was in contrast to Defendants' broadcast nearly a year prior in which Defendant Maddow begrudgingly mentioned that Plaintiff Dean had stated that "We have never and will never call for the execution of homosexuals," but stated in a manner that gave the impression to the audience that Dean's disclaimer was disingenuous, insincere, false, and meaningless. Compl. ¶9. Thus, almost a year after Defendants' initial false broadcast, Defendants intentionally took Plaintiffs' statements out of context, added their own fabricated statements, and maliciously and knowingly "upped the ante" and omitted Plaintiffs' disclaimer. After all, nearly a year later, Defendants recognized that viewers would have no recollection of the original broadcast (with the derisively presentation of Plaintiffs' disclaimer) and, therefore, would not appreciate the true meaning Plaintiff Dean conveyed in his statements. Thus, they would be influenced by Defendants broadcast of false and misleading "facts" that Plaintiffs are bloodthirsty and advocated the killing of homosexuals. Compl. ¶10.

Sickening but "clever" was Defendants' malicious motive. By harming Plaintiffs, Maddow, MSNBC, and NBC sought to significantly harm the "big political prize" which they not only loathe but use with their leftist audience to woo viewers, Republican presidential candidate Michele Bachman, who they cleverly sought to link to Plaintiffs. Compl. ¶11. Specifically, Defendants sought to destroy Bachmann, an evangelical Christian conservative presidential candidate who they and most of their audience detests and despise for her religious

and political beliefs. *Id*. This was not coincidental, as NBC had recently faced a public uproar when it also removed any reference to God in its distorted, doctored and offensive rendition of the "Pledge of Allegiance" at the U.S. Open for Golf. *Id*. Following a huge public reaction to this blasphemy, from both people of faith and other patriotic Americans, NBC, putting their overly secular tail in between its leftist legs, was forced to issue an apology to the American people. *Id.* Moreover, further indicating Defendants' adherence to liberal, anti-religious, pro-"gay rights" views is Phil Griffin's, the president of MSNBC, statement in which he admitted that the tagline of the network, "Lean forward," connotes that its marketing strategy is to corner the "leftist progressive" market, which, by its nature, tends to be liberal, socialist, pro-radical homosexual agenda, and anti-religious. *Id*. As such, this explains the malicious attacks on Plaintiffs and Congresswoman Michele Bachmann. They were calculated both to boost viewership and to further Griffin's and MSNBC's ideological bent.

It thus regrettably came as no surprise when Defendants sought to link Michele Bachmann – who they beat up on virtually every broadcast night --with Plaintiffs, in effect attempting to label them as "Siamese twins." *Id*. In fact, on the offending May 11 broadcast, Defendants explicitly stated "Republican Congresswoman Michele Bachmann of Minnesota, for example, will reportedly share the stage next month at a Tea-Party nominating convention for president and vice president, with an activist named Bradlee Dean." Defs.' Exhibit 36. By creating this connection between Plaintiffs and Bachmann, Defendants sought to harm the presidential campaign of Bachmann by willfully and maliciously harming Plaintiff Dean through presenting him in a false light and defaming him and his organization. Through connecting Bachmann to Plaintiffs and stating that persons like Bachmann and Plaintiffs are "bloodthirsty," were calling for the "upping of bloodshed in America's culture wars" and that Plaintiffs

"advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians," in conjunction with omitting Plaintiffs' disclaimer, Defendants sought to destroy Bachmann by destroying Plaintiffs, particularly during this highly charged season leading up to the presidential elections in 2012. Compl. ¶¶ 10, 11.

There is no doubt Plaintiff Dean's reputation has been damaged also causing business losses, as contributions to his organization have severely dropped as a result of Defendants' false and misleading statements. There are no justifiable bases to contend that Plaintiff has not been placed in false light and defamed. What is most horrifying, however, is the effect Defendants' statements had on viewers, leading many viewers to not only discredit Dean but to also threaten Dean's life. Compl. ¶11. As a father of four, nothing was more petrifying to Dean than continuously receiving death threats, such as one particular disturbing internet threat that warned "Now I'm gonna have to kill you! I thought we were gonna to cut each others' hair than have sex, but you stood me up! I am so upset that I think I may just have to blow up your ministry instead!" *Id*. Making the threats more imminent is that some radical homosexual activists went as far as posting a picture and Plaintiffs' physical address, providing a roadmap to where Plaintiffs can be found and harmed. *Id*. In fact, the seriousness of these internet threats has triggered an investigation by the Federal Bureau of Investigation. *Id*.

As set forth below, Defendants' Motion to Dismiss should be denied and this case must respectfully go forward with discovery.

III. LEGAL DISCUSSION

As set forth in the Complaint, Defendants' actions on or about May 11, 2011, during which time Defendants referred to Plaintiff as "bloodthirsty" and calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies

against America because Christians aren't doing the job by killing gays and lesbians." Compl. at ¶ 10. It was during the May 11, 2011 segment that Defendants' altered Plaintiffs' previous statements and distorted them in order to defame Plaintiffs and place them in a false light. This action was filed on February 21, 2012. The statute of limitations for defamation is one year. D.C. Code §12-301(4). Since the tortuous actions of Defendants occurred on May 11, 2011, and this action was filed in February, 2012, it fell well within the statutory period of filing the action.

The broadcast of August 9, 2010, and claims that came out of that tortuous act, are not barred by the one year statute of limitations. Since the district court action was filed before the superior court action was dismissed, the doctrine of equitable tolling dictates that the statute of limitations had not run because no time had lapsed before the filing of the district court action. In any event, the broadcast of May 11, 2011, which is the most defamatory and otherwise actionable of the two broadcasts, was filed in this federal court action well within the prescribed time.

A. DEFENDANTS' SPECIAL MOTION TO DISMISS UNDER THE ANTI-SLAPP ACT 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 §165502(b). Defendants' Special Motion to Dismiss brought under the Act should be denied for several reasons. First, the D.C. anti-SLAPP has been held inapplicable in federal court and must not apply in this case. Moreover, the Act was enacted in violation of D.C.'s

Home Rule Act and is, thereby, unconstitutional. Finally, application of the Act to the case at hand would be contrary to public policy. Even in the unlikely event the Act was to apply, Plaintiffs meet their burden of showing they are likely to succeed on the merits.

i. The D.C. Anti-Slapp Act Has Been Held Inapplicable In District Court

The anti-SLAPP Act has recently been held inapplicable in district court. In this Court's recent decision of *3M Co. v. Boulter*, the District Court for the District of Columbia, this very same Court, held that the anti-SLAPP act directly conflicted with the Federal Rules of Civil Procedure and was thus inapplicable. *3M Co. v. Boulter*, --- F. Supp. 2d ---, 2012 WL 386488 (D.D.C. Feb. 2, 2012) (Wilkins, J.). The Court entered into an *Erie* analysis, as set forth most recently in the 2010 Supreme Court's Decision of *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010).

As Judge Wilkins ruled:

> "The Court must "first determine whether [the federal rule] answers the question in dispute." Id. (citing Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987)). "This question involves a straightforward exercise in statutory interpretation to determine if the statute covers the point in dispute." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988) (citing Burlington Northern and Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980).
>
> "If the federal rule answers or covers the question in dispute, the federal rule governs unless it is invalid. Shady Grove, 130 S.Ct. at 1437; Stewart, 487 U.S. at 27. The Court does not "wade into Erie's murky waters unless the federal rule is inapplicable or invalid." Shady Grove, 130 S.Ct. at 1437 (citing Hanna v. Plumer, 380 U.S. 460, 469-71 (1965))."

3M Co. at 11. Ultimately Judge Wilkins held:

> "[p]ursuant to the unanimous opinions in Burlington Northern and Walker, as well as the majority opinion in part II-A of Shady Grove and other Supreme Court cases, the first obligation of the Court is to construe the applicable federal rule according to its plain meaning and the relevant explanations provided in the Advisory Committee Notes. This Court holds that the text and structure of Rules 12 and 56 were intended to create a system of federal civil procedure requiring notice pleading by plaintiffs, whereby a federal court may dismiss a case when the

> plaintiff fails to plead sufficiently detailed and plausible facts to state a valid claim, but a federal court may not dismiss a case without a trial based upon its view of the merits of the case after considering matters outside of the pleadings, except in those instances where summary judgment under Rule 56 is appropriate."

