ORAL ARGUMENT NOT YET SCHEDULED

CASE NO. 12-7055

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH FARAH, JEROME CORSI,
WORLDNETDAILY.COM AND WND BOOKS
Plaintiffs-Appellants,
v.
ESQUIRE MAGAZINE, INC., HEARST COMMUNICATIONS, INC.,
AND MARK WARREN
Defendants-Appellees.

APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFFS-APPELLANTS JOSEPH FARAH, JEROME CORSI, WORLDNETDAILY.COM AND WND BOOKS FOR REVERSAL OF THE DISTRICT COURT'S ORDER AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties that appeared in the district court are Plaintiffs Joseph Farah, Jerome Corsi, WorldNetDaily.com, and WND Books, and Defendants Hearst Communications, Inc., Mark Warren and Esquire Magazine.

Pursuant to Circuit Rule 26.1, WorldNetDaily.com and WND Books are not publicly held.

B. Rulings Under Review

The rulings under review are the final Memorandum and Opinion ("Memorandum Opinion") and Judgment of the district court entered on June 4, 2012 (Docket Nos. 20, 21) which granted Defendants' Motion to Dismiss, dismissed all claims, and entered judgment for Defendants, and all other rulings adverse to Plaintiffs in this case.

C. Related Cases

Sherrod v. Breitbart, et. al, Case No. 11-7088, also pending before this court, similarly involves the applicability of the D.C. Anti-SLAPP Act in the federal court. Appellant is aware of no other related cases.

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STATUTES AND RULES

PRELIMINARY STATEMENT

Appellants Joseph Farah, Jerome Corsi, WorldNetDaily.com and WND Books, filed their Complaint seeking compensatory and punitive damages as a result of Appellees' willful, wanton, and malicious conduct. Appellees' deliberate conduct has given rise to Appellants' claims of defamation, false light, tortious interference with business relations, and violations of the Lanham Act. Appellants are world-renowned authors and publishers who have consistently and comprehensively covered the issues related to Mr. Barack Hussein Obama's eligibility to be president and the validity of his birth certificate. Just as Appellant's highly anticipated book was released, Appellees engaged in deliberate and malevolent acts, seeking not only to sabotage the success of the publication but also severely harm the reputation of the Appellants. As commercial competitors of Appellants, Appellees had one goal: to damage the commercial enterprise and success of Appellants' newly released book. In a strategic manner, Appellees engaged in ruthless, outrageous, and atrocious conduct, seeking only to damage the commercial success of their competitors' publication. After causing extensive harm, crippling Appellants' commercial expectations, and impairing Appellants' credibility in a manner that would impede on Appellants' ability to regain commercial success, Appellees seek to improperly hide behind the District of

Columbia's newly enacted Anti-Strategic Lawsuits Against Public Participation Act of 2010 ("Anti-SLAPP Act" or "Act").

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

As commercial competitors of Appellants, there is no doubt that the course of action Appellees engaged in was aimed at maliciously damaging Appellants' commercial enterprise. The focus of Appellees' publication, after all, focused on the commercial aspect of Appellants' book: that the books were being recalled (specifically 200,000 first run prints), that the author and publisher were refunding the purchase price to all buyers of the book, and that bookstores were pulling the books from their shelves. Appellees' publication was void of any public interest; rather it was a commercial hit job on a competitor. In aiming to deter further purchases of Appellants' book and in seeking to cripple their competitor, Appellees sought only to damage Appellants commercial enterprise. After the extensive damage had been done to the success of Appellants' book, and after Appellee Warren made it a point to publicly call Appellants an **"execrable piece of shit."** Their acts were intended to be malicious, cause extreme harm and in fact did so.

