**IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | |
|---|---|
| **DANIEL M. SNYDER,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**CREATIVE LOAFING, INC.; CL WASHINGTON, INC. (d/b/a WASHINGTON CITY PAPER); and DAVE McKENNA**<br><br>**Defendants.** | **Civil Action No. 2011 CA 003168 B**<br>**Judge Todd E. Edelman**<br><br>**Next court date: TBD**<br>**Event: Hearing on Defendants' Special Motion to Dismiss** |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS THE COMPLAINT**

Richard W. Smith
D.C. Bar No. 465563
Jacqueline Browder Chaffee
D.C. Bar No. 986710
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
202-756-8000

- and –

Patricia L. Glaser, Esq. (pro hac vice)
G. Jill Basinger, Esq. (pro hac vice)
GLASER, WEIL, FINK, JACOBS,
HOWARD, AVCHEN & SHAPIRO, LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067
310-553-3000

*Attorneys for Plaintiff Daniel M. Snyder*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**



**Rules**

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

| | |
|---|---|
| **DANIEL M. SNYDER,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**CREATIVE LOAFING, INC.; CL WASHINGTON, INC. (d/b/a WASHINGTON CITY PAPER); and DAVE McKENNA**<br><br>**Defendants.** | **Civil Action No. 2011 CA 003168 B**<br>**Judge Todd E. Edelman**<br><br>**Next court date: TBD**<br>**Event: Hearing on Defendants' Special Motion to Dismiss** |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS THE COMPLAINT**

**INTRODUCTION**

Defendant Dave McKenna wrote, and Defendant Washington City Paper published, among other things, that Dan Snyder "got caught forging names as a telemarketer with Snyder Communications." This statement specifically and unambiguously accuses Dan Snyder of personally committing the crime of forgery. The phrase "as a telemarketer with Snyder Communications" underscores that the statement is about Dan Snyder personally committing a crime, and not, as Defendants now assert, about Snyder Communications being involved in a telephone "slamming" case in 2001.

Dan Snyder, after asking for an apology and a retraction, but receiving neither, filed this suit for libel *per se* based on a limited number of Defendants' false and malicious statements. Defendants do not argue that the statements at issue are true. Instead, they take the position that no reasonable person could read the words accusing Dan Snyder of forgery as accusing Dan Snyder of forgery. They also argue that their statements are all rhetorical hyperbole that could not have been believed because they are an "alternative newsweekly" and that their writer, Dave McKenna, is known for playing fast and loose with facts and language. Past sloppiness and a

writer's poor reputation for accuracy are no defense to a valid claim for libel. Even bad newspapers cannot publish lies.

Knowing that discovery will reveal the depths of their malice, and knowing that a jury of reasonable people will find against them, Defendants responded to Mr. Snyder's lawsuit by invoking the District of Columbia's newly enacted, and not yet legally tested, Anti-SLAPP Act. Defendants' allegation that Mr. Snyder's lawsuit is a SLAPP suit is as off the mark as their defense of the statements.

Defendants' motion must fail because the D.C. Anti-SLAPP Act is both unconstitutional under the D.C. Home Rule Act and inapplicable to these facts since the comments Mr. Snyder sued over were not about issues of public concern. Moreover, Mr. Snyder will establish that his case is meritorious given that the statements at issue are plainly false and that Defendants' excuses of "hyperbole," "subsidiary meaning," and "no one could have believed us" fail as a matter of law.

*First*, the Anti-SLAPP Act is unconstitutional in its application here, as *ultra vires* under the D.C. Home Rule Act, as it establishes a new procedure for the early adjudication of SLAPP suits, and therefore is "with respect to" Title 11 of the D.C. Code. While Congress delegated to the D.C. Council the right to legislate on local issues, it specifically prohibited the Council from passing legislation to create or modify the procedures used to adjudicate cases filed in the D.C. Superior Court. By enacting legislation that is not only "with respect to," but also in conflict with, existing procedures of the D.C. Superior Court, the D.C. Council has far exceeded the powers Congress delegated to it.

*Second*, even if the Home Rule Act did not render the D.C. Anti-SLAPP Act unconstitutional, the Anti-SLAPP Act would still not apply to the present facts because the issues discussed do not deal with matters of public concern. Any other interpretation of the Act would be unreasonably broad, and would render meaningless the statutory language that does not permit this Act to be applied to purely private interests. Because the Anti-SLAPP Act has not yet been interpreted by the trial and appellate courts with jurisdiction over the District of

Columbia, this Court should look to the interpretations given to other Anti-SLAPP statutes in other jurisdictions to be guided on the appropriate reach and proper effect of Anti-SLAPP statutes. We are aware of no such statute in any other jurisdiction that has been read as broadly as Defendants would have this Court read D.C.'s Anti-SLAPP Act.

*Third*, even if the Court were to find the D.C. Anti-SLAPP Act constitutional, and that the comments at issue revolved around matters of public concern, Defendants' motion would still fail because Mr. Snyder will demonstrate that his claims are meritorious. The purpose of the Anti-SLAPP Act is not to change substantive law, but to save defendants money by avoiding discovery in cases that will inevitably result in summary judgment for the defendants. If a suit has sufficient merit to survive summary judgment, it by definition does not create the harm the Act is designed to cure and cannot be deemed a meritless suit subject to dismissal as a SLAPP. Mr. Snyder will establish that the statements at issue in this suit are false, not hyperbolical, and the subsidiary meaning doctrine is not applicable.

Plaintiff asks the Court to deny the present motion because the D.C. Anti-SLAPP Act is unconstitutional and inapplicable to claims like these which arise out of issues of private concern. Moreover, even if Defendants can overcome both of these hurdles, and they cannot, the only element in dispute is a simple one: are any of the three statements Plaintiff sues under false.[1]

For example, could a reasonable jury find that the statement Dan Snyder "got caught forging names as a telemarketer with Snyder Communications" meant that Dan Snyder personally got caught forging names when he worked as a telemarketer with Snyder

[1] In nearly a foot of briefing papers, Defendants notably never denied that their statements were published with actual malice, and at the July 20 status conference, counsel for Defendant McKenna expressly stated that Defendants, in fact, were not defending this case (at least for SLAPP purposes) on grounds that Plaintiff could not show actual malice. Counsel for CL Washington strangely refused to echo the concession at the status conference, and the Court expressly reserved the actual malice issue for another day. Thus, this brief does not address the issue of actual malice. Nor, in the interest of time and pages, does this brief directly address the other elements of Plaintiff's claim – none of which are in dispute.

Communications? If so, this motion must be denied since Defendants admit that Dan Snyder had never even been accused of, much less been "caught," forging anyone's name. Could a reasonable jury find that the statements that Mr. Snyder "cut down trees protected by the National Park Service" and "made a great view of the Potomac River for himself by going all Agent Orange on federally protected lands" to mean that Mr. Snyder had violated federal law or National Park Service rules and regulations in removing trees on his property in Potomac, Maryland? If so, this motion must be denied since Defendants' own exhibits state that Dan Snyder was not even accused of doing, much less that he did, anything illegal. Could a reasonable jury find that the statement Mr. Snyder was "tossed off the Six Flags board of directors" meant that he was thrown off the board? If so, this motion must be denied since the evidence clearly proves Mr. Snyder was offered a position on the board of Six Flags, and that he declined the opportunity, directly contrary to the allegation that he was involuntarily removed – or "tossed off" – the board of this company.[2]

Notwithstanding that Defendants most vitriolic rhetoric (at 8-11, 20-21) is directed at Mr. Snyder's election to file suit, it is plain that he – like any other aggrieved person – has the right to do so. *See Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens."); *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983) ("The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution."). Indeed, it is well-settled that the marketplace of ideas places no value on false and defamatory statements made about any individual, whether they be public or

[2] These statements obviously assume the summary judgment standard applies. If a more stringent standard were to be applied, however, Plaintiff's position is that he has herein demonstrated that he likely will prevail on the merits.

private figures, famous or infamous. *See Solers, Inc. v. John Doe*, 977 A.2d 941, 951 (D.C. App. 2009). And whatever Mr. Snyder's motivation – to punish those who publish such false slanders, to seek redress for harm, or to deter others from recklessly republishing the same slander – he need not apologize for exercising his rights. Mr. Snyder's election to file suit does not in any way transform his legitimate complaint into a SLAPP.

Defendants' motion is frivolous. It is both legally wrong, by invoking the Anti-SLAPP Act, and factually wrong, by defending the blatantly false statements made against Mr. Snyder. This motion should be denied, with fees and costs awarded against Defendants.

## ARGUMENT

### I. THE D.C. COUNCIL'S ANTI-SLAPP ACT IS UNENFORCEABLE AND CANNOT BAR MR. SNYDER'S SUIT BECAUSE IT VIOLATES THE HOME RULE ACT.