Id. at 31. The anti-SLAPP act is therefore in direct conflict with the Federal Rules of Civil Procedure and the federal rule governs unless the federal rule was passed in violation of the Rules Enabling Act, 28 U.S.C. § 2072. Challenges to the Federal Rules of Civil Procedure as violations of the Rules Enabling Act can succeed "only if the Advisory Committee, the [Supreme] Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Rules Enabling Act nor constitutional restrictions." *Bus. Guides, Inc. v. Chromatic Communs. Enters.*, 498 U.S. 533, 552 (1991)(quoting *Hanna v. Plumer* , 380 U.S. 460, 471). The Supreme Court has rejected *every* Rules Enabling Act challenge to a federal rule that has come before it. *Shady Grove*, 130 S. Ct. at 1442 (plurality)(emphasis added).

Federal Rules 12 and 56 have similarly never been held in violation of the Rules Enabling Act. The Court in *3M Co.* found that "[g]iven the procedural characteristics of Rule 12(d) and Rule 56, they fall squarely within the proper scope of the Rules Enabling Act." *3M Co.* at 38 (*citing Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 8; *Shady Grove*, 130 S. Ct. at 1442 (federal rule is valid so long as it "really regulates procedure") (quoting *Sibbach v. Wilson & Co*., 312 U.S. 1, 14 (1941) (plurality)).

Whether the anti-SLAPP act is procedural or substantive is thus irrelevant to its applicability. As the Court went on to further find:

> "This Court need not conclusively decide whether the D.C. Anti-SLAPP Act creates any substantive rights. Because this Court finds that Rules 12 and 56 answer the question in dispute, the Court need not "wade into Erie's murky waters" to consider that issue. See Shady Grove, 130 S.Ct. at 1437. Nonetheless, even assuming a substantive right is created, the Anti-SLAPP Act cannot apply in

> this Court because the D.C. Council has clearly mandated the *procedure* for enforcing any such substantive right that preempts Federal Rules 12 and 56."

Id. at 34. Nevertheless, Judge Wilkins ruled that:

> "The D.C. Council could have, but chose not to, simply granted a defendant an immunity that could be invoked via a Rule 12 or 56 motion, similar to existing qualified or absolute immunities. Instead, the Council mandated a dismissal procedure that directly conflicts with the operation of the federal rules as required by the binding precedent of this Circuit."

Id. at 35. Thus, it was not a substantive right, but rather a procedure that was implemented by the anti-SLAPP Act. In summation, Judge Wilkins determined that ultimately the "Act is a summary dismissal *procedure* that the Defendants and the District seek to clothe in the costume of the substantive right of immunity--but this is largely a masquerade." *Id*. at 39 (emphasis added).

Ultimately, the Act cannot stand. Since there is a direct conflict, as determined under the *Shady Grove* analysis, the Federal Rules of Civil Procedure control and the D.C. anti-SLAPP Act no longer applicable and void in federal court. And even in the unlikely event that this Court makes the determination that the anti-SLAPP Act does not directly conflict with Federal Rules 12 and 56, then there is no doubt that the D.C. anti-SLAPP Act is simply procedural and must once yield to the Federal Rules of Civil Procedure. Thus, the Act, under any analysis, is inapplicable and void in federal court.

ii. D.C's Anti-SLAPP Statute Also Does Not Apply Because of D.C.'s Home Rule Act.

D.C.'s "Home Rule Act" was enacted as a means to delegate certain legislative powers in purely local issues to the government of D.C. As reiterated in its statement of purpose, the Home Rule Act provides, "Subject to the retention by Congress of the ultimate legislative authority over the nation's capital granted by Article 1, Sec. 8 of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia." Home Rule

Act, Sec. 102 (D.C. Official Code 1-201.01). In conveying such legislative powers, the Home Rule Act also establishes a Council in which such powers are vested. Home Rule Act Sec. 401(a) (D.C. Official Code 1-204.01); Home Rule Act Sec 404 (D.C. Official Code 1-204.04). However, the Home Rule Act has placed explicit limitations on the powers of the Council. Specifically, the Council does not have the authority "…to enact any act, resolution, or rule with respect to any provision of title 11 of the D.C. Official Code (relating to organization and jurisdiction of the District of Columbia Courts)." In this respect, in enacting the D.C.'s anti-SLAPP act, the Council has exceeded its scope of power in violation of the Constitution.[1]

In 2010, the Council enacted the anti-SLAPP act, which provides a basis for a party to file a special motion to dismiss a claim arising from an act in furtherance of the right of advocacy on issues of public interest. D.C. Code §16-5502. If 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, in which case the motion shall be denied. D.C. Code §16-5502. Essentially, the Act provides for a stay of discovery, an expedited hearing on the special motion to dismiss and for the issuance of a ruling as soon as practicable after the hearing. D.C. Code §16-5502. In essence, the anti-SLAPP act provides for procedures in certain types of litigation. *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 at 2 (D.Mass. Dec.1, 2010).

Other states have provided guidance on the procedural nature of the anti-SLAPP acts. It has been argued that classification of the anti-SLAPP statute as procedural rather than

[1] A similar argument was recently made in *Snyder v. Creative Loafing, Inc*., 2011-CA-003168-B (filed Apr. 26, 2011)(Edelman, J.), where the Plaintiff claimed that the anti-SLAPP act violates D.C.'s Home Rule Act because the act is procedural in nature rather than a substantive immunity from suit.

substantive is "generally a straightforward exercise." *Turkowitz*, 2010 WL 5583119 at 2. The anti-SLAPP law creates procedures for certain kinds of litigation, and thus, is procedural in nature. *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2008 WL 4595369 at 9 (D.Mass. Sept. 30, 2008). See Also *The Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D.Mass. July 19, 2010). Often, in reaching the conclusion that the anti-SLAPP statute is procedural, courts take note of the fact that the statute governs the rules for dismissal and the burden shifting that occurs when a defendant introduces evidence that the plaintiff has engaged in a SLAPP suit. *South Middlesex Opportunity Council, Inc.*, 2008 WL 4595469 at 9.

Based on such prior cases, it is evident that D.C.'s Act is procedural in nature and as such, violates the Home Rule Act by relating to the organization of the D.C. Courts. D.C.'s act provides a procedure for a defendant to file a special motion to dismiss, giving such a party 45 days to file such a motion after service of the claim. Additionally, if the defendant introduces evidence of an act in furtherance of the right of advocacy on issues of public interest, the burden shifts to the plaintiff. The act is purely procedural, providing rules and procedures for dismissal and the burden shifting that occurs when a defendant makes a prima facie showing.

Based on the procedural nature of the anti-SLAPP act, it contravenes D.C.'s Home Rule Act. Essentially, it relates to the organization of the D.C. Courts by altering the procedural rules of the Superior Court specified in Title 11. When examining the organization and jurisdiction of the Superior Courts under Title 11, sec. 11-946 explicitly states, "The Superior court shall conduct its business according to the Federal Rules of Civil Procedure…" In fact, the Superior Court's general rules of pleading, like the Federal Rules of Civil Procedure, only require a short plain statement of the claim showing that the pleader is entitled to relief. See Comment to Rule 8, which states that Superior Court Rule 8 is identical to Federal Rules of Civil Procedure 8. The

anti-SLAPP act, however, requires that the plaintiff show that they are likely to succeed on the merits of the claim. Contrary to Title 11, the anti-SLAPP procedure "incorporates additional fact-finding beyond the facts alleged in the pleading." *Torkowitz*, 2010 WL 5583119 at 2. Simply put, the Act imposes the burden on the plaintiff to demonstrate that their claims are likely to succeed before discovery even begins. Thus, the Act relates to the organization of the courts as indicated in Title 11 in that it is contrary to the Superior Court Rules of Civil Procedure 8, which only requires a short plain statement.

Through enacting a procedural rule, thereby altering the pleading requirements of Rule 8, the Council has passed a law relating to the organization of the courts. Given the specific limitation in the Home Rule Act barring the Council from enacting acts or resolutions with respect to any provision of Title 11 of the D.C. Official Code, the Council has exceeded its powers. As such, in violating the Home Rule Act, the anti-SLAPP act is unconstitutional and thus cannot and should not be enforced.

iii. D.C.'s Anti-SLAPP Statute Also Should Not Apply to Cases such as this Given Public Policy Concerns.