Appellees' defamatory statements not only resulted in tortious interference with business relations but also, in acting with malice, further perpetuated the economic and reputational harm Appellants incurred. Appellees, aware of Appellants' position in the community as credible authors and publisher, have also placed Appellants in a false light in a manner that is highly offensive to a reasonable person. Furthermore, through their intentional misrepresentation and

deception, Appellees are in violation of the Lanham Act. Despite the malicious conduct on the part of the Appellees, Appellees moved to dismiss Appellants' complaint on various grounds. Specifically, Appellees sought to dismiss Appellants' complaint based on the District of Columbia's ("D.C.") Anti-SLAPP statute as well as under FRCP 12(b)(6). As demonstrated below, Appellees' motion was improperly granted and must respectfully be reversed.

This case is of great precedence whether or not one believes as Appellants do. It is the function of our laws to protect all types of publications from defamatory statements such as those intentionally made my Appellees in order to destroy the credibility of Appellants.

JURISDICTIONAL STATEMENT

The U.S. District Court for the District of Columbia ("District Court") had jurisdiction over this case pursuant to 28 U.S.C. §1331 because the matter arises under the Lanham Act, 15 U.S.C. § 1125(a)(1) and the lower court had supplemental jurisdiction over Appellants' common law claims under 28 U.S.C. § 1367. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

The notice of appeal was timely filed pursuant to 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a)(1)(A) on August 26, 2011 from an order of the District Court dated July 28, 2011. The appeal is from a final order that disposed of all Plaintiffs-Appellants' claims.

ISSUES PRESENTED

1. Whether the District Court was biased or prejudiced against Appellants and thus should have its decisions reversed and the judge disqualified?
2. Whether the District Court prejudged the case as reflected in its irrelevant finding that President Barack Hussein Obama was born in Hawaii?
3. Whether the District Court erred when it took judicial notice of internet postings proffered by Appellees, which internet postings were not authenticated and had no evidentiary value?
4. Whether the District Court erred when it applied the DC Anti-SLAPP Act when it is both unconstitutional and does not apply to proceedings in federal court?
5. Whether the District Court erred when it relied upon matters outside of the pleadings and Appellants had properly pled causes of action for, false light, and tortious interference with business relations?
6. Whether the District Court erred when it found that Appellants had not properly pled causes of action under section 15 U.S.C. § 1125 of the Lanham Act?
7. Whether the District Court erred when it found that Appellees' statement regarding Appellants' book was satirical non-commercial speech and not

commercial speech and thus dismissing Appellants' claim under the Lanham Act, as well as other errors with regard to Appellant's Lanham Act claim?

8. Whether the District Court erred when it found that Appellees' defamatory statements regarding Appellants' book were protected under the First Amendment as satirical in nature?
9. Whether the District Court erred when it found that Appellants' had not met the factual and legal threshold for pleading libel, false light, and tortious interference with business relations?

STATEMENT OF THE CASE

In 2010, the D.C. Council passed the District of Columbia Anti-Strategic Lawsuits Against Public Participation Act of 2010 ("Anti-SLAPP Act" or "Act"), codified at D.C. Code § 16-5501 *et seq.* (Addendum at 1-3). The legislation was signed on January 18, 2011 and published in the D.C. Register on January 28, 2011.

On June 28, 2011, Appellants filed their Complaint in the District Court, and this case was then assigned to the Honorable Rosemary M. Collyer.

On October 26, 2011, Appellees filed their Motion to Dismiss and Special Motion to Dismiss pursuant to the District of Columbia's newly enacted Anti-SLAPP Act. On September 23, 2011 Appellants filed their Response in Opposition to Appellees' Motion to Dismiss and Special Motion to Dismiss.

On June 4, 2012 the Honorable Judge Collyer issued a Memorandum Opinion and Order granting Appellees' Motion to Dismiss and dismissing the case with prejudice. On June 11, 2012, Appellants filed their notice of appeal to the U.S. Court of Appeal for the District of Columbia Circuit ("D.C. Circuit").