#### A. Through The Home Rule Act, Congress Prohibited The D.C. Council From Enacting Legislation With Respect To The District's Courts.

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. The D.C. Council did not heed this prohibition.

The prohibition on the D.C. Council's authority to interfere with the Superior Court stems directly from the Constitution. Article I, Section 8 reserves exclusively to the Congress the authority to legislate over the District of Columbia. *See* U.S. Const. art. I, § 8 ("The Congress shall have the power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States"); *Jackson v. D.C. Bd. of Elections & Ethics,* 999 A.2d 89, 94 (D.C. 2010) ("The Constitution vests Congress with the authority 'to exercise exclusive Legislation' over the District.").

Although Congress has delegated to the D.C. Council authority to legislate in matters of local concern, Congress has never delegated to the D.C. Council authority to legislate in areas

concerning the D.C. Courts. *See* District of Columbia Self-Government and Government Reorganization Act, Pub. L. No. 93-198, 87 Stat. 777 ("Home Rule Act"); *Jackson*, 999 A.2d at 94-95 (describing Home Rule Act's delegation of legislative authority to Council). In fact, Congress has expressly prohibited the Council from enacting legislation "with respect to any provision of Title 11," which is the D.C. Code Title relating to the courts. *Id.* at 95 n.5 (noting that Sections 601 to 603 of Home Rule Act "expressly restrict the Council's power to legislate").

The prohibition on the D.C. Council is as plain and unmistakable as it is absolute:

> The Council shall have ***no authority*** to . . . enact any act, resolution, or rule with respect to any provision of Title 11 of the District of Columbia code (relating to organization and jurisdiction of the District of Columbia courts)

Pub. L. 93-198, 87 Stat. 774 § 602(a)(4) (emphasis added).

Although entitled "Organization and Jurisdiction of the Courts," Title 11 of the D.C. Code is quite broad and deals with, among other things, all aspects of civil procedure. For example, Congress through Title 11 established the federal and local court systems for the District of Columbia, identified each court's jurisdiction, conferred contempt powers, and required the Superior Court to "conduct its business according to the Federal Rules of Civil Procedure." *See* D.C. Code. §§ 11-101 (vesting judicial authority in Courts); 11-921 (creating Superior Court jurisdiction); 11-944 (conferring contempt powers); 11-946 (providing that "Superior Court shall conduct its business according to the Federal Rules of Civil Procedure... unless it prescribes or adopts rules which modify those Rules"). Notably, Congress authorized only the Superior Court – not the D.C. Council – to adopt and enforce other procedures that the Court deemed necessary, and it allowed only the Superior Court – not the D.C. Council – to adopt procedures that would modify the Federal Rules (under specific procedures that Congress also set forth in the statute). *See id.* § 11-946 ("Rules which modify the Federal Rules shall be

submitted for the approval of the [D.C. Court of Appeals]. The Superior Court may adopt and enforce other rules as it may deem necessary... if such rules do not modify the Federal Rules.").

As this Court is well-aware, the D.C. Superior Court, pursuant to its exclusive jurisdiction, has exercised its authority to adopt its own rules of procedure for civil actions, including rules governing discovery, motions for dismissal, and other dispositive motions that afford parties to civil actions rights and opportunities both to discover the evidence in their opponents' and non-parties' possession and to defend themselves in court. *See, e.g.,* D.C. Super. Ct. R. Civ. P. 26-37 (discovery and depositions); 12(c) (motions for judgment on the pleadings); and 56 (summary judgment). Together, the Home Rule Act and Title 11 evince Congress's intention for these rules to occupy the field as to the rules and procedures by which the D.C. Courts are to conduct their affairs. Indeed, the D.C. Courts have zealously guarded their jurisdiction against encroachment by the D.C. Council. For example, in *Stuart v. Walker*, the D.C. Court of Appeals struck down a D.C. Council attempt to modify the definitional parameters of the finality of court orders, an effort the Court held was beyond the Council's authority under the Home Rule Act. *Stuart v. Walker*, 6 A.3d 1215, 1219 (D.C. 2010).

### B. The Anti-SLAPP Act Violates The Home Rule Act Because It Is Legislation That Affects The Procedures Of The D.C. Superior Court.

#### 1. The Anti-SLAPP Act Creates New Procedures That Conflict With Superior Court Rules And Must Be Rejected.

The D.C. Anti-SLAPP Act is undoubtedly a procedural statute designed to modify the manner in which the Superior Court conducts its affairs; there can be no honest dispute that it is not. *See Blumenthal v. Drudge*, 2001 WL 587860, at *1 (D.D.C. Feb. 13, 2001) (finding that California's anti-SLAPP statute, upon which D.C. Act is modeled, is "a procedural rule"). The Act clearly purports to change the rules in libel cases, and to impose those changes on the Superior Court. Absent the Anti-SLAPP Act, Defendants in this case, for example, would have

been required to file Answers under Rule 12(a)(1), or to otherwise plead under Rule 12(b) by June 17, 2011. Discovery would not have been stayed, and the Defendants would have been required to respond to Plaintiff's written Requests for the Production of Documents under Rule 34 by June 20, 2011, and to sit for their depositions under Rule 30, which were noticed for July May 5-7, 2011. Moreover, absent the Act, the Court would likely have set a schedule, and the parties would be proceeding toward trial.

In turn, had Defendants filed a motion for summary judgment instead of a Special Motion to Dismiss, Plaintiff would be entitled to denial of the motion as premature, or at least to ask for discovery under Rule 56(f). Ultimately Defendants' motion would be denied – with no burden shift – if Defendants failed to demonstrate that there is no "genuine issue as to any material fact," so that "the moving party is entitled to judgment as a matter of law." *See* D.C. Super. Ct. R. Civ. P. 56(c). The case would then proceed to trial where Mr. Snyder would finally get his day in Court and could vindicate his rights. Instead, Defendants filed a Special Motion to Dismiss that does not exist in any current rule of Court, seek to hold Plaintiff to a legal standard of proof that does not exist in any current rule of Court, and have exploited an automatic stay that would not otherwise be available under any current rule of Court.

This total disruption of the normal civil litigation process is exactly what the Act is designed to create. Indeed, the Act's purpose is to circumvent the normal litigation process in favor of certain litigants, which the D.C. Council believed should be able to fast-forward to dispositive motions (with a burden shift in defendants' favor on those dispositive motions), without having first to endure normal discovery. Through the Anti-SLAPP Act, the D.C.

Council abolished the old procedures, and replaced them with an entirely new system of its own creation.[3]

The Act does not just slightly modify current procedural rules, it obliterates them. Good or bad, gone are the procedural advantages of discovery. Costly to defendants or not, lost is the ability to earn a day in court by creating a genuine issue of material fact. In their place, as amici describe them, is "a 'special motion to dismiss,' which must be granted unless the plaintiff can show that he or she 'is likely to succeed on the merits.' D.C. Code § 16-5502. End of story." Amended Memorandum of the American Civil Liberties Union of the Nation's Capital, *et al.*, as Amici Curiae, No. 2011-CA-003168-B, at 6 (filed July 6, 2011).

Although the Anti-SLAPP Act actually contradicts the Superior Court's rules of procedure, and therefore is unconstitutional on its face, the Act would be unconstitutional even if its procedures were not contradictory with the Court's normal procedures.

### 2. Enacting Any Law "With Respect To" Title 11 Violates The Home Rule Act, Even If The New Procedures Are Not In Conflict With The Old.

Even though the very purpose of the Anti-SLAPP Act is to create a conflict with the ordinary rules of civil procedure, and to clear away the procedural hurdles that stand between defendants and early dismissal of meritless claims, the Anti-SLAPP Act would violate the Home Rule Act even if its procedures did not conflict with the rules of procedure. Any enactment by the D.C. Council "with respect to" Title 11, and therefore, "with respect to" the manner in which the Superior Court conducts itself, violates the Home Rule Act. *Jackson*, 999 A.2d at 95.

The Anti-SLAPP Act creates new procedures. Those procedures are clearly enacted "with respect to" the manner in which the Superior Court may conduct its business.[4] Thus, even

[3] Notably, the new procedures are so novel and foreign to this Court that the parties were invited to attend a status conference on July 20 for the sole purpose of providing guidance as to how to employ the new procedural mechanisms.

if the Court were to find that the Anti-SLAPP Act's procedures and the Superior Court's procedures can somehow coexist, the Home Rule Act is violated, and the Anti-SLAPP Act falls as an unconstitutional exercise of authority by the D.C. Council.

### 3. The Anti-SLAPP Act's New Rules Are Also Ineffective Because They Have Not Been Approved By The D.C. Court Of Appeals.