In determining the application of the anti-SLAPP act, it is imperative to examine the rationale behind its enactment. Legislative intent can be found through scrutinizing similar statutes in other jurisdictions. California's anti-SLAPP law is alleged to be the model for the D.C. Act. *Navellier v. Sletten*, 29 Cal. 4th 82, 88 (2002). In examining California's anti-SLAPP law, it is important to evaluate this legislative intent. In cases where the legislative intent was examined, it was found that 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).

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*. In this case, MSNBC, NBC and Rachel Maddow have published the false and misleading statements through their broadcasts, on multiple occasions, as set forth in the complaint. Compl. ¶¶ 9, 10.

The application of the anti-SLAPP suit in the case at hand, therefore, is against public policy for the above mentioned two reasons. First, seeking to vindicate their legally cognizable rights, the claims that Plaintiffs allege are meritorious, indicated by the sufficient evidence

supporting the false light and defamation causes of action. Second, the purpose of the anti-SLAPP statute in preventing the chilling of speech would not be accomplished. In fact, the contrary would result were the anti-SLAPP act to apply.

First, through examining the legislative intent and resulting case law of enacting such anti-SLAPP laws, it is evident that it this case is not the type of suit 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. Defendants clearly manipulated and misrepresented Plaintiffs own words in an effort to damage their reputations and financial well-being. This is supported by the fact that Defendants, rather than broadcasting Plaintiffs' entire statement, cleverly opted to only publish a few sentences. By taking certain sentences out of context, and editing them to appear as if they were one continuous statement, Defendants intended to portray Plaintiff as an evil person who advocated killing, while later claiming they did not defame Plaintiffs because "it was Plaintiffs' own words." Defs.' Memo at 23. Unfortunately for Defendants, that is not how the law of false light and defamation work. Defamatory meaning is to be determined by examining the entirety of the context. *Carpenter v. King*, 2011 WL 2432910 at 4 (D.D.C June 17, 2011). Defendants, instead, wrongfully and strategically examine individual broadcasted statements, claiming they were accurate quotes of Plaintiffs' comments, refusing to acknowledge to the Court that the statements were intentionally and maliciously taken out of their original context to make them defamatory. Through substantial omissions, and then branding Plaintiffs as "bloodthirsty," Defendants were able to effectively place Plaintiffs in a highly offensive false light and defamatory conduct. Compl. ¶10. As such, Plaintiffs are seeking to enforce a legally cognizable right. The act's purpose, after all, was to prevent frivolous suits, not meritorious claims.

Secondly, consistent with *Blumenthal*, while the Court must be sensitive to the chilling effect that a defamation suit has on exercise of First Amendment Rights, the Defendants' exercise of his free speech rights were not chilled given their continued broadcast of stories in much the same manner as before the lawsuit. Defendants MSNBC, NBC, and Maddow have continued to broadcast similar messages, and in fact they became more distorted and defamatory as time went on, particularly given the current highly-charged political season leading up to the 2012 elections. As such, Defendants' speech has not been chilled and this is not the type of case in which the anti-SLAPP act was designed to prevent.

Rather, by applying the anti-SLAPP act to this case, free speech will be chilled. To allow a defendant to avoid liability after intentionally and maliciously misstating and omitting key words and phrases, taking statements out of context, and deliberately leaving out issued disclaimers – much more claiming falsely that Plaintiffs and their "ally," former presidential candidate Michele Bachmann, are bloodthirsty and unhappy that more gays are not killed -- would chill the speech of many plaintiffs. *Id*. Concerned with their words being taken out of context, many potential plaintiffs would be reluctant to address matters of political concern, particularly with regard to highly controversial issues, fearing defamatory manipulations of their views, knowing they would have no recourse. After all, it is in matters of such public concern where open and robust discussion is wanted and should be encouraged, particularly in controversial matters. As Justice Holmes emphasized in his dissenting opinion in *Abrams v. United States*, "…the ultimate good desired is better reached by free trade in ideas…that the best test of truth is the power of the thought to get itself accepted in the competition of the market…" *Abrams v. United States*, 250 U.S. 616, 630 (1919). In encouraging such "marketplace of ideas," it is imperative that speech not be chilled, regardless of controversial viewpoint and whether one

agrees with the views conveyed. After all, to determine the "truth" of such thought is for such viewpoints to be shared and embraced by the market.

Plaintiffs do not argue that Defendants are not entitled to disagree with Plaintiffs' true and accurate viewpoint that the radical homosexual agenda, which is frequently pushed in schools, is harmful to children. To the contrary, such debate is encouraged. However, to intentionally misstate and manipulate Plaintiffs' words and motives, in an effort to produce a sensational but false and misleading presentation that Plaintiffs advocated for the killing of homosexuals, is not conducive to the "marketplace of ideas." Simply put, Defendants sought to show that Plaintiff advocated murder, further evidenced by Defendants' sarcastic commentary to Plaintiffs' disclaimer. Compl. ¶13. In their second broadcast, Defendants didn't even bother mentioning Plaintiff's disclaimer, further showing that Plaintiffs advocated the killing of homosexuals and were, in fact, unapologetic. Compl. ¶10. It would be against public policy to allow Defendants to falsify and manipulate the words of others in an attempt to damage their reputation and then later allow them to assert the anti-SLAPP act. As such, in cases such as the one at hand, even if the statue is constitutional and enforceable – which it is clearly not under D.C. and federal law --the application of the anti-SLAPP statute would violate its own purpose, rather than preventing the chilling of speech, it perpetuates it, deterring many from participating in open discussions regarding their views on controversial matters, knowing they have no recourse against a malicious defendant who falsifies and manipulates their statements. After all, there's a distinction to be drawn from those engaging in debate on matters of public interest and those that intentionally, maliciously, and willfully sabotage and destroy someone's reputation and financial well-being by wrongfully falsifying and manipulating words and omitting significant facts to accomplish their own political and commercial goals. MSNBC, who

significantly trails other political prime time lineups such as Fox News and CNN in viewers, cynically and cruelly used Plaintiffs as a means to boost ratings and thus profits. Compl. ¶11.

B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Given the unconstitutionality of D.C.'s anti-SLAPP statute as well as the public policy supporting its inapplicability, as well as this district court's ruling that it does not apply to federal actions, this case should not be subject to the Act. Even in the unlikely event that the Act is held by this court to apply, Defendants' Special Motion to Dismiss should still be denied since Plaintiffs can more than satisfy their burden of establishing they are likely to succeed on the merits of their false light and defamation claims. D.C. Code §16-5502(b). In addition to satisfying the necessary elements of both claims and the inapplicability of the Fair Comment Privilege, the evidence undoubtedly supports the fact that Defendants' publications placed Plaintiff in a false light while damaging their reputation and financial well-being.

i. Likely to Succeed on Merits of Claim for False Light.

A claim for false light simply requires: (1) publicity; (2) about a false statement, representation or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be offensive to a reasonable person. *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859 (D.C. 1999), citing Restatement (Second) of Torts §652E. It is not necessary to the action for invasion of privacy that the plaintiff be defamed. "It is enough that he is given unreasonable and highly objectionable publicity that attributes to him characteristics, conduct or belief that are false, and so is placed before the public in a false position". Restatement (Second) of Torts §652E. An action for false light differs from an action for defamation because a defamation claim redresses damage to reputation while false light privacy claim redresses mental distress from exposure to public view. *State v. Carpenter*, 171 P.3d 41

(Alaska 2007). Defendants allege, without even the slightest examination of the requirements for false light, that Plaintiffs' claim is invalid. However, Defendants intentionally "play dumb" and fail to appreciate the varying facts involved in Plaintiffs' false light claim, particularly given the mental distress suffered as a result of Defendants' conduct. Through evaluation of Plaintiffs' false light claim, it is evident that Plaintiffs are likely to succeed on the merits of the claim.

1. Defendants' Broadcast Clearly Placed Plaintiffs in a False Light That Would Be Highly Offensive to a Reasonable Person.

A false light claim requires a false statement, representation or imputation that places Plaintiff in a false light that would be highly offensive to a reasonable person. *Kitt*, 742 A.2d at 850. In other words, "…it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity." Restatement (Second) of Torts §652E, cmt. c. It is when there is a major misrepresentation of a person's character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy. *Id*.