STATEMENT OF FACTS

Appellant Dr. Jerome Corsi, Senior Staff Writer for World Net Daily, conducted extensive research into the birthplace of Barak Hussein Obama, and the images of identifying documents that Mr. Obama had posted to the internet, including his short form birth certificate. Compl. ¶8 (JA____). Dr. Corsi published his book *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President* on May 17, 2001. Compl. ¶12 (JA____). The book was published by Appellant WND Books, a subsidiary of worldnetdaily.com. Appellee Joseph Farah is the founder of World Net Daily and is the editor and chief executive officer of both the website and the publishing firm. Compl. ¶¶1-3 (JA____).

The very next day, esquire.com published a piece by Appellee Mark Warren entitled "BREAKING: Jerome Corsi's Birther Book Pulled From Shelves!" in "The Politics Blog" section of the esquire.com website (hereafter, referred to as the "Blog Post") Compl. ¶12 (JA____).

The Blog Post read in its entirety:

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

Id. (JA____) (boldface and italics in original). Esquire readers quickly started linking the Blog Post on Twitter.com, a social networking site used by millions within the United States and worldwide. An hour and a half later, Esquire,

admitting that many of its readers did not see the Blog Post was, as they falsely claimed ex post facto "satire," added an "update" which stated the following:

> ***UPDATE*, 12:25 p.m.**, *for those who didn't figure it out yet, and the many on Twitter for whom it took a while*: We committed satire this morning to point out the problems with selling and marketing a book that has had its core premise and reason to exist gutted by the news cycle, several weeks in advance of publication. Are its author and publisher chastened? Well, no. They double down, and accuse the President of the United States of perpetrating a fraud on the world by having released a forged birth certificate. Not because this claim is in any way based on reality, but to hold their terribly gullible audience captive to their lies, and to sell books. This is despicable, and deserves only ridicule. That's why we committed satire in the matter of the Corsi book. Hell, even the president has a sense of humor about it all. Some more serious reporting from us on this whole "birther" phenomenon here, here, and here.

Compl. ¶14 (JA____) (boldface and italics in original).

After alleging that Appellants' book contained inaccuracies, Appellees also falsely stated that Appellants were planning to recall and pulp the entire 200,000 first print run of their book. Compl. ¶12 (JA____). More damaging is Appellees' false statements that such action was being taken because Appellants acknowledged the inaccuracies of their book. *Id.* (JA____). In falsely and inappropriately misusing Appellants' names, Appellees also falsely attributed statements to Appellant, claiming that Appellant Farah had confirmed the book "contains what I now belief to be factual inaccuracies…I cannot in good conscience publish it and believe it." *Id.* (JA____). This manufactured alleged

quote is false, as Appellants continue to remain steadfast in their belief of the book's propositions.

The *Daily Caller* contacted Appellee Mark Warren about an hour later seeking a comment about the Blog post. Mr. Warren offensively referred to Dr. Corsi as "**an execrable piece of shit**" and that Appellees had **"no regrets"** in their publication. Compl. ¶14 (JA____) Defs. Mem. in Suppt. of Mot. to Dismiss, Ex. A ("Findikyan Decl."), Ex. 28 (JA____) (dailycaller.com post May 18, 2011 at 12:06 p.m.) ("The Esquire story, written by Mark Warren, spread across the Internet moments after being posted on the magazine's website Wednesday morning. Esquire has said it was a joke and Warren told [the *Daily Caller*] he has no regrets about posting it."). The *Daily Caller* also contacted Mr. Farah, who told the *Daily Caller* that he had never spoken to anyone from Esquire and "[n]ever uttered these words or anything remotely resembling them to anyone. It is a complete fabrication. The book is selling briskly. I am 100 percent behind it." *Id.* (JA____). Mr. Farah also told the *Daily Caller* that he was considering "legal options" but he stated sarcastically to show his incredulousness that it was; "assume[d] it [was] a very poorly executed parody," **meaning it was not parody at all!** *Id.* (JA____).