Under D.C. Code § 11-946, proposed procedures which "modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that Court." The Anti-SLAPP Act's new procedures clearly modify the Superior Court's Rules, have not been submitted to the D.C. Court of Appeals, and therefore are ineffective.

The conflict between the new procedures set out in the Anti-SLAPP Act and the Federal Rules is obvious and has been previously discussed. Moreover, several federal courts sitting in diversity have examined whether there is conflict between state Anti-SLAPP statutes and the Federal Rules under the *Erie* doctrine, held that a conflict exists, and consequently rejected the application of Anti-SLAPP procedures in federal court. *See Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1278 (N.D. Ga. 2007), *rev'd on other grounds*, 552 F.3d 1290 (11th Cir. 2008) (holding that Georgia Anti-SLAPP statute "is contrary to the Federal Rules of Civil Procedure and does not apply"); *South Middlesex Opportunity Council, Inc. v. Town of Framington*, No. 07-12018-DPW, 2008 WL 4595369, at *10 (D. Mass. Sept. 30, 2008); *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003) (ruling that Massachusetts Anti-SLAPP Act's burden-shifting provision is inapplicable in federal court because it directly

[4] The Anti-SLAPP Act's procedures are imposed upon the D.C. Superior Court by the D.C. Council and not adopted or created by the D.C. Superior Court. The Council's action in creating those procedures, therefore, conflicts with the procedural mechanism provided for by Congress in Title 11, and is void on that basis. *See* D.C. Code § 11-946 ("The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules.")

conflicts with Federal Rules of Civil Procedure); *see also Metabolife Int'l., Inc. v. Wornick*, 264 F.3d 832, 845-46 (9th Cir. 2001) (finding conflict between California's Anti-SLAPP statute permitting motion within 60 days of complaint and automatic stay of discovery and federal summary judgment rule's procedure requiring discovery); *Flores v. Emerich & Fike,* No. 07-15761, 2010 WL 2640625, at *2 (9th Cir. June 17, 2010) (holding that Rule 56 is in conflict with discovery provisions of California Anti-SLAPP statute); *Rogers v. Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 980-81 (C.D. Cal. 1999) ("Because the discovery-limiting aspects of [the California Anti-SLAPP statute] collide with the discovery-allowing aspects of Rule 56, these aspects . . . cannot apply in federal court"); *Verizon v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (noting that Ninth Circuit has "refused to apply certain discovery limiting provisions of the anti-SLAPP statute because they would conflict with Fed. R. Civ. P. 56"). For the very same reason that other state's Anti-SLAPP statutes have been held to be "procedural" in nature and therefore inapplicable in federal courts under *Erie*, the D.C. Anti-SLAPP Act is procedural in nature and therefore in violation of D.C. Code §11-946.

4. **Defendants' Counsel Agrees That The Act Is Procedural In Nature.**

The Anti-SLAPP Act is "procedural in nature" as counsel for Defendant McKenna himself has argued in a brief he filed last month in the United States District Court for the District of Columbia. Marc Bailen and Baker & Hostetler, L.L.P., counsel for Mr. McKenna, is also counsel of record for Defendants in *Sherrod v. Breitbart* -- the only other case to have thus far considered the D.C. Anti-SLAPP Act. In that case, counsel argued that the Anti-SLAPP Act was entirely "procedural." *See* Reply In Support Of Special Motion To Dismiss Complaint Under The District Of Columbia Anti-SLAPP Act of 2010 By Defendants Andrew Breitbart and Larry O'Connor, at 4, *Sherrod v. Breitbart*, No. 1:11-cv-00477 (D.D.C. filed June 3, 2011), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2011-06-03-

Support%20Anti-SLAPP.pdf (hereinafter, "*Sherrod* Reply") (arguing that Act should be applied to Sherrod's claims retroactively because of its "procedural nature").

Although the facts in the *Sherrod* case are undoubtedly different, the D.C. Anti-SLAPP Act is entirely the same. Thus, defense counsels' position on that issue should remain consistent. It does not. Although defense counsel admitted in his *Sherrod* brief that the D.C. Anti-SLAPP Act "does not change the law on defamation" and that "it merely creates a new mechanism to evaluate the sufficiency of those claims at the outset of the case," *id.* at 5, in Mr. Snyder's case, counsel argues that the Act confers a new type of defamation "immunity"—a substantive immunity counsel cannot square with his arguments in *Sherrod*, and an immunity that appears nowhere in the Act, *see* Mot. at 19-20, 22, 24.

Apparently fully aware of the Anti-SLAPP Act's constitutional defect (but unwilling affirmatively to raise the issue themselves), Defendants in their motion go to great lengths to describe the Act alternatively as "immuniz[ing] from liability speech about public figures" (at 2), conferring an "immunity" (at 19-20, 22, 24), and providing "substantive rights" (at 20, 24), as if to suggest that the Act is not procedural at all and that it somehow changes the law of defamation such that it creates a substantive immunity not previously available to a libel defendant. The suggestion is flatly wrong, and Defendants know it. The word "immunity" appears neither in the Act, nor in the legislative history of the Act. Defendants appear to be suggesting that the law of defamation no longer applies to public figures and that defendants are somehow "immunized" from any fallout for writing injurious and malicious lies about Plaintiff. Not only is this position wholly at odds with the position defense counsel took in the only other case dealing with the D.C. Anti-SLAPP Act – namely that D.C. Anti-SLAPP Act "does not change the law on

defamation" – but it is also at odds with the words and legislative intent of the D.C. Anti-SLAPP Act.

### 5. The D.C. Anti-SLAPP Act's Legislative History Establishes That It Is Procedural In Nature.

The procedural nature of the Anti-SLAPP Act (and thus its inherent constitutional defects) are highlighted in the legislative history submitted by the Defendants in this matter. Indeed, on the day the Committee on Public Safety & the Judiciary convened hearings, then-D.C. Attorney General Peter Nickles wrote to Committee Chairperson Phil Mendelson to voice his "concern" that the legislation "may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council." *See* Affidavit of Alia L. Smith, Esq., in Support of Defendants' Special Motion to Dismiss ("Smith Aff."), Exh. 27 at 23. Attorney General Nickles's concerns were well-founded, and were presumably the impetus for the committee report's self-serving and empty characterization of the Act as "substantive." *Id.* at 1-4.

Indeed, as Defendant McKenna's counsel stated in *Sherrod*: "The legislative history of the [D.C. Anti-SLAPP] Act further supports the *procedural nature of the statute*. Although the Committee Report references 'substantive' rights at various points, it is clear that the substantive rights are actually the creation of *expedited procedures* for quickly disposing of SLAPP suits." *Sherrod* Reply at 6 (emphasis added). Indeed, Mr. McKenna's counsel went on to argue that the D.C. Anti-SLAPP Act is procedural because the D.C. District Court had previously found that California's Anti-SLAPP statute, upon which the D.C. Act is modeled, was "a procedural rule." *See Blumenthal*, 2001 WL 587860, at *1 (D.D.C. Feb. 13, 2001).

Having admitted that the Anti-SLAPP Act affects the procedures employed by the Superior Court, Defendants must concede that the Act is "with respect to" Title 11, and consequently, an *ultra vires* act by the D.C. Council in excess of Congress's delegation of authority. The D.C. Anti-SLAPP Act is unconstitutional pursuant to Article I of the Constitution and the Home Rule Act, and Defendants' motion therefore must be denied.

## II. MR. SNYDER'S COMPLAINT IS DIRECTED AGAINST COMMENTS INVOLVING MATTERS SOLELY OF PRIVATE CONCERN WHICH ARE NOT COVERED BY THE ANTI-SLAPP ACT.

As an initial matter, the language of the D.C. Anti-SLAPP Act is contradictory. On the one hand, it states that all issues regarding public figures are covered by the Act. On the other hand, it specifically states that the Act shall not apply to statements of private concern. An analysis of the purpose and language of the Act, as well as a view of other states' interpretation of SLAPP law, leads to the conclusion that applying the Act to anything said about a public figure would be impermissibly broad, and that applying the Act exclusively to statements of public concern is the only interpretation consistent with the legislative intent of the Act. The statements at issue in this suit are of private concern.