In seeking to attack and destroy their political foil, Michele Bachman, to boost ratings during this highly charged political season, Defendants created an association between Bachmann and Plaintiff, and then proceeded to maliciously and willfully engage in a tirade of false and misleading statement in order to place Plaintiffs in a false light, thereby damaging Bachmann. Specifically, on their May 11, 2011 broadcast, Defendants explicitly stated that persons like Bachmann and Plaintiff are "bloodthirsty," were calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians." Compl. ¶10. However, no such belief or statement was ever stated, implied or conveyed by Plaintiffs. In

fact, contrary to Defendants' false insinuation that Plaintiffs advocated killing homosexuals, Plaintiffs have consistently and continuously stated the contrary, that gays and lesbians should be loved as children of God. *Id.* Defendant Maddow—who herself admittedly a proud lesbian activist -knowing of Plaintiffs' position, as evidenced by her broadcast nearly a year before where she derisively presented Plaintiffs' disclaimer, willfully and maliciously chose to omit this disclaimer. Compl. ¶¶ 9, 10. After all, Defendants knew, given the substantial length of time between the two broadcasts, that viewers would not be able to appreciate Plaintiffs' actual beliefs, particularly since viewers would not be able to recall the disclaimer from the initial broadcast. Rather, in seeking to destroy Bachmann while boosting their own ratings and financial performance, Defendants intentionally and maliciously attributed false beliefs and statements to Plaintiffs thereby placing Plaintiffs in a false light.

There is no doubt that Defendants' publicity placed Plaintiffs in a position that would be highly offensive to a reasonable person, attributing to him false beliefs that he advocated the killing of homosexuals, was calling for the "upping of bloodshed in America's culture wars," and that Plaintiffs "advocated using foreign enemies against America's because Christians aren't doing the job by killing gays and lesbians." Compl. ¶10. Defendants effectively placed Plaintiffs in a position of danger, inciting many to issue violent, atrocious, and disturbing death threats. Compl. ¶¶ 10, 11. In fact, one such threat stated "Why Bradlee Why? Now I'm gonna have to kill you! I thought we were gonna cut each others' hair then have sex, but you stood me up! I am so upset that I think I may just have to blow up your ministry instead! Good bye, forever, BQ." Compl. ¶11. To attribute false and misleading statements and views to Plaintiffs that incite such behavior by members of the community clearly indicate that Plaintiff was placed in a false light that is highly offensive to a reasonable person, particularly given Plaintiffs continued position

that he, in no way, advocates the execution of homosexuals, but that to the contrary gays and lesbians should be loved as the children of God. Compl. ¶10. Moreover, Defendants' outrageous statements even perpetuated radical gay activists to post pictures and the physical address of Plaintiffs on their websites, providing a roadmap where Plaintiffs can be found and harmed. Compl. ¶11. Defendants' false, misleading, and outrageous statements, admittedly held Plaintiff Dean up for extreme ridicule in his community, particularly in D.C. where he pursues his mission of YCR and where he and his organization's works and preaches to promote family values and posterity. Compl. ¶16. In fact, as a result of Defendants' malevolent conduct, not only did Plaintiffs' suffer emotional and reputational damage, but his organization, striving to promote such values to our youth, had to endure a serious loss of financial contributions as a result of the false light.

2. Defendants' Broadcast Consisted of Material Omissions and Misleading Half- Truths, Placing Plaintiffs in a False Light.

It is well recognized that falsity can be created by a misleading half-truth. In fact, courts have recognized there is a cognizable false light claim if an edited version of the facts is represented in such a way that a false impression is created. *Larsen v. Philadelphia Newspapers, Inc.*, 375 Pa. Super. 66, 82 (Pa.Super.1988), *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (holding that publicizing details that are true but are selected or presented in a way as to convey a misleading impression of that person's character, gives rise to a false light claim). See Also, *Russell v. American Broadcasting Co., Inc.*, 1995 WL 330920 at 5 (N.D. Ill. 1995), (holding that defendant taking plaintiff's statements out of context and incorporated them in the broadcast in such a way that a viewer would wrongly infer that plaintiff was an unscrupulous and dishonest merchant constituted a classic example of a false light claim).

On both of Defendants' broadcasts of "The Rachel Maddow Show," August 2010 and

May 2011, Maddow took great effort in only displaying three specific, unconnected and targeted phrases as to appear as if they were one complete statement:

"Muslims are calling for the execution of homosexuals in America."

"…they themselves are upholding the laws that are even in the Bible of the Judeo-Christian God but they seem to be more moral than even the American Christians do, because these people are livid about enforcing their laws. They know homosexuality's an abomination."

"If America won't enforce the laws, God will raise up a foreign enemy to do just that. That's what you're seeing today in America."

Defs.' Memo at 9. It is evident that Maddow's edited version of Plaintiffs' statement is represented in such a way to falsely and misleadingly convey to the viewer that Plaintiffs advocated the execution of homosexuals. While Defendants try to disingenuously contend that so called editing is a "necessary" component of journalism, omitting material facts to convey a false fact is not protected and arguably is not even "journalism." Rather, it is important to note that Maddow only broadcasted five sentences from Plaintiffs' original comment, compromised of 19 complete sentences. Moreover, the three phrases Defendants strategically chose to broadcast were unrelated and unconnected, each found in different sections of Plaintiffs' comments. To further create the implication that Dean, in fact, advocated the killing of homosexuals, Defendants took great effort in displaying only the three specific phrases on the screen, in order to portray the statements as Dean's words in their entirety. Defs.' Exhibit 36.

This method of editing audio/video clips in order to mislead the public is an action not uncommon with Defendant NBC. In the recent controversy over George Zimmerman's alleged shooting of Trayvon Martin, NBC once again edited audio in order to portray a false narrative that Zimmerman was acting out in a racist manner. Exhibit 3. In this instance, Defendant NBC admittedly edited out the dispatcher's questioning of Martin's race, leaving Zimmerman's comment "[h]e looks black" to appear as though Zimmerman was reporting Martin simply

because of his race. Exhibit 3. This action shows Defendants' continued pattern and practice of altering facts, in the guise of "reporting news," while actually misleading the public, defaming individuals, and stirring up controversy in order to bolster their ratings.

However, in the case at hand, Defendants did not leave the issue at rest with the altered audio. With obvious concern that they were not damaging the Plaintiffs and Michele Bachmann enough to boost ratings, Defendants, in their May 2011 broadcast, didn't even bother referencing Plaintiffs' disclaimer "We have never and will never call for the execution of homosexuals," knowing that this would lead viewers to fail in appreciating Plaintiffs' actual meaning. Compl. ¶ 10. In fact, Defendants went even further by adding that Plaintiffs were calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians." *Id*. No such statement or inference was ever made by Plaintiffs. Through the substantial omissions of material quotes, the implication that the Plaintiffs' words were presented in their entirety, in conjunction with Defendants' added factual assertions and broadcast statements, Defendants effectively placed Plaintiffs in a highly offensive false light.

Further contributing to the false light is the placement of Defendants' fabricated statements. Specifically, Defendant stated that Plaintiffs were calling for the "upping of the bloodshed in America's culture wars" and immediately followed this assertion with the defamatory version of Dean's statement. See Defs.' Exhibit 36. Essentially, the presentation of this material clearly insinuates that Defendants' added assertion was part of Plaintiffs' speech, Defendants maliciously and knowingly attempted to attribute to Plaintiffs such false beliefs. See *Braun v. Flynt*, 726 F.2d 245, 257 (5th Cir. 1984) (holding that the juxtaposition of a picture among a series of vulgar cartoons and jokes to be a highly offensive actionable false light

depiction and that defendants were aware the placement of the photo would create such a false impression). As such, Defendants were aware that the placement and presentation of such statements would create a false impression of so called fact in the viewer that Plaintiffs advocated the execution of homosexuals and through such conduct, placed Plaintiffs in a false light.

ii. Plaintiffs Are Likely to Succeed on Merits of Claim for Defamation.