Yet Appellants' book suffered considerable harm as a result of Appellees' Blog Post. Compl. ¶¶ 13,17 (JA____). Booksellers removed Appellants' books from their shelves and some even refused to sell the books at all. Compl. ¶ 17

(JA____). Appellants' book had risen to the top of the Amazon.com bestseller's list and was performing well until the Blog Post discredited both the book and Appellant Corsi. Potential customers no longer viewed the book as credible, and even some who had already purchased the book were asking for their money back as a result of the Blog Post.

Appellants thus filed their Complaint in the District Court, seeking to recover under the Lanham Act, as well as common law defamation, false light invasion of privacy, and tortious interference. The entirety of the Complaint was improperly dismissed by Judge Collyer, leading to this appeal.

SUMMARY OF ARGUMENT

The District Court erred when it dismissed Appellants' Complaint. Evidence of judicial bias presented itself in the memorandum opinion that was issued along with the order. Judge Collyer mocked Appellants' website and published materials, including the articles posted on www.worldnetdaily.com and Appellant Corsi's book questioning the birthplace and birth certificate of Barack Hussein Obama.

Moreover, the District Court improperly held the Blog Post was noncommercial speech, and determined that the Lanham Act did not apply. The Blog Post was a malicious, libelous statement coming from a direct commercial competitor of Appellants. The Appellees now simply claim, after the fact and after

the damage was done, that their Blog Post was satire in order to shield themselves from their tortious conduct. In addition, Appellee Warren's statement referring to Appellant Corsi as an "execrable piece of shit" was ignored by the District Court, and is clear cut "false light."

In addition, the District Court wrongly utilized the District of Columbia Anti-SLAPP Act, which directly conflicts with the Federal Rules of Civil Procedure ("FRCP") and is thus inapplicable in federal court. Even if the Anti-SLAPP Act is held applicable in federal court, it is improper to utilize it in this case. The Blog Post was not in the public interest, but was rather a direct attack on Appellants. Even more incredible, if the Blog Post somehow is considered in the public interest, the Anti-SLAPP Act still would not be proper grounds to dismiss this case because Appellants established a likelihood of succeeding on the merits of the case.

STANDARD OF REVIEW

This appeal raises questions of law which are reviewed *de novo. United States v. Cook*, 594 F.3d 883, 886 (D.C. Cir. 2010).

ARGUMENT

I. EVIDENCE OF JUDICIAL BIAS MANIFESTED ITSELF IN THE MEMORANDUM OPINION

After sitting on the case for nearly seven months, Judge Collyer's Memorandum Opinion, which set forth her grounds for dismissing all of

Appellant's claims, unmasked her extra- judicial bias and prejudice towards Appellants. In this regard, she begins her Memorandum Opinion with pages of irrelevant "facts," that were inappropriate for her to decide and irrelevant to the case. Memorandum Opinion at 1(JA____). She then spends pages of her Memorandum Opinion to simply recount the biography of Barack Hussein Obama. Memorandum Opinion at 1-3(JA____). Then, Judge Collyer makes a wholly irrelevant finding that Mr. Obama was born in the United States, and appears to disparage Appellants for not sharing in her views. She writes, "President Obama was born on August 4, 1961, in Honolulu, Hawaii, to Ann Dunham, from Wichita, Kansas, and Barack Obama, Sr., from Kenya." Memorandum Opinion at 2 (JA____).

In essence, Judge Collyer, without even a shred of evidence before her, improperly found that the thesis of Appellants' book in question is "inaccurate," thus siding with the Appellees and herself discrediting Appellants' book. She then goes to disparage and mock the Plaintiffs, characterizing them as the leaders of the "so-called Birther Movement." Memorandum Opinion at 3 (JA____). This is a well-known pejorative expression used by supporters of Mr. Obama to belittle those who legitimately believe that he was not born in the United State to two American citizen parents and thus not a natural born citizen eligible to run for and be sworn in as president.