### A. The Act Was Not Intended To Apply To All Statements Concerning Public Figures.

Although the Anti-SLAPP Act includes the phrase "public figure" as one of a number of elements that may comprise an "issue of public interest" (in Section 2(3) of the Act), that definition is *restricted* in the second sentence of that Section, which states that the "term 'issue of public interest' shall not be construed to include private interests." If one were to interpret every comment about a public figure as always embodying "issues of public interest" (as Defendants appear to suggest), however, then the concept of excluding private interests would lose all meaning. Moreover, sweeping everything dealing with public figures into the definition

of "issue of public interest" would be an unwarranted intrusion into the rights of public figures, especially given that public figures already have a heightened standard of proof. As established by the Supreme Court, in order to prove libel, public figures already have to prove that the writer acted with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). There is no justification, therefore, interpreting the D.C. Anti-SLAPP Act to require public figures to overcome the additional hurdle of an Anti-SLAPP motion when dealing with private, as opposed to public, issues. Given that public figures have the added burden of establishing actual malice, imposing that requirement on them for private statements, *prior to* any opportunity for meaningful discovery, is an additional burden that no court should allow to be applied. And, indeed, it is an additional burden the D.C. Anti-SLAPP Act does not impose.

Moreover, there is no justification for setting this separate requirement solely for public figures to meet in defamation cases. The purpose of the Act is to curb SLAPP suits. A SLAPP suit by its very name is a Strategic Lawsuit Against ***Public*** Participation. A suit dealing with statements unrelated to public issues cannot be a SLAPP suit by its very definition.

The Act's legislative history itself (attached to Defendants' moving papers) establishes that the purpose of Anti-SLAPP legislation in general – and the D.C. Anti-SLAPP Act in particular – is to protect those who "speak out politically" and who present their views in connection with matters of "political or public policy debate" to "a government body, official or electorate." *See* Smith Aff., Exh. 27 at 1-4. To apply the Act to nonpublic issues, therefore, would wholly contravene its purpose. Applying the Act to public figures suing over statements of private concern would wholly read out the exception in the Act that specifies that "issue of public interest" shall not be construed to include "private interests." Moreover, interpreting the Act to apply to public figures regardless of the content of the underlying statements at issue

would extend D.C.'s Act far beyond the statutory definition of "public interest" in the Anti-SLAPP statutes of any other jurisdiction. The only way to reconcile the contradictory language of the Act with its legislative history, legislative intent, and the laws in jurisdictions where Anti-SLAPP acts exist, is to deny Defendants' attempt to extend the Act to statements of private concern simply because they concern the affairs of public figures.

**B. The Allegations At Issue In the Instant Suit Are Of Private Concern.**

Defendants falsely accused Mr. Snyder of committing the crime of forgery. They alleged that Mr. Snyder broke federal law when he had the trees at his private residence cut down. They alleged that Mr. Snyder was tossed off the board of Six Flags. None of these statements deal with matters that are remotely of public concern; nor are they topics of public controversy, dispute, charge or allegation. In fact, assuming (as Defendants now assert) that the underlying facts concerning the "forgery" charge relate to claims about customer "slamming" by Snyder Communications in the late 1990s, it is difficult to imagine any current "issue" or public interest in them at all. Moreover, because Mr. Snyder does not hold, nor is he running for, public office, no decision about his character is required by the public which would put Mr. Snyder's past private, personal, and business activity on which he has brought suit here into issue before the public.

Because the District does not thus far have case law concerning what qualifies as private/public issues for purposes of Anti-SLAPP laws, a review of other courts' treatment of this issue may prove instructive. In California, known to have one of the most liberal applications on an Anti-SLAPP statute, the state's Anti-SLAPP statute has been held inapplicable to a defamation *per se* action, in which the plaintiff, like Mr. Snyder, was accused of committing a crime. *See Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1135-36 (2003). The Court noted that "there are no charges pending against plaintiff, and defendant has not taken

action intended to result in a criminal investigation or prosecution. The fact that defendant's statements accuse plaintiff of criminal conduct make them defamatory on their face. It does not automatically make them a matter of public interest." *Id.* at 1135.

The *Weinberg* court reasoned that encompassing false allegations of criminal activity as a matter of public interest under Anti-SLAPP protections would be antithetical to the purpose of the Anti-SLAPP statute. The Court concluded:

> Simply stated, causes of action arising out of false allegations of criminal conduct, made under circumstances like those alleged in this case, are not subject to the anti-SLAPP statute. Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law, without regard to the circumstances in which they were made—a result that would be inconsistent with the purpose of the anti-SLAPP statute and would unduly undermine the protection accorded by paragraph 1 of Civil Code section 46, which includes as slander any false and unprivileged communication charging a person with a crime, and the California rule that false accusations of crime are libel per se (citations omitted). For all of the reasons stated above, we agree with the trial court that defendant has failed to make the threshold showing required to support a special motion to strike.

*Id.* at 1136.

Defendants do not allege, nor can they, that the complained of statements deal with issues of public concern or public participation, or even that the statements seek to redress any type of harm. Other than merely being about a public figure, these statements are in no way related to issues of public concern. As such, they are not the proper subject of a motion under the D.C. Anti-SLAPP statute.

### C. Plaintiff's Motives For Filing This Suit, Although Appropriate, Are Not Relevant.

Defendants attempt to muddy the issues by arguing that Mr. Snyder had nefarious motives in bringing this suit. Although only the merit of his lawsuit, and not his motives, are at issue, it should be noted that Defendants are owned by a wealthy hedge fund which can afford extremely capable and expensive law firms. To characterize this suit as a traditional SLAPP suit

in which money is used to silence opposition is ludicrous. Moreover, an examination of the statements Defendants rely on to prove their point reveals that Mr. Snyder's attorney said nothing improper or different from anything that is said in most settlement negotiations. A statement that a newspaper should prefer to apologize and retract defamatory statements rather than spend hundreds of thousands of dollars to attempt to defend its lies is not tantamount to a real estate developer embroiling a protester in litigation to drive him into bankruptcy—the scenario Anti-SLAPP laws were created to curb. Likewise, the statement by Mr. Snyder's press relations representative that the lawsuit was a "warning shot" to the media simply stated the obvious, that Mr. Snyder is demonstrating that he will not tolerate plainly false and defamatory statements to be made about him. Anti-SLAPP laws were not created to give media a license to lie, even about public figures.

## III. MR. SNYDER WILL PREVAIL ON THE MERITS.

### A. In Determining Likelihood Of Success On The Merits, The Proper Standard To Apply Is Whether Plaintiff Can Substantiate A Legally Sufficient Claim Pursuant To Rule 56 Of The Federal Rules Of Civil Procedure.

Traditional SLAPP suits are meritless suits brought strategically for the purpose of preventing individual economically disadvantaged citizens from participating in public policy debates. George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation, Pace Env. L. Rev.*, Paper 132, 1 (1989). There is a substantial body of legislative history demonstrating that the D.C. Council passed the statute to limit only traditional SLAPP suits. *See* Smith Aff., Exh. 27, at 14. A "true" SLAPP suit requires the defendant to expend substantial sums on discovery, without recourse, only to prevail easily on summary judgment. *See id.* at 1, 3. The Anti-SLAPP Act accelerates the date on which a dispositive motion can be brought, and eliminates or greatly limits discovery in the interim, so that obviously meritless cases can be immediately dismissed. D.C. Code § 16-5502(a), (c). A suit that can survive a motion for summary judgment is by its definition not meritless. *See Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137,

1141 (D.C. Cir. 1970) (observing that "the summary judgment procedure contemplated by Rule 56 of the Federal Rules of Civil Procedure will serve admirably to eliminate the frivolous lawsuits which might occasionally arise"). If the lawsuit that Mr. Snyder has filed to seek redress for the personal attacks that Defendants have publicly made on him is meritorious on its face, or put differently, if it would survive summary judgment, then it simply is not a SLAPP suit.

### 1. Assuming The D.C. Council Has The Authority To Pass The Anti-SLAPP Act, It May Not Alter The Showing That The Plaintiff Must Make To Defeat A Motion For Summary Judgment.

Assuming for argument's sake that the Court is willing to overlook the fact that the D.C. Council is wholly without authority to enact a statute such as the Anti-SLAPP Act, which is by any measure, an Act "with respect to" a provision of Title 11, under no set of circumstances may the Court apply the Act's burden-shifting mechanism to decide the Special Motion to Dismiss.

Before the Court could allow the Special Motion to Dismiss at all, it would have to determine (erroneously) that the Act is *not* an enactment "with respect to any provision of Title 11." The Court would then have to determine (again erroneously) that the Act is *not* procedural in nature, since the Act's procedures were not adopted as set forth in Title 11. And finally, in an unabashed attempt to save the statute, the Court would have to pretend (another error) that the Special Motion to Dismiss is *not* special at all, but simply a Rule 12 (or in this case Rule 56) motion to dismiss that carries a "Special" name.

Even if the Court were to clear all these hurdles and were to allow the Special Motion, it still would have to apply a typical summary judgment standard when deciding the motion; that is, it would deny the motion if, taking the evidence in a light most favorable to the Plaintiff (after a reasonable opportunity for discovery), there existed genuine disputes as to material issues of fact such that Defendants were not entitled to judgment as a matter of law. To apply any other

standard would be impermissibly to toss out the Superior Court rules and to supplant them with the *ultra vires*, unconstitutional rules of the D.C. Council.