A claim of defamation merely requires (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) the defendant published the statement without privilege to a third party; (3) the requisite degree of fault, and (4) the statement was actionable as a matter of law or that it caused plaintiff special damages. In determining the meaning of a communication, however, words are to be construed together with their context. In examining Defendants' broadcast in the context in which they were presented, it is clear that Plaintiffs have more than satisfied the requirements for defamation.

1. Defendants' Allegation that the Broadcasted Declarations Were Not Defamatory is Baseless Given Defendants Failure to Construe the Statements in their Context.

"In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their contexts…words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it." Restatement (Second) of Torts §563(d) (1977). The alleged defamatory statement is not considered in isolation but rather must be examined in the context in which it appeared. *Carpenter v. King*, 2011 WL 2432910 at 4. In fact, "Courts should look to the broader social context in which a statement is made." *Lewis v. McTavish*, 673 F.Supp. 608, 610 (D.D.C. 1987). In this respect, Defendants' arguments fail.

While Defendants concede this point, they blatantly disregard this principle and proceed, in a misleading way, to analyze the alleged defamatory statements in isolation. Defendants instead hope to circumvent this well-established standard by presenting each statement individually, intentionally ignoring the context in which these statements were presented and the blatant omissions of significant facts. Moreover, despite their own concession, Defendants fail to take note of the broader social context in which the statements were made, knowing full well the defamatory implications such context provides. Specifically, Defendants first address the statement, "Dean and YCR had advocated the execution of gays," claiming that since Dean's statements were directly and accurately quoted, there is an absolute defense to a defamation claim. Defs.' Memo at 23. Specifically, they allege that since Plaintiff uttered these statements, they are not actionable. Unfortunately for Defendants, this is not how the law of defamation operates. While it is true that a statement accurately quoted might constitute a defense, the defense is unavailable to elude liability when a statement is intentionally and maliciously taken out of context, leaving material omissions, raising unreasonable inferences, and leaving false impressions on viewers. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515 (1991).

Defendant wrongfully continues to analyze individual statements in isolation in an effort to try, in vain, to avoid proceeding with this litigation, knowing the defamatory implication that arises when analyzing these statements in context. Defendants address the statement Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians." Defs.' Memo at 27. Defendants unjustifiably alleged that Defendant Maddow never made such a comment. *Id*. Instead, they mislead the Court in claiming that Maddow used a slightly different language. *Id*. Again, Defendants ignore the context of the statement, refusing to acknowledge that these statements were made immediately after playing

audio of selected comments made by Plaintiff and were stated in a manner to ensure that the viewer would falsely understand that Plaintiffs not only advocated using foreign enemies against America but had clearly stated such beliefs. Defendants engage in similar analysis with the statement "Bloodthirsty," and "Calling for an upping of the bloodshed in America's culture wars." Defs.' Memo at 30. Unsurprisingly, Defendants conclude that the statements are not defamatory.

However, it becomes clear that Defendants manner of analysis is a tactical effort to mislead the court from the truth: that taken in context, the broadcasts were clearly defamatory. In viewing the defamatory statements in their context, it is important to note that the broadcasted statements were cleverly and strategically selected from a longer statement and were not published in its entirety or in a manner that adequately portrayed its original meaning. Of the original statements made by Plaintiff taken in their entirety, constituting nineteen complete sentences, Defendants only broadcasted five of them, five statements found in different points of the comment. Defs.' Memo at 5-6, 9-10. Moreover, in addition to their distorted and misleading presentation of Plaintiffs' disclaimer in their first broadcast, Defendants' left noticeably absent any reference to this disclaimer in their May 2011 show – which later broadcast occurred about a year later. Compl. ¶10. Again, it is exactly this type of context that must be considered. See Restatement (Second) of Torts §563(e) (1977), ("…an apparently flattering statement may be reasonably understood in a defamatory sense by reason of the publisher's recognizably ironical manner.") What Defendants attempt to do, however, is avoid the broader context of Plaintiffs' statement, attempting to misleadingly parse out only selective narrow individual statements that were broadcasted and then misleadingly argue that such statements were not defamatory.

Additionally, as Defendants concede, the broader social context should also be considered. Defendants NBC and MSNBC pride themselves on their marketing of secular and anti-religious beliefs, and have sought to woo leftist oriented viewer markets as an attempt to compete with and match, through leftist viewership, Fox News' domination of the politically conservative and generally religious markets. Compl. ¶11. In fact, on June 19, 2011, NBC faced much controversy after removing any reference to God in its distorted, doctored and offensive rendition of the "Pledge of Allegiance" at the U.S. Open for golf. *Id.* The president of MSNBC, Phil Griffin, admitted in an interview that the tagline of his network, "Lean Forward," connotes that its strategy is to corner the "leftist progressive" market. *Id.* How does a network ensure support from liberal, radical gay activists while attacking their political opposition? They intentionally, maliciously, wantonly, and willfully engage in a series of defamatory attacks on conservative figures who they cast, as here, as rabidly anti-gay to the point of advocating the death of gays and lesbians, particularly those who have been linked to opposed political candidates. In the case of Defendant Maddow, this fits with her sexual orientation and activism, and of course her audience. Compl. ¶ 5.

This is precisely the strategic, tactical ploy that Defendants sought to portray. Trying to link Plaintiffs to Republican presidential conservative evangelical hopeful Michele Bachmann, who has been and remains MSNBC's "whipping boy" to boost ratings and revenues, Defendant attacked Plaintiffs' character, attempting to establish that he advocated killing homosexuals. Compl. ¶¶10, 11. Defendants hoped that by broadcasting this false and misleading assertion, they could further show their viewers into believing that Bachmann also supported such killings, given her support of Plaintiffs. After all, Defendant Maddow has embraced a leftist political ideology and, as a proud lesbian, is committed to what many Americans view as the radical gay

agenda, which seeks to promote their homosexuality in schools, workplaces, and elsewhere, rather than just practicing their sexual preference in the privacy of their homes as most heterosexuals and non-radical gays and lesbians do. See e.g. Compl. ¶ 5. Perceiving Bachmann as a threat, they sought to subtly and maliciously damage her political campaign through heartlessly damaging Plaintiffs. It is no coincidence, that in an effort to further harm conservative candidates, Defendants followed each broadcast of the defamatory statements with unfavorable references to a conservative figure. Such incriminating evidence of Defendants' intent is found in the May 2011 broadcast, where the defamatory statements were preceded with "Republican Congresswoman Michele Bachmann of Minnesota, for example, will reportedly share the stage next month at a Tea-Party nominating convention for president and vice president, with an activist named Bradlee Dean." Defs.' Exhibit 36. Following this remark, Defendant Maddow played the out of context, manipulated, defamatory statements in which she attributed to Plaintiff. Ironically, while conceding that the broader social context should be considered, Defendants claim that the mentioned facts are "nebulous." Yet, by considering the broadcast in context, such facts clearly evidence Defendants' malicious intent while establishing the falsity and defamatory meaning found in the broadcasts.

2. Defendants' Material Omissions Created a False and Defamatory Meaning.

In order to prevail in a defamation claim, the statement must be false or misleading and defamatory of and concerning the plaintiff. Defamatory meaning and falsity are distinct elements of the tort and are considered separately. This court has recognized that "District of Columbia law… clearly contemplates the possibility that a defamatory inference may be derived from a factually accurate news report." *Southern Air Transport, Inc., v. American Broadcasting Companies, Inc.*, 877 F.2d 1010, 1014 (D.C. Cir.1989). See Also *Davis v. Ross*, 754 F.2d 80, 84

(2d Cir. 1985) (holding that a factually accurate report that an employee was discharged may nonetheless constitute actionable defamation if the report contains an insinuation that the discharge was for some misconduct."). An alleged defamation is considered false if it "…would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson*, 501 U.S. at 496.

Omission of material facts might in some circumstances, as here, supply the missing ingredient that would place a literally true communication in the field of implied defamation. *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. 2008) (noting that in Memphis *Publishing v. Nichols*, the omissions were not used to establish defamatory meaning, but demonstrated the falsity of the defamatory meaning which the report was found capable of bearing). The United States Supreme Court has further supported the notion of excluding from First Amendment protection, calculated falsehoods. "Calculated falsehood falls into a class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Garrison v. State of La.*, 379 U.S. 64, 75 (1964), (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Through calculated falsehoods and distortions of truth, accomplished through strategic and selective omissions of material fact, Defendants not only defamed Plaintiffs through insinuation of false facts but also endangered his life.