To top it all off, Judge Collyer then goes outside of the four corners of the complaint and relies on a rambling recitation of wholly unauthenticated internet postings that also have no bearing on the issues before her, but simply appear to be more condescending and irrelevant remarks questioning Appellants' motives and integrity. Memorandum Opinion at 3-5 (JA____).

In short, Judge Collyer's written findings and demeanor show that she has prejudged the case, and to make matters even worse on irrelevant facts. When her Memorandum Opinion is ultimately reversed, this Court is respectfully requested to remand it with instructions to have it randomly assigned to another District Court judge.[1]

II. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT THE LANHAM ACT WAS NOT APPLICABLE.

The District Court improperly held that the Lanham Act only applies to commercial speech and thus, does not apply to this case. Def.'s Motion to Dismiss at 43 (JA____). Not only was the speech here largely commercial, many courts have held the contrary and have applied the Lanham Act to cases involving non-commercial speech. See *PAM Media, Inc. v. American Research Corp.*, 889

[1]Disqualification or recusal is required when judicial remarks create the appearance that the court's impartiality may be called into question...that 'fair judgment is impossible.' *Liteky v. United States*, 510 U.S. 540, 555, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994)); *See also Jackson v. Microsoft Corp.*, 135 F. Supp. 2d 38, 40 (D.D.C. 2001) (recusal was proper because the judge "ha[d] created an appearance of personal bias or prejudice").

F.Supp.1403 (D. Colo. 1995) (holding that genuine issue of material fact as to whether the name "After the Rush" for a show named "The Rush Limbaugh Show" precluded summary judgment of Lanham Act action).

Even if it is determined that the Lanham Act only applies to commercial speech, the speech involved in this case is clearly commercial. Appellees allege that the statements are not commercial since it involves Mr. Obama's birth certificate and eligibility for office. Def.'s Motion to Dismiss at 37 (JA____). The post involved false and misleading representations on and about Appellants' book, a commercial item, and its release. The article specifically used false and misleading statements to attack and incorrectly represents the commercial aspects of the release of Appellants' book. In fact, the book focused on the alleged promise by Appellants – which was never made -- to refund purchasers money and the refusal of booksellers to sell the book. Compl. ¶ 12 (JA____). Hearst Corporation and Esquire magazine are competitors of Appellants in the marketplace -- both write frequently about the birth certificate and "natural born citizen" issues. They are flip sides of the same coin and readers frequently do read publications that contain "points and counterpoints." Both maintain websites that publish content and rely on viewers and advertisements as a means of revenue. When Appellees attack a direct competitor, they are going far beyond simple satire, they are

attempting to discredit and destroy the commercial reputations of Appellants, and these actions are defamatory and must be rectified.

For these reasons, this court must respectfully reverse the District Court's ruling and allow the Lanham Act claim to proceed.

III. APPELLANTS' CLAIMS WERE WRONGLY DISMISSED AS A RESULT OF THE D.C. ANTI-SLAPP SPECIAL MOTION TO DISMISS

The District Court improperly relied on the newly enacted Anti-SLAPP Act of 2010 in dismissing Appellants' claims. D.C's Anti-SLAPP Act of 2010 ("Act"), requires that the party filing a special motion to dismiss under this section make a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest. D.C. Code § 16-5502(a). If the movant makes such a showing, the motion is granted unless the responding party demonstrates that the claim is likely to succeed on the merits. D.C. Code §16-5502(b). Appellees' Special Motion to Dismiss brought under the Act was improperly granted for several reasons. The speech in issue does not involve a matter of public but rather a primarily commercial interest and application of the Act to this case would be contrary to public policy. Even if the Act were applicable, Appellants' met their burden of showing that the claims were likely to succeed on the merits.