Thus, the Special Motion to Dismiss cannot be granted unless Defendants can demonstrate that no genuine dispute exists as to any material issue of fact and that they are entitled to judgment as a matter of law. This they cannot do, and have not even tried.[5]

### 2. Even In State Courts Where Anti-SLAPP Acts Unquestionably Apply, No Court of Which Plaintiff Is Aware Has Ever Held a Plaintiff To As Strict a Standard of Proof As Defendants Advocate Here.

Once it is determined that the speech in question falls under the purview of the Anti-SLAPP laws, courts in other jurisdictions typically require plaintiffs to meet their burden of success on the merits by establishing, like they would on a motion for summary judgment, that they can substantiate a legally sufficient claim.

In those jurisdictions where the Anti-SLAPP laws are interpreted broadly to cover a wider swath of cases, the statute's broad application is counterbalanced by an even more lenient burden of proof. "Although both California and Louisiana's statutes contain anti-SLAPP protections that encompass far more than citizen participation in government, both states limit the stretch of those protections through the second critical feature determining the scope of an anti-SLAPP law – the burden of proof." "Note: Protecting Informed Public Participation: Anti-

---

[5] Defendants' motion would fail as a motion for summary judgment, and would be denied, because it does not include the requisite statement of material facts. *See* D.C. Super. Ct. R. Civ. P. 12-I(k) ("In addition to the points and authorities required by subparagraph (e) of this Rule, there shall be served and filed with each motion for summary judgment pursuant to Rule 56 a statement of the material facts numbered by paragraphs as to which the moving party contends there is no genuine issue. Each material fact shall be stated in a separate numbered paragraph."); *Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) ("The parties failed to include in the record on appeal their respective statements of material fact as to which there is no genuine issue. Such statements were required to be filed in the trial court in conjunction with the motions for summary judgment.").

SLAPP Law and the Media Defendant," 41 Valparaiso L. Rev. 1235, 1236 (Spring 2007) (internal citations omitted).

Taking California's law, for example, known to be one of the most broadly interpreted of the Anti-SLAPP statutes, "the required probability that [Plaintiff] will prevail need not be high. The California Supreme Court has sometimes suggested that suits subject to being stricken at step two are those that lack[] even minimal merit." *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010) (internal punctuation omitted).

Once an action is subjected to Anti-SLAPP scrutiny, even in broadly applied and interpreted jurisdictions such as California, the court merely determines whether the plaintiff has presented sufficient facts to establish a *prima facie* case, *i.e.*, evidence to support a judgment in the plaintiff's favor. *E.g.*, *Kashian v. Harriman*, 98 Cal. App. 4th 892, 906 (2002). The showing required at this stage is much like a summary judgment standard – the plaintiff must simply raise a triable issue of fact as to whether he can prevail. *Taus v. Loftus*, 40 Cal. App. 4th 683, 714 (2007). The court must accept the plaintiff's evidence as true and draw all inferences from the evidence in favor of the plaintiff. *Soukop v. Hafif*, 39 Cal. 4th 260, 269 n.3 (2006).

The balancing act reflected in these SLAPP Act statutes is between a plaintiffs' right to access the court and a defendant's interest in avoiding litigation costs and distractions. A more stringent standard, such as that advocated by Defendants here, would unduly restrict Plaintiff's rights, and render the statute unconstitutional. Of course, the Court need not reach this conclusion in D.C., since the D.C. version of the statute is *ultra vires*.

## B. The Statements Alleged In Plaintiff's Action Are False, Defamatory *Per Se*, and Were Published With Actual Malice.

Because the Court has ruled that malice need not be addressed in this motion, the only question with respect to the merits is whether the statements are false.[6] Should this Court determine that it must make an early assessment of the Plaintiff's likelihood of prevailing on the merits, there is only one possible conclusion that it could reach: the Plaintiff will prevail, as the statements at issue are false and defamatory *per se*.

In response to the encyclopedic tirade against Mr. Snyder encompassing virtually everything negative that Defendants could drag out that ever had anything to do with his personal or business life, Mr. Snyder has exercised laudable restraint, bringing suit for libel *per se* for only three statements, two of which accused Mr. Snyder of criminal misconduct and the third impugning his reputation as a business man. The statements at issue are:

(1) that "Dan Snyder . . . got caught forging names as a telemarketer with Snyder Communications" (Complaint, Paragraph 21.a.);

(2) "that Mr. Snyder 'cut down trees protected by the National Park Service' and 'made a great view of the Potomac River for himself by going all agent orange on federally protected lands'" (Complaint, Paragraph 21.b.); and

(3) that Mr. Snyder was "'tossed off' the Six Flags' board of directors" (Complaint, Paragraph 21.c.).

Each of these allegations by Defendants is false, and each of these allegations accuses Mr. Snyder of acting in a criminal fashion or casts him in a light that associates him with moral

---

[6] Likewise, Defendants make no claim that the statements at issue are not 1) defamatory; 2) capable of being proved true or false; or 3) of and concerning Mr. Snyder. Nor could they. Each statement satisfies all of these elements as a matter of law. Even so, Mr. Snyder reserves the right to request further briefing and potentially discovery on the remaining elements if Defendants argue in their reply that they do not.

turpitude and exposes him to hatred or contempt and has a tendency to injure him in his occupation or community standing, and thus each constitutes libel *per se*. *See Raboya v. Shrybman & Assoc.*, 777 F. Supp. 58, 59 (D.D.C. 1991) ("Any written or printed statement which falsely charges another with the commission of a crime is libelous per se.").

### 1. Defendants Have Admitted Their Allegation That Dan Snyder Committed Forgery Is False.

On the *very first page* of Defendants' offending article, they state that "Dan Snyder . . . got caught forging names as a telemarketer with Snyder Communications . . . ." This statement is untrue, Defendants have always known it was untrue, and their publisher has admitted it is untrue.

There is no question that Dan Snyder never "got caught forging names." Defendant CL Washington admitted as much when its publisher, Amy Austin, in an open letter published by the *Washington City Paper* discussing this lawsuit and the forgery allegations, wrote that Defendants "have no reason to believe he [Mr. Snyder] personally did any such thing." Smith Aff., Exh. 16.

Defendants argue that the statement "Dan Snyder . . . got caught forging names as a telemarketer with Snyder Communications" does not actually accuse Dan Snyder of forging names. They contend, instead, that any reader would understand this statement to be referring to a paragraph much later in the article in which Defendants summarize allegations that Snyder Communications engaged in "slamming" in Florida in the late 1990s.

*First*, there is no factual (or even common sense) basis for Defendants' implicit assumption that any reader would make a connection between the allegation in the opening paragraphs of the article that Dan Snyder "got caught forging names as a telemarketer" and the later reference to "slamming" allegations against Snyder Communications in the sale of cell phone service in Florida. There is no reference to "slamming" in the sentence alleging that Mr.

Snyder "got caught forging names," nor any reference to "forging names" in the much later paragraph regarding "slamming." Nor is there any obvious connection between being a "telemarketer" and engaging in the practice of "slamming," which apparently involves switching phone customers from one service provider to another without their knowledge or consent. Defendants never address the obvious logical leap that a reader would need to make between the "forgery" allegation and their later comments about a settlement involving Snyder Communications and the state of Florida for "slamming," because there is no way any reader would ever have connected the two comments. Thus, the truth or falsity of Defendants' comments about the "slamming" settlement is simply irrelevant to the question of whether the allegation that "Dan Snyder ... got caught forging names" is defamatory.

*Second*, even if a reader would somehow have understood that the "forgery" allegation were connected in some way to the "slamming" discussion later in the article, to read the "forgery" statement as Defendants suggest would require one to play a very advanced game of Twister with the English language.[7]

The statement says that Dan Snyder got caught forging names *as a telemarketer with* Snyder Communications. To accept Defendants' argument that when they said "Dan Snyder" they really meant "Snyder Communications" would rewrite the sentence to read "Snyder Communications got caught forging names as a telemarketer with Snyder Communications." Defendants' preferred interpretation of the sentence would require that "Dan Snyder" be replaced with "Snyder Communications," and then that the phrase "as a telemarketer with Snyder

---

[7] The Twister match would be fruitless. In a libel case, the Court's role is merely to determine whether the challenged statement *could have* a particular meaning. *See Southern Air Transport, Inc. v. American Broadcasting Companies, Inc.*, 877 F.2d 1010, 1013-14 (D.C. Cir. 1989) (internal quotations omitted). Once the Court determines a statement has the potential to be interpreted as Plaintiff claims, it is the jury's decision whether that potential interpretation is proper. *See id.* at 1014.