In two different broadcasts of "The Rachel Maddow" show, August 2010 and May 2011, Defendants engaged in direct, malicious acts in an effort to defame Plaintiffs, accomplishing their goal through omissions of significant, material facts. Evidencing in particular Defendants' malicious intent is Defendants May 11, 2011 broadcast. Defendant Maddow, acting in concert

with MSNBC and NBC, intentionally and knowingly omitted Plaintiffs' continuing statements that they have never and will never call for the execution of homosexuals. Compl. ¶10. In contrast with their broadcast nearly a year prior, in which Maddow contemptuously presented Plaintiffs' disclaimer, Defendants sought to link Plaintiffs with Bachmann and, through omission of Plaintiffs' disclaimer, perpetuate the false meaning that Plaintiffs advocated the execution of homosexuals. Compl. ¶¶ 10, 11. Defendants sought to directly damage Plaintiffs in order to indirectly harm Bachmann and her presidential campaign – and thus boost ratings and revenues during this highly politically charged time, knowing that the omission of the disclaimer in conjunction with the substantial length of time between Defendants' two broadcasts would lead viewers to fail to appreciate Plaintiffs' actual statements. By harming Plaintiffs, Defendants attempted to significantly harm the "big political price" which they loathe, a Christian conservative presidential candidate. Compl. ¶11. To ensure such damage and to sensationalize to boost views and ratings and thus revenues, Defendants falsely added that Plaintiffs and Bachmann were calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians." Compl. ¶10. It is precisely such "calculated falsehoods" that are excluded from First Amendment protections.

On both broadcasts, knowing that Dean's statement in its entirety would not effectively convey the false view that Plaintiffs advocated killing homosexuals, Maddow desperately tore apart Plaintiffs' original statement, taking unrelated snippets of sentences out of context and strategically broadcasting these cleverly selected phrases, while implying that the statements were Dean's words in their entirety. Of 19 complete sentences, Defendants only mentioned 5 of Plaintiffs' statements, 5 strategically selected sentences that effectively insinuated (falsely) that

Plaintiffs advocated the killings of homosexuals, an effect that would not have resulted had Dean's comments been broadcasted in their entirety.

While it is true that the law recognizes the "practical necessity to edit and make intelligible a speaker's perhaps rambling comments," the law does not recognize edits and omissions that create a material or misleading falsehood. *Masson,* 501 U.S. at 515. In fact, some courts have even stated that evidence of a defendant omitting facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel. *Hinerman v. Daily Gazette Co.,* Inc., 188 W.Va. 157, 174 (W.Va. 1992). Omitting Plaintiffs' disclaimer all together, while only broadcasting three statements from a longer comment, Defendants effectively conveyed a materially false and misleading statement, insinuating not only that Plaintiffs advocated killing homosexuals but also were unapologetic. See *Ollman v. Evans, 750 F.2d 970, 989 n.38 (D.C. Cir. 1984),* stating that at some point the deletion or omission of proper context can be so egregious as to amount to misquotation.

While Defendants contend that such edits and omissions were necessary, they also admit that these statements appeared simultaneously on the screen. Defs.' Memo at 25. One can't help ask the lingering question: If time and necessity were really Defendants' motivation for the omissions, then why did Defendants further emphasize the selected statements by only displaying those statements on the screen rather than the entirety of Plaintiffs' comment? The answer is simple. Defendants sought to raise a false conclusion, alleging that Plaintiff advocated the killing of homosexuals. Defendants knew that this falsity could not effectively be conveyed if Plaintiffs' statements were broadcasted in their entirety or if they were displayed on the screen in their entirety. Rather, Defendants avoided any mention that the statements came from a larger context and instead, presented the material as if they were the complete declarations of Plaintiffs.

Through such strategic, yet malicious, conduct, Defendants effectively established a false and defamatory insinuation and "fact" that Plaintiffs advocated killing homosexuals.

Defendants unjustifiably contend that broadcasts do not constitute defamation because broadcasting the entirety of his statement would not have cast Dean in a more flattering light. However, this could not be further from the truth. In fact, had the truth been broadcasted, a reasonable reader would not conclude that Plaintiffs advocated the killing of homosexuals, particularly if the Defendants, so maliciously, did not omit the disclaimer Such an inference is unreasonable when examining Plaintiffs' statement in their entirety. "Intelligent, well-read people act unreasonably from time to time, whereas the hypothetical reader, for purposes of defamation law, does not." *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 158 (Tex. 2004). Dean specifically rejects, as Christians do, the Islamic doctrine and actual practice of executing homosexuals. (youcanruninternational.com). Dean sought to encourage Christians to take a stronger stance with regards to the radical gay and lesbian lobby promoting homosexuality in the schools. In short, Dean's intent was to focus attention to the dangers of promoting homosexuality to young, vulnerable, and susceptible children, not to advocate harm to anyone.

3. Defendants' Statements Can Reasonably Be Interpreted as Stating Actual Facts About the Individual and Do Not Constitute Opinion or Rhetorical Hyperbole.

The Supreme Court has definitively indicated that there is no categorical First Amendment immunity against defamation suits for statements of opinion. *Rodriguez v. Panayiotu*, 314 F.3d 979, 985 (9th Cir. 2002), citing *Milkovich*, 497 U.S. 1, 19 (1990). However, to insure room for imaginative expression and rhetorical hyperbole, a statement of opinion is actionable only if it has an explicit or implicit factual foundation and is therefore, objectively verifiable. *White*, 909 F.2d at 522. "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is

erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 19-20, (where the Supreme Court held that a reasonable fact finder could conclude that statements in a reporter's column implied assertions that a high school wrestling coach perjured himself in a judicial proceedings, and this was sufficiently factual to be susceptible of being proved as true or false). In determining whether an alleged defamatory statement merits First Amendment protection enjoyed by an opinion, the totality of circumstances must be analyzed, including the full context of the statement, and the broader context or setting in which the statement appears. *Ollman*. 750 F.2d at 979. Defendants make two unjustifiable contentions regarding their broadcast of the statement Plaintiffs "advocated using foreign enemies against America because Christians aren't doing the job by killing gays and lesbians." Specifically, they claim that Maddow did not make such a statement. Second, Defendants baselessly allege that this statement is rhetoric, loose, figurative' language that expresses a point of view. Defs.' Memo at 27. However, both arguments are unfounded.

Defendants concede that Maddow did say "foreign enemies rising up against America because Christians aren't doing the jobs of killing the gays." Defs.' Memo at 27. What Defendants fail to acknowledge, however, is the effects Maddow's statement had in the context in which it was presented. Maddow's statement immediately followed the audio clip of Dean's statements, not Dean's statement in its entirety, but Defendants "edited" false light and defamatory version of Dean's statement. Defs.' Exhibit 36. Specifically, Defendants aired the selected comments from Dean, "Muslims are calling for the execution of homosexuals in America…If America won't enforce the laws, God will raise up a foreign enemy to do just that…" and Maddow immediately, without hesitation, in an instant stated "foreign enemies rising up against America because Christians aren't doing the jobs of killing the gays." Defs.' Exhibit

36. Defendants attempt to claim that because "advocated" was not explicitly stated by Maddow, Plaintiff is precluded from vindicating his legally cognizable rights. However, Defendants intentionally mislead the Court by failing to address the implications of Maddow's statements as taken in its context. Since defamatory statements are to be considered in their context, Maddow was referring to Plaintiffs as being the ones that "advocated using foreign enemies against America."

Defendants further contend that Maddow's statement cannot reasonably be interpreted as stating actual facts. Defs.' Memo at 27. Through presenting the statement immediately after the broadcast of the defamatory version of Dean's statement, Maddow clearly indicated that it was, in fact, Plaintiffs that were the ones advocating use of foreign enemies against America. Defs.' Exhibit 36. Despite Defendants' contention, this is an objectively verifiable fact. A reasonable person would interpret Defendants' statement as stating actual facts about Plaintiffs, that Plaintiff advocated the use of foreign enemies against America. Specifically, Plaintiffs are well-known for advocating the need to be grateful for the liberty our nation provides us, taking great pride in America. (youcanruninternational.com) Moreover, in examining the entirety of Dean's comment, it is evident that in no way did Plaintiff advocate the use of foreign enemies against America. Through insinuating that Plaintiffs did, in fact, support the use of foreign enemies against America because Christians aren't doing the job by killing gays, Defendants raised an objectively verifiable fact, capable of being as proven true or false.