A. The D.C. Anti-Slapp Statute Is Inapplicable In Federal Court.

In the recent District Court decision of *3M Co. v. Boulter*, the Honorable Robert L. Wilkins held that the Anti-SLAPP Act directly conflicted with FRCP and was thus inapplicable. *3M Co. v. Boulter*, 842 F.Supp.2d 85, (D.D.C. 2012) (Wilkins, J.). Appellant finds this analysis to be correct and thus will repeat a portion of it here. 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 the court 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 106. 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 FRCP and the FRCP rule governs unless the federal rule was passed in violation of the Rules Enabling Act, 28 U.S.C. § 2072. Challenges to the FRCP 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).

FRCP 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 108. Nevertheless, the *3M Co.* court 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 108. 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 100 (emphasis added).

Other federal circuits, such as in Massachusetts, have declined to apply the Massachusetts Anti-SLAPP statute in federal court as well, ruling that burden-

shifting directly conflicts with FRCP 12(b)(6). *South Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2008 WL 4595369 (D.Mass. Sept. 30, 2008).

Appellees argued that D.C.'s Anti-SLAPP Act is substantive in nature and thus, is applicable to this case. Def.'s Special Motion to Dismiss at 19 (JA____). Supporting their argument, Appellees claim that many courts have held the Anti-SLAPP Act compatible with FRCP. *Id.* (JA____). However, Appellees intentionally sidestep the majority of courts which hold Anti-SLAPP statutes to be procedural in nature and therefore, not applicable in federal court proceedings. After all, the purpose of the Act is to provide *procedures* for certain types of litigation, namely frivolous suits based on citizens' petition activities. Specifically, the Act creates a process for filing a special motion to dismiss that consists of a burden-shifting framework. *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 at 2 (D.Mass. Dec.1, 2010). As such, the Act is clearly procedural in nature and inapplicable to this case.

Even more, the burden-shifting required and the additional fact-finding mandated by the Act directly conflicts FRCP, making the Act inapplicable. This is the situation in this case. The Act directly conflicts with the FRCP in that it shifts the burden on the plaintiff in a manner that is at odds with FRCP 12(b)(6). FRCP merely requires plaintiff, at the earliest stage of litigation, to state a claim upon

which relief may be granted. Contrary to this, the Anti-SLAPP procedure "incorporates additional fact-finding beyond the facts alleged in the pleadings, which is fundamentally different from a Rule 12 motion." *South Middlesex Opportunity Council, Inc.*, 2008 WL 4595369 at 31. Simply put, the Act imposes the burden on the plaintiff to demonstrate that their claims are likely to succeed before discovery even begins. This is contrary to federal practice.

In fact, a great number of courts have held anti- SLAPP statutes to be procedural in nature, and therefore, not applicable in federal court proceedings. See *Turkowitz*, 2010 WL 5583119 at 2. See also *The Saint Consulting Grp., Inc. v. Litz*, 2010 WL 2836792 (D.Mass. July 19, 2010). Moreover, other federal courts have compared the Anti-SLAPP procedures and FRCP and have declined to apply the state statute when in conflict with FRCP.

Ultimately, the Act cannot stand. Since there is a direct conflict, as determined under the *Shady Grove* analysis, FRCP controls and the D.C. Anti-SLAPP Act is 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 FRCP 12 and 56, then there is no doubt that the D.C. Anti-SLAPP Act is simply procedural and must once yield to FRCP. Thus, the Act, under any analysis, is inapplicable and void in federal court.

B. Appellees' Special Motion To Dismiss Was Improperly Granted Since The Speech At Issue Does Not Constitute An Act In Furtherance Of The Right Of Advocacy On Issues Of Public Interest.