Communications" simply be read out of the sentence altogether. In essence, to give the reading to the sentence that Defendants request, almost every word, and the order of those words, would have to be changed.

*Third,* even if Defendants were to be allowed to "reinterpret" their defamatory statement to completely change the words on the page, the evidence submitted by Defendants in support of their motion still proves that the new statement that "Snyder Communications got caught forging names" is still false.

Defendants contend that the statement about Dan Snyder forging names would have been understood by a reasonable reader to be referring to an instance of Snyder Communications, in the 1990's, being *accused* of improperly switching phone subscribers from one phone company to another. And they argue that the reference to Dan Snyder is appropriate because as Chief Executive Officer of Snyder Communications he obviously knew what every employee did and an admission of wrongdoing by the company was the same as an admission of wrongdoing by him. All of Defendants arguments, however, are belied by their own evidence.

As Exhibit 36 to the Smith Aff. in support of their Anti-SLAPP Motion, Defendants attach a Settlement Agreement entered into between the State of Florida and a number of companies, including Snyder Communications. It is noteworthy that Dan Snyder did not own Snyder Communications at the time of the settlement. *See* Smith Aff., Exh. 36, at 3. Moreover, in the this Settlement Agreement, Snyder Communications expressly *denied* liability, *see id.* at ¶ 44, made *no* admissions of any kind, and affirmatively represented and warranted that neither Michele D. Snyder nor Daniel M. Snyder personally or managerially controlled Snyder Communications. *See id.* at 1, 12. These representations (denying liability) were precisely what the Florida Attorney General contemporaneously reported in his Press Release of April 25, 2001,

a copy of which Defendants have attached as Exhibit 37. *See* Smith Aff. ¶ 43 & Exh. 37. In a desperate attempt to "link" Mr. Snyder to "knowledge" of the activity, Defendants (at 14-15) impermissibly attach pages of inadmissible (and herein objected-to) and irrelevant hearsay testimony of an employee of a separate Florida office who *speculated* that Mr. Snyder *must have known* about what was going on. But even he would not allege Mr. Snyder *himself* forged anyone's signature.

Although Defendants have attached a mountain of Exhibits to their Anti-SLAPP Motion (*i.e.*, Exhibits 35-59) that are supposed to bolster their position in this Special Motion that their statements accusing Mr. Snyder of forgery were not made with "malice," and are "substantially true," none of these exhibits do anything but support Mr. Snyder's claims that Defendants lied about him.

To recap: Was Dan Snyder caught forging names as a telemarketer for Snyder communications? No. Can the statement reasonably be read to suggest that it is about Snyder Communications and not about Dan Snyder? No. As a matter of law, *must* the statement be read to constitute an allegation that Snyder Communications, and not Dan Snyder, was "caught forging names"? No. *Could* it reasonably be read to suggest that it is about Snyder Communications and not about Dan Snyder? No. Is the statement that Dan Snyder got caught forging names "substantially true" because Snyder Communications and other companies entered a settlement agreement with the State of Florida in which they denied any wrongdoing (after Dan Snyder was no longer affiliated with it.) No. Did Defendants publish the false statement that Dan Snyder got caught forging names as a telemarketer with Snyder Communications? Yes. Have Defendants admitted that they "have no reason to believe he [Mr. Snyder] personally did any such thing"? Yes.

### 2. The Statement That Mr. Snyder Unlawfully Cut Down Trees And Otherwise Took Illegal Anti-Environmental Actions On Nationally Protected Parklands Is False.

Defendants wrote that Mr. Snyder "made a great view of the Potomac River for himself by going all Agent Orange on federally protected lands." Smith Aff., Exh. 2. Defendants further wrote "Unobstructed View: What Snyder wanted of the Potomac River from the back of his Montgomery County home. To accomplish this, he cut down trees protected by the National Park Service." *Id.* The Plaintiff does not allege that Defendants, in the first quote, accused Mr. Snyder of actually using the Vietnam-era defoliant Agent Orange. Instead, taking both those statements together, Plaintiff alleges that a reasonable person would infer that Mr. Snyder did something illegal, in violation of federal environmental laws or regulations, in connection with the removal of the trees from his property. Otherwise, if not to imply wrongdoing, there is no point in mentioning that the trees were on federally protected lands or protected by the National Park Service. The clear implication is that Mr. Snyder broke federal law when he had the trees at his home cut, which is defamatory. Moreover, the implication is false, and Defendants know it. Amy Austin, publisher of the *Washington City Paper*, in the previously discussed open letter attached as Exhibit 16 admits that, "[a]n inspector general's report subsequently blamed a top parks official for intervening to give Snyder a green light." Defendants knew that Mr. Snyder had formal permission from the National Park Service to do what he had done in cutting down and replacing the trees on his property. Indeed, in their paper, Defendants reference a May 19, 2006 *Washington Post* article entitled "Parks Official Is Blamed in Snyder Tree Cutting." The article states on the very first page that a report by the Interior Department inspector general's office "does not accuse Snyder of doing anything improper when he got permission to clear 50,000 square feet of mature trees and replace them with saplings."

In other words, Defendants have admitted that they knew at the time they wrote their defamatory article that Mr. Snyder had permission from the National Park Service to cut down and replace a limited number of trees on a hillside between his Potomac estate and the C&O Canal, and that he did not violate any federal law or any Park Service rule or regulation in so doing. The implication that Mr. Snyder violated federal law in removing the trees is false and defamatory.

### 3. The Statement That Mr. Snyder Was "Tossed Off" The Six Flags Board Of Directors Is False.

Equally untrue is Defendants' claim that Mr. Snyder was "tossed off" the Six Flags Board of Directors. Plaintiff intends to call at trial Mark Shapiro, who was the Chief Executive Officer and Director and President of Six Flags, Inc., from August 2005 to May 2010 and who has personal knowledge concerning Defendants' statement. Mr. Shapiro, whose sworn declaration is submitted herewith, will testify as follows:

> I have read the allegation made in the Washington City Paper that Daniel M. Snyder was thrown off the Board of Directors of Six Flags ('the Board'). This allegation is completely false. Mr. Snyder was not 'thrown off' the Board, but rather was invited to remain on the Board by Six Flags' new owners in 2010. Mr. Snyder declined this invitation.

Declaration of Mark Shapiro ¶¶ 2-3 (submitted herewith). Based on this testimony alone, a jury would undoubtedly find that the Defendants' Six Flags statements were false and defamatory.

Defendants (at 17-19) point to several snippets from various sources, all apparently gathered after extensive post-complaint research by their counsel, in an attempt to cobble together a counter-suggestion that Mr. Snyder's decision to leave Six Flags may not have been his own. These post hoc amalgamations of counsel do even suggest, much less prove, that Mr. Snyder was "tossed off" the Board of Six Flags, far from it. But even if they did so suggest, they

stand in stark conflict with the direct testimony of Mr. Shapiro, an individual who Defendants repeatedly referenced in their submissions to this Court and an individual with personal knowledge of the falsity of Defendants' published charges.[8] There is simply no better evidence in the record on this issue than Mr. Shapiro's testimony.

Undaunted, and apparently to try to justify (or cover up) the fact that they did not do even the slightest investigation to find out what really happened regarding Mr. Snyder's decision not to continue to serve on the Six Flags Board (a task the *Wall Street Journal* evidently had no problem doing for its story published before this action was filed), Defendants have offered 11 separate exhibits (Exhs. 69-80), not one of which demonstrates, or even reasonably implies, that Mr. Snyder was "tossed off" the Six Flags Board of Directors.

Exhibit 69 does not mention Mr. Snyder at all. It is a March 2009 article that reported only on Six Flags' financial problems. Exhibit 70 is a 2009 *Washington Post* article that reported only that Six Flags filed for bankruptcy. And while Exhibit 71, an April 2010 *AmLaw Daily* article, mentions Mr. Snyder, it does not support Defendants' position; it reported only that Mr. Snyder's fate was "unclear."

The remaining exhibits mention Mr. Snyder in various ways, but none support Defendants' conclusion. Exhibit 72 is a May 2010 *Washington Post* article that reported merely that Mr. Snyder had left the Six Flags Board of Directors. There is no suggestion that Mr. Snyder's departure was forced; rather, the article states just the opposite – that Mr. Snyder

---

[8] In their article, Defendants create the appearance that an individual described by Defendants only as an unnamed "representative of Resilient Capital Management" may have been the source of their false suggestion. *See* Smith Aff., Exh. 2. Whoever this mystery man may be (and Defendants do not tell us), his commentary is obviously inadmissible on the issue of falsity, since it cannot be sourced to any person and cannot cross-examined. Nor, for that reason, can the mystery man's suggestion be considered by the Court for purposes of deciding Defendants' motion.