Providing further guidance is *Milkovich v. Lorain Journal Co.,* where the Supreme Court held that a reasonable fact finder could conclude that statements in a reporter's column implied assertions that a high school wrestling coach perjured himself in a judicial proceedings, and this was sufficiently factual to be susceptible of being proved as true or false. *Milkovich,* 497 at. 21.

The Court reasoned that it never intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.' *Rodriguez v. Panayiotu,* 314 F.3d 979, 985 (9th Cir. 2002), *citing Milkovich,* 497 U.S. at 19. The Court further indicated that a false assertion of fact could be libelous even though couched in terms of opinion. *Moyer v. Amador Valley Joint Union High Sch. Dist.*, 225 Cal.App.3d 720 (1990). "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich,* 497 U.S. at 19-20. As such, statements including provable false factual assertions which are implied in the context of an opinion are not protected from defamation liability under the First Amendment. See *Milkovich,* 497 U.S. at 19.

Similarly, Defendants are clearly attempting to falsely disguise a blatant factual assertion as an opinion. They contend that Maddow was merely expressing a subjective view or opinion. However, as *Milkovich* indicates, even though Defendants' attempt to couch their factual assertion in the form of an opinion, Maddow's statement, at a minimum, is an erroneous assessment of the stated facts. Through broadcasting only three unconnected and unrelated statements of Plaintiffs, in addition to omitting any reference to Plaintiffs' continued position that they never have and never will, advocate for the execution of homosexuals, Defendants exploited the opportunity in making erroneous assessments by using the presented quotes as their basis.

Essentially, Defendants intentionally omitted substantial and material facts, thereby creating an inference that Plaintiff advocated the killing of homosexuals. Based on the broadcasted three statements, Defendants maliciously went even further by, in their words, "forming a conjecture" that Plaintiffs advocated using foreign enemies against America. Defs.'

Memo at 30. As such, through their erroneous assessment of Plaintiffs' comments in which they, themselves, manipulated, Defendants statement clearly implies a false assertion of fact.

Similarly, Defendants further contend that their broadcast statement that persons like presidential candidate Bachmann and Plaintiffs are "bloodthirsty" and were calling for the "upping of the bloodshed in America's culture wars," also constitute "rhetorical hyperbole." They unjustifiably assume that viewers would understand the statements to be expressions of Maddow's opinion intended to spark debate and discussion. Defs. Memo at 30-31. However, Defendants' arguments fail for the same reasons previously mentioned. Specifically, they fail to fully and accurately convey the context in which the statements appeared. Even more convincing is that, while Defendants attempt to avoid proceeding with litigation and thus liability by couching factual assertions as opinion, it is clear that their assessments of the facts that form the bases of their opinion is erroneous. See *Milkovich*, 497 U.S. at 19-20. Defendants failed to present any support for formulating this so-called opinion, opting to present the statement as if it were Plaintiffs' own words. Thus, despite Defendants plea to recognize the statements as rhetorical hyperbole, they are recognizably false assertions of fact. See *Grass v. News Group Publications, Inc.*, 570 F.Supp. 178 (S.D.N.Y. 1983), (stating that when statements of opinion convey clear implication of underlying facts that would confirm opinion but are unknown to reader or listener, words may be actionable under defamation law).

4. Defendants' Statements are Not Part of the Conventional Give-And-Take in Our Economic and Political Controversies.

Further providing guidance is *Cafeteria Union v. Angelo,* 320 U.S. 293 (1943). The Court acknowledged that the use of loose language or undefined slogans is part of the conventional give-and take in our economic and political controversies. However, there is a limit as to what the court will recognize as protected. The court in *Cafeteria Union,* in applying this standard,

held that continuing representations unquestionably false are not constitutional prerogatives. *Cafeteria Union,* 320 U.S. at 295. Similarly, in *Cianci v. New Times Pub. Co,* the court held, with regards to an article, that the "…charges of rape and obstruction of justice were not employed in a loose, figurative sense or as rhetorical hyperbole…Such serious charges have not yet become undefined slogans that are part of the conventional give-and-take in our economic and political controversies." *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d. Cir. 1980). The court reasoned that the effect of the article was not simply to convey that a man was unworthy of the confidence of voters but rather to produce a specific image of depraved conduct. *Id.* Similarly, Defendants charge that Plaintiffs were calling for the "upping of bloodshed in America's culture wars" is far from becoming part of the conventional give-and-take of political controversies, particularly when taken in conjunction with the allegation that Plaintiffs advocated "using foreign enemies against America." Compl. ¶ 10. Defendants did not merely attempt to deter voter confidence in specific political candidates given their support of Dean, but also to produce a specific image of depraved conduct that Plaintiff advocated bloodshed against America. As such, for these reasons, Maddow's statements fail to constitute an opinion but rather, are clearly false assertions of fact that have minimal, if any, social value.

5. Defendants' Calculated Falsehoods are Clearly Defamatory, Injuring Plaintiff in his Reputation.

The First Amendment guarantees free and uninhibited discussion of public issues, only when such discussion is not false, misleading, or does not constitute false light. However, there is another side to the equation. The Supreme Court has recognized the important social values which underlie the law of defamation and have acknowledged that "society has a pervasive and strong interest in preventing and redressing attacks upon reputation. *Milkovich,* 497 U.S. 1, 22 (1990*), Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). After all, "The right of a man to the

protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Milkovich*, 497 U.S. at 22, citing *Rosenblatt*, 383 U.S. at 92-93 (concurring opinion). Through material omissions and calculated falsehoods, there is no doubt that Plaintiffs have been defamed. 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*, 909 F.2d at 518, 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 and they have prayed for a jury trial.

Specifically, there is no doubt that in omitting material facts, Defendants conveyed a substantially false and misleading statement. Knowing Plaintiffs position in the community and as the founder of YCR, Defendants, through their defamatory statements, lowered Plaintiffs' reputation in the community. Plaintiff Dean and YCR seek to restore Judeo-Christian and family values to society. Specifically, they strive to positively influence the nation's youth. Compl. ¶ 2. As an ordained minister, both nationally and internationally, Plaintiff Dean speaks at a wide array of venues, including public schools, preaching about the dangers of alcoholism and drug abuse, while instilling moral values in the youth. (youcanruninternational.com). He speaks on the

spiritual heritage and foundation of the United States. In fact, he advocates the importance of expressing gratitude for the liberty our nation provides us. (youcanruninternational.com). As a result of his firm moral foundation, and mission to instill such values in our vulnerable youth, it is no surprise that school officials and students both praise the positive impact of Plaintiff Dean's message. http://www.nytimes.com/2011/09/25/fashion/michele-bachmann-and-the-makingofanacolyte.html?pagewanted=2&_r=1.

Through Defendants calculated falsehoods, Plaintiffs' reputation and livelihoods have been irreparably damaged. As a result of Defendants' false and misleading insinuation that Plaintiffs advocated the killing of homosexual, people questioned the credibility of Plaintiffs. After all, Plaintiff advocated the importance of expressing gratitude for the liberty the United States provides. Now, the Defendants perpetuated the notion that, through advocating killings of homosexuals, Plaintiffs did not, in fact, stand by the liberty granted to people. After all, Defendants falsely insinuated and in fact openly stated that Plaintiffs advocated the taking of the lives of homosexuals, clearing contradicting Plaintiffs' firm belief in our nation's grant of liberty. Moreover, it is hard to conceive any bases for believing that the killing of an innocent person is moral. Plaintiffs, taking pride in their firmly rooted morals, are now facing allegations that they are in fact immoral as a result of Defendants' false insinuations. In fact, through irreparably damaging Plaintiff Dean's reputation, Defendants have also caused excessive business damages, causing the amount of contributions to falter as a result of their false and defamatory statements. As such, there is no doubt that Defendants statements, material omissions, and manipulations, constitute defamatory declarations.