"*declined the* opportunity to remain on the board of directors." *See* Smith Aff., Exh. 72. In fact, as to this exhibit, it is Defendants *alone* who have interpreted it to suggest that Mr. Snyder was removed from the Six Flags Board, rather than declining the opportunity, as the article expressly states.

Exhibit 73 is an Associated Press article published April 29, 2010. Nothing in that article even remotely suggests that Mr. Snyder was "tossed off" the Board. In fact, the most it does is repeat the statement in Exhibit 71 that Mr. Snyder's fate was "unclear." Exhibit 74 is an August 2010, *Fort Worth Star-Telegram* article. In the two-page article, a single line of text indicates that "much of the old regime [of Six Flags] was purged" after it had filed bankruptcy in 2009, but nothing in the remaining pages says or implies that Mr. Snyder was "tossed off" the Board. It is not even critical of Mr. Snyder so as to leave the impression that he could have possibly been one of those "purged."

Exhibit 75 purports to be "excerpts" from Six Flags' initial bankruptcy reorganization plan filed on July 22, 2009. It included Mr. Snyder as an individual being contemplated for the post-confirmation Board. The excerpts certainly do not suggest Mr. Snyder was excluded from the Board; rather, they imply exactly the opposite, that Mr. Snyder may have been offered a Board position and may have accepted it. Exhibit 76 purports to be a copy of motion papers filed in the bankruptcy proceedings on February 11, 2010, by preferred shareholders, to have a trustee appointed. While the motion papers may be critical of Mr. Snyder, Defendants' own attachment at Exhibit 74 reports that the movants *did not prevail*. This exhibit (even standing alone without knowledge that it was ultimately found unpersuasive) says and proves nothing about whether Mr. Snyder was "tossed off" the Board.

Exhibit 77 purports to be a copy of March 1, 2010, objections filed by certain unsecured creditors in the Six Flags bankruptcy proceedings as to the then-current management remaining in place. There is no suggestion in the document that Mr. Snyder had been tossed off the Board. Exhibit 78 consists of select "portions" of the bankruptcy court's findings of fact, conclusions of law, and order confirming the debtors' modified fourth amended joint plan of reorganization under Chapter 11 of the Bankruptcy Code, dated April 29, 2010. The order does not indicate that Mr. Snyder had been removed from the Board, but rather, mentions that he was *eligible* to serve on the Board. The order further stated that if Six Flags desired to appoint Mr. Snyder to its Board, and if Mr. Snyder agreed to accept the appointment, then consent of certain new investors would be required. But the order creates no impression that the appointment request or Mr. Snyder's acceptance had ever occurred.

Exhibit 79 consists of "excerpts" of the Six Flags April 13, 2010 SEC Form 8-K, which merely reported the content of the Exhibit 78 order. Exhibit 80 consists of a blog post by the *Defendants* dated May 28, 2010, where they first published their defamatory statement that Mr. Snyder got "booted out as chairman" of Six Flags. This clearly cannot be indicative of truth.

Respectfully, there is simply *no likelihood* that a jury would choose to believe the post hoc interpretations offered by counsel regarding these exhibits over the testimony of Mr. Shapiro, the CEO of the company. And at the very least, Plaintiff has created a genuine dispute regarding this material issue of fact.

## C. Defendants' Defenses Of "Rhetorical Hyperbole," "Subsidiary Meaning" And "We Are An Alternative Publication With A Reputation For Getting It Wrong So No One Could Believe Us" Are Not Applicable In This Case.

### 1. Defendants' Defamation Is Harmful Libel *Per Se, Not* "Rhetorical Hyperbole."

"The Oxford American Dictionary defines 'rhetorical' as 'expressed in a way that is designed to be impressive' and 'hyperbole' as 'an exaggerated statement that is not meant to be taken literally.' In defamation law, the phrase 'rhetorical hyperbole' encompasses a variety of communications, including epithets, insults, and name-calling, which are protected against civil liability." Eric S. Fulcher, *Rhetorical Hyperbole And The Reasonable Person Standard: Drawing The Line Between Figurative Expression And Factual Defamation*, 38 Georgia L. Rev. 717, 719-21 (2004) (internal citations omitted).

"The primary rationale behind precluding liability for statements that qualify as rhetorical hyperbole is that the listener or reader knows that the statements are not to be taken literally, and, therefore, such statements do not damage the subject's reputation." *Id.* Examined under this structure, none of the three statements at issue can be excused as "rhetorical hyperbole."

Defendants stated that Dan Snyder "got caught forging names as a telemarketer with Snyder Communications." This statement was not "expressed in a way that is designed to be impressive." There was nothing impressive, or even entertaining, about the way it was written. The statement was written simply as a declarative statement of fact. There is nothing in the statement that suggests that it was not intended to be taken literally, or that the reader should have known not to take it literally. Moreover, being accused of forgery is obviously injurious to reputation, which is why being accused of a crime qualifies as libel *per se*. *Farnum v. Colbert*, 293 A.2d 279, 281-282 (D.C. 1972) ("[A]ctions have been properly characterized as 'slander per se' where people were accused of theft of a television set, a money deposit, and even a box of

Chiclets. The language used in the instant case is no less susceptible of conveying an accusation of theft. The cause of action was therefore appropriately brought under the theory of 'slander per se.'").

Defendants wrote that Mr. Snyder "made a great view of the Potomac River for himself by going all Agent Orange on federally protected lands" and that "he cut down trees protected by the National Park Service." The embellishment "Agent Orange" qualifies as hyperbole. And while Defendants' choice of words will demonstrate to the jury that Defendants' article was nothing but a hatchet job, Plaintiffs are *not* suing over that phrase. The problem with these statements is that they imply, in a very factual manner, that Dan Snyder broke some federal law when he cut down trees on "federally protected lands" and cut down trees "protected by the National Park Service." The statements are not "designed to be impressive" (that was accomplished by the Agent Orange reference, if one were to be impressed by grammatically flawed references to military abuses in Vietnam). The statements were designed to be taken factually, and it is certain that readers did so.

The third allegation is that Dan Snyder was tossed off the Six Flags Board of Directors. This is, once again, a simply written lie. No pomp, no circumstance, no rhetorical flourish. Nothing to suggest to readers that the statement is anything but a true statement of fact. Nothing to suggest to a reader that they should not believe what is being written. "Tossed off" may be hyperbolical -- the reader certainly would understood that Mr. Snyder was not picked up and thrown -- but the hyperbolical phrase clearly conveys the fact that Mr. Snyder was fired. There is no other rational interpretation of the phrase.

Defendants argue that the statements need to be evaluated in context, and because the *Washington City Paper* holds itself out as an alternative newsweekly, and Mr. McKenna

generally writes with "provocative prose," no reasonable reader could have interpreted what was written as "actual facts." Regardless how the *Washington City Paper* characterizes itself, the inquiry remains the same: would a reasonable reader have interpreted the statements at issue as hyperbole or fact? Defendants point to a host of statements that Mr. Snyder did not sue about to argue that they use a hyperbolical style. They fail, however, to explain a potential "hyperbolic meaning" to the statements at issue.

Defendants point to *Weyrich v. New Republic, Inc.*, 235 F.3d 617 (2001), to support their argument. In *Weyrich*, however, the phrase that the court found to be hyperbolical was accusing the plaintiff of "paranoia"—the court found that the phrase was being used in its colloquial, and not medical, sense. Defendants also point to Mr. Snyder himself relying on hyperbole when a court found that the statement "three guys trying to kill the players with their crappy field" could not have been intended in the literal sense. Those statements are distinct from "got caught forging names," cutting down trees on "federally protected lands," and being "tossed off" the board of Six Flags. There is no colloquial meaning for "forgery," as there is for "paranoia," and it is simply incredible for Defendants to argue that no one could have read the phrase in the literal sense. Moreover, although "tossed off" is a colloquial expression, Plaintiff contends that it conveys the very defamatory meaning that Defendant attributes to it – that Plaintiff was involuntarily removed from the Board – and not that someone literally picked him up and threw him out of the room.

Defendants cannot point to a contrary interpretation of that phrase. Defendants' lies are written as statements of fact, not statements of opinion, and they were meant to be taken literally. They are not flowery metaphors, they are accusations of criminal wrongdoing and professional embarrassment. In fact, a cursory review of the readers' comments to the Defendants' article as

they appeared on November 29, 2010, reveals that Defendants' lies *were* taken literally, and that readers were shocked and appalled at what they read about Mr. Snyder. *See* Complaint, Exh. C. The fact that they were reading it in the *Washington City Paper* under Dave McKenna's byline made no difference. The readers did not, and a reasonable reader could not, view the comments at issue as rhetorical hyperbole.