Nothing more clearly indicates the lack of value in Defendants' defamatory statements, than the threats that ensued as a result. By conveying such defamatory meaning, Defendants

essentially put Plaintiffs lives in peril. Subsequent to Defendants broadcast, Plaintiff was met with horrifying, atrocious, deadly, threats to his life. Compl. ¶11. In fact, the threats received by Plaintiff became so severe that they have been reported to the Federal Bureau of Investigation and are under investigation. *Id.* One such threat stated, "Why Bradlee Why? Now I'm gonna have to kill you! I thought we were gonna cut each others' hair then have sex, but you stood me up! I am so upset that I think I may just have to blow up your ministry instead! Good bye, forever, BQ." *Id.* Some people went as far as posting pictures and providing the physical address of Plaintiffs on their website, providing a roadmap to where Plaintiff could be found and thus, be harmed. *Id.* Interestingly, while Defendants accused Plaintiffs of advocating "bloodshed", they, themselves, were actually inciting such violence. Compl. ¶¶10, 11. Essentially, through Defendants maliciously executed defamatory statements, Defendants made a man renowned for his moral values into a hated and despised person, such that Plaintiffs' own life was and remains in danger. While Defendants may contend the First Amendment protects their speech, it is precisely this type of speech that is clearly outweighed by the social interest in order and morality.

6. Defendants' Statements Were Of and Concerning Plaintiff YCR.

While there is no doubt that Defendants' defamatory statements were of and concerning Plaintiff Dean, Defendants content that the defamatory statements do not concern Plaintiff YCR. Specifically, they argue, "…allegations of defamation by an organization and its members are not interchangeable. Statements which refer to individual members of an organization do not implicate the organization." *Jankovic*, 494 F.3d at 1089. This principle is not absolute, however. *Brayton v. Crowell-Collier Publ'g Co.*, 205 F.2d 644, 645 (2d Cir. 1953). To satisfy the of and concerning element of a defamation claim, it suffices that the statements at issue lead the listener

to conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named.

Defendants argue that the defamatory statements referred only to the re-broadcast of Dean's statement and were thus, personal to Dean. Defendants further claim that such defamatory statements cannot be imputed to YCR. Defs.' Memo at 22, n.7. However, Defendants fail to acknowledge the references made to YCR. Although not explicitly, they were sufficient to lead the viewers to conclude that the Defendants were referring to YCR as well. Specifically, on Defendants' August 2010 broadcast, YCR's website was prominently displayed in the background as Maddow read Dean's statement. Defs.' Memo at 10. Similarly, on the May 2011 broadcast, the YCR website was once again simultaneously displayed on the screen as the defamatory statements were played. Defs.' Memo at 12. There is no doubt that a listener could conclude that the broadcast referred to YCR. The fact that YCR's statement was, in Defendants own words, "prominently" displayed on the background as the defamatory words were simultaneously read would lead any viewer to associate the defamatory statements with YCR. As such, there is no merit to Defendants far-fetched argument that the statements do not concern YCR. These are issues for the jury to decide in any event and the argument of Defendants is at best premature.

C. Fair Comment Privilege Doesn't Apply.

The Fair Comment Privilege has been recognized in this jurisdiction as "now obsolete in light of the broader first amendment protections afforded expressions of opinion." *Pearce v. E.F. Hutton Group, Inc.*, 664 F.Supp. 1490, 1503 (D.C. 1987). Even if the doctrine was not obsolete, it would still be inapplicable to the case at bar. *Id.* The Fair Comment privilege embraces criticism of matters of interest to the public, provided that such criticism is not motivated by

malice. *Safe Site, Inc., v. National Rifle Ass'n of America*, 253 F.Supp. 418, 419 (D.D.C. 1966). "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, §566. A conclusion based on a misstatement of fact is not protected by the Fair Comment Privilege. *Jankovic v. International Crisis Group*, 389 U.S.App.D.C. 170, 173 (D.C.Cir. 2010). See Also *Washington Times Co. v. Bonner*, 86 F.2d 836, 841 n.4 (D.C. Cir. 1936) ("The facts asserted as predicate of the fair comment must be true…). The fair comment defense applies only to opinions, not misstatements of fact. *Fisher v. Washington Post Co.*, 212 A.2d 335, 337 (D.C. 1965). Defendants' claim that their speech was protected by the Fair Comment Privilege fails for two significant reasons. First, the broadcasts of the false and defamatory statements were purely motivated by malice, done solely for the purpose of causing harm. Second, despite their contention that such statements were merely opinion, it is evident that the defamatory comments were assertions of actual fact, merely disguised as opinionated commentary.

As already examined, it is evident that Defendants' broadcast is anything but opinion and was clearly done with a great degree of malice. Almost a year after their initial broadcast, on May 11, 2011, Defendants again engaged in a tirade of defamatory statements by attributing false and misleading comments and beliefs to Plaintiffs, clearly acting with malice in placing Plaintiffs in a false light. Knowing that Plaintiffs had immediately issued a disclaimer following their original comment, stating that they do not advocate killing homosexuals, Defendants intentionally and maliciously ignored this fact. Compl. ¶10. While Defendants brought up the disclaimer in their broadcast a year prior, albeit in a derisive and misleading manner, they noticeably left absent any reference to such disclaimer on May 2011, clearly intending to further

insinuate that Plaintiffs advocated the killing of homosexuals. *Id*. It is important to note that this omission of the disclaimer was in conjunction was a substantially edited version of Plaintiffs' original statement. Already placing Plaintiffs in a false light, Defendants, to ensure Plaintiffs were caused harm to boost ratings and revenues, added so-called "commentary." Specifically, Defendants added, Plaintiffs were calling for the "upping of the bloodshed in America's culture wars" and that Plaintiffs "advocated using foreign enemies against America." *Id*. It cannot be stressed enough that Plaintiffs never stated this comment nor did they encourage this behavior. Rather, Defendants added this commentary and presented it in a manner that clearly implied that it was Plaintiffs' own belief. No one can legitimately contend that a belief that foreign enemies should be used against America would not be met with hatred, scorn, and likely violence. This is exactly what Defendants sought to encourage by attributing the false beliefs to Plaintiffs.

Further evidencing Defendants malicious mindset is the motive behind Defendants' actions. Seeking to boost their ratings the leftist viewership market, while harming presidential hopeful Michele Bachmann, Defendants sought to specifically harm Plaintiffs, knowing that Bachmann supported Plaintiffs. Compl. ¶11. In fact, the defamatory statements appeared amidst Maddow's criticism of conservative political figures. Defs.' Exhibit 36. The implication is clear. By associating Plaintiffs with conservative political figures and then damaging Plaintiffs by insinuating false facts, Defendants were able to indirectly harm the conservative market while gaining support from liberal viewers. As such, it is clear that Defendants acted with the requisite degree of malice, acting solely to harm Plaintiffs and, thereby, precluding them from the protection of the Fair Comment Privilege.

III. DEFENDANTS' MOTION TO DISMISS PURSUANT TO SUPER. CT. CIV. R. 12(B)(6) MUST BE DENIED.

Under Super. Ct. Civ. R. 12(b)(6), dismissal is warranted only when "the plaintiff can prove no set of facts supporting their claims." *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997). In deciding a motion to dismiss, the court must accept as true all well pleaded allegations and views them in the light most favorable to the non-moving party. *Oparaugo v. Watts*, 884 A.2d 63, 79 (D.C. 2005). The Superior Court's general rules of pleading, like the Federal Rules of Civil Procedure, only require a short plain statement of the claim showing that the pleader is entitled to relief. See Comment to Rule 8, which states that Superior Court Rule 8 is identical to Federal Rules of Civil Procedure 8. As many courts have indicated, 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. As previously set forth, D.C.'s anti-SLAPP Act does not apply and is unconstitutional in any event. Given that Plaintiffs are even likely to succeed on the merits of the claim, a higher pleading standard than Super. Ct. Civ. R. 12(b)(6), Defendants' Motion should be denied.

IV. CONCLUSION

For the compelling foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Special Motion to Dismiss under the anti-SLAPP Act and Motion to Dismiss under Super. Ct. Civ. R. 12(B)(6).

Dated: May 1, 2012

Respectfully Submitted,

/s/ *Larry Klayman*
Larry Klayman, Esq.
D.C. Bar No. 334581
Klayman Law Firm

2020 Pennsylvania Ave. NW #345
Washington, DC 20006
Tel: (310) 595-0800
Email: leklayman@gmail.com