### 2. Defendants' Reliance on the "Subsidiary Meaning" Doctrine is Misplaced, Because the Actionable Statements Uniquely Allege Criminal Activity.

Defendants seek the dismissal of Plaintiff's Complaint based, in part, on the restraint Plaintiff has shown in choosing to litigate on only the most egregious and harmful statements. The statements at issue accusing him of criminal misconduct and otherwise subjecting him to public contempt, which are actionable as libel *per se* in this jurisdiction, are not "subsidiary" to any broader insult. *See Raboya*, 777 F. Supp. at 59; *Guilford Transp. Indus. v. Wilner*, 760 A.2d 580, 600 n.19 (D.C. 2000) ("It is a well settled general rule, supported by both modern and older cases, both British and American, that a publication . . . that charges the present plaintiff with a crime or criminal conduct or activity . . . is libelous per se.").

Through his Complaint, Plaintiff has exercised reasonable and remarkable restraint, avoiding litigation on the many unfair, inaccurate, or incomplete criticisms Defendants have made, and continue to make, about the way he has operated as a young owner of the Washington Redskins by instead focusing on the relatively few but large lies about Mr. Snyder committing crimes. In response, Defendants urge (at 39-43) that the so-called "subsidiary meaning doctrine" prevents Plaintiff from maintaining a defamation suit upon these three statements because, even if they would support such claims in isolation, they were purportedly made in furtherance of a broader, non-actionable premise. In so arguing, Defendants turn the doctrine on its head,

attempting to use it to shield themselves for liability based on the most offensive and defamatory portions of the McKenna's article.

First and foremost, this Court should not even consider Defendants' subsidiary meaning doctrine arguments at this time. As explained above, the proper standard under which courts should evaluate Anti-SLAPP motions is analogous to a summary judgment standard, under which Plaintiff merely must establish a prima facie claim. *See, e.g., Kashian*, 98 Cal. App. 4th at 906. Under this standard, a court should not weigh evidence or arguments in defense against the claim; the court must limit its focus to the facial legitimacy of the Plaintiff's claim. *See, e.g., Kyle v. Carmon*, 71 Cal. App. 4th 901, 907-08 (1999). ("[T]o preserve the plaintiff's right to jury trial the court's determination of [a SLAPP] motion cannot involve a weighing of the evidence"). Thus, to the extent that the subsidiary meaning doctrine is a defense to Plaintiff's prima facie claim, it is not properly subject to consideration under this Anti-SLAPP motion.

But even if Defendants were correct to invoke the subsidiary meaning doctrine in their motion, their argument is flawed. The crux of the subsidiary meaning doctrine is that a plaintiff cannot premise a defamation suit upon otherwise-actionable but minor defamatory statements that simply support a broader, non-actionable premise. *See, e.g., Herbert v. Lando*, 781 F.2d 298, 310–12 (2d Cir. 1986); *Church of Scientology Int'l v. Time Warner*, Inc., 932 F. Supp. 589, 594 (S.D.N.Y. 1996). Defendants strive to fit this case within that mold, arguing that the three statements targeted by Plaintiffs are mere aspects of the Commentary's larger, non-actionable premise—that Mr. Snyder is an unsavory person in general. *See* Mot. at 39–43. But in making this argument, Defendants ignore the fact that the targeted statements are different in kind from the remainder of the article, crossing the line from being abstractly disparaging to directly accusing Mr. Snyder of illegal conduct and related malfeasance.

The cases Defendants cite all follow a common pattern—the challenged statements were clearly subordinate to a larger, more severe premise. For example, in *Tavoulareas v. Piro*, 817 F.2d 762 (1987), the D.C. Circuit relied upon the subsidiary meaning doctrine to reject a defamation suit based upon a specific claim that an oil company president had failed to recuse himself with respect to certain issues involving his son, when this statement was simply an example of a larger, supported, and non-actionable claim that the president had engaged in nepotism, to his son's benefit. *Id.* at 787–88. Likewise, in *Herbert*, the Second Circuit stated that, because a *60 Minutes* segment stating that the plaintiff had lied to his superiors about reporting war crimes was not actionable in general, the plaintiff could not support a defamation suit based upon minor inaccuracies that supported the same accusation. 781 F.2d at 307–12. Similarly, in *Church of Scientology*, the non-actionable nature of the overall gist of a Time magazine story contending that Scientology was "organized for the purpose of making money by means legitimate and illegitimate" barred any defamation suit based on a subsidiary statement regarding one source of the Church's income. 932 F. Supp. at 592–95. In each of these cases, the challenged statements were undisputedly minor contentions, plainly related, and subsidiary to the supported central thrust of the broader report.

The statements challenged by Plaintiff at issue here, on the other hand, simply do not fit this mold. Although Defendants claim that the challenged statements merely support the Commentary's broader criticism of Mr. Snyder, the statements in fact go further than the remainder of the article, crossing the line from general (and, for the most part, trivial) aspersions against his character and criticism of his abilities as a football team owner to specific accusations of criminal misconduct and purported ineptitude as the chairman of a public company. In contrast, none of the cases cited by Defendants involved accusations of criminal conduct, nor did

any of the cases deal with statements that actually broadened the "central thrust" of the report that contained them. Here, there is nothing "subsidiary" to the libel per se that is the reason and basis for Plaintiff's action, and the "subsidiary meaning" doctrine is inapplicable.

In sum, Plaintiff's Complaint does not target a few scattered statements that are merely subsidiary to the broader, non-defamatory content of the article. Rather, Plaintiff has targeted its most egregious aspects, choosing to focus solely upon the article's clearly defamatory elements rather than waste this court's time and energy with further litigation upon its myriad other potentially-defamatory statements. Such restraint should be a reason to credit Plaintiff's Complaint, not to dismiss it. Otherwise, if Defendants' interpretation of the subsidiary meaning doctrine were to prevail, then newspapers could defame public figures with impunity, so long as they were careful to bury the offensive statements within lists of additional, less-offensive or opinion-based statements. That is not—and cannot be—the law.

## IV. DEFENDANTS' MOTION IS FRIVOLOUS, AND PLAINTIFF SHOULD BE AWARDED HIS COSTS AND ATTORNEYS' FEES.

This motion was brought solely to delay these proceedings and to put pressure on Mr. Snyder to settle his claims. Defendants' "Hail Mary" should not be rewarded. Indeed, all of the foregoing facts and circumstances demonstrate not only that the statements published by Defendants were false, but also that Defendants at all times knew, and admitted in their own contemporaneous Internet hyperlinks, subsequent publications and court filings, that they were false. Defendants at all times knew that the instant lawsuit was *not* meritless and was, in fact, based on Defendants' false accusations of Plaintiff's criminality and other activity described in the Complaint and in these Opposition papers that is libelous *per se*.

In fact, all the vast extraneous and irrelevant evidence attached to Defendants' moving papers obviously was included there only to re-publish and propagate their lies and innuendo about Mr. Snyder. Defendants' topic headings, which they know appear in the table of contents, and which are the extent to which many non-lawyers will read and report upon their papers, were without doubt purposefully written in a misleading way to suggest that Defendants had evidence of or reason to believe the "truth" of their defamatory statements where, in fact, they did not and could not have such information. Section 5 of the D.C. Anti-SLAPP Act provides that the Court may award reasonable attorneys' fees and costs to the responding party who prevails on a Special Motion to Dismiss if the Court finds that the motion "is frivolous or is solely intended to cause unnecessary delay." D.C. Code § 16-5504. Defendants at all times herein knew that Plaintiff would be able to establish a *prima facie* case of libel *per se*. Indeed, after reading in press articles that Defendants planned to file a Special Motion to Dismiss, Plaintiff warned Defendants that the Motion would be frivolous before Defendants chose to file.

## CONCLUSION

For all of the foregoing reasons, Plaintiff submits that this instant Motion is frivolous and is solely intended to cause unnecessary delay and respectfully requests that this Court deny the Motion forthwith and award Plaintiff his reasonable attorneys' fees and costs pursuant to Section 5 of the D.C. Anti-SLAPP Act.

Dated: August 1, 2011

/s/ Richard W. Smith

Richard W. Smith
D.C. Bar No. 465563
Jacqueline Browder Chaffee
D.C. Bar No. 986710
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, N.W.
Washington, D.C. 20005
202-756-8000

- and –

Patricia L. Glaser, Esq. (pro hac vice)
G. Jill Basinger, Esq. (pro hac vice)
GLASER, WEIL, FINK, JACOBS,
HOWARD, AVCHEN & SHAPIRO, LLP
10250 Constellation Boulevard, 19th Floor
Los Angeles, CA 90067
310-553-3000

*Attorneys for Plaintiff Daniel M. Snyder*