The Act states "a party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code §16-5502. To fall within the scope of the Act, a defendant must make a prima facie showing that action arises from an activity protected by the statute. *Flores v. Emerich & Fike*, 416 F.Supp.2d 885, 897 (E.D.Cal. 2006). The simple fact that a cause of action arguably may have been triggered by protected activity does not necessarily mean that it arises from such activity. *Id.* The additional fact that a protected activity may lurk in the background and may explain why the rift between the parties arose in the first place, does not transform a non-protected dispute into a SLAPP suit. *Doe v. Gangland Production, Inc.* 2011 WL 3447214 at 5 (C.D. Cal. 2011). The critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right to free speech. *Flores,* 416 F. Supp.2d at 897. The Court must focus on the substance of the plaintiff's lawsuit in determining whether a cause of action arises from protected activity. *Id.* In this respect, Appellees' application of the Act fails. First, Appellees argue that Esquire's speech clearly falls within the scope of D.C. Code §16-5501(1)(A)(i), which applies to statements made "in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any

other official proceeding authorized by law." Def.'s Special Motion to Dismiss at 16. Second, Appellees allege that the claims fall within the Act's scope as a matter of public interest. Def.'s Special Motion to Dismiss at 17. In supporting this claim, Appellees argue that the speech focused specifically on the controversy stoked by Appellants' allegation that the President may be foreign-born and thus barred from serving as President. *Id.* at 16. Appellees further state "There is no doubt that the controversy over the President's qualifications for office is a matter of the highest public interest." *Id.* at 17. However, in their vain attempt to circumvent the Act's public interest requirement, Appellees refuse to acknowledge that the speech at issue was not primarily focused on this public concern. Appellees disregard the fact that the substance underlying Appellants' causes of action do not arise from protected activity, but a desire to harm Appellants commercially as well as their reputations. Appellees are merely attempting to use some fact "lurking in the background" to transform Appellants' meritorious claims into a SLAPP suit.

Specifically, the defamatory speech concerned the business aspect of Appellants' publication. Appellees falsely accused Appellants of planning to recall and pulp the entire 200,000 first printing run of their book. Compl. ¶ 12 (JA____). This is not a matter of public interest. Appellees further alleged that the Appellants had announced an offer to refund the purchase price to anyone who had already bought either a hard copy or electronic download of the book. Compl. ¶ 13

(JA____). This is not a matter of public interest. Appellees continued their engagement of unprotected activity by falsely imputing statements to Appellants, falsely alleging, with a manufactured quote, that Appellant Farah had stated the book "contains what I now believe to be factual inaccuracies…I cannot in good conscience publish it and expect anyone to believe it." *Id.*(JA____). Despite Appellees' contrary belief, Appellants' opinion on the accuracy of the book's content is not in essence primarily a matter of public interest. Appellees' speech did not discuss Mr. Obama's qualifications nor did it consider the validity of Mr. Obama's birth certificate. In fact, Appellees' speech did not even address the substance of what was written in Appellants' book; i.e. it was not a "book review." In their attempt to try to argue the public interest requirements, Appellees disingenuously now seek to use the subject matter of Appellants' book as an inappropriate means to create Anti-SLAPP defenses when they have none. Moreover, the substance giving rise to Appellants' claims are commercial issues and not a matter of public interest. As many courts have indicated and ruled, disputes that are predominantly commercial were not intended to come within the scope of Anti-SLAPP statutes. See *TYR Sports Inc. v. Warnaco Swimwear*, 679 F.Supp.2d 1120, 1140 (C.D. Cal. 2009). See also *Welland Sliding Doors and Windows, Inc. v. Panda Windows and Doors, LLC*., 2011 WL 3812695 at 2 (S.D.Cal. 2011). In this case, seeking to halt and impede sales, Appellees made

false statements as to the accuracy of the book. Appellees' speech did not discuss the validity of the Mr. Obama's qualifications to be president. Appellees' speech did not focus on the legitimacy of the Mr. Obama's birth certificate.

Appellees' speech did not dispute the accuracy of Appellants' book. Instead, the defamatory speech was geared to the commercial aspects of the publication, focusing on recalling the book, refunding its purchase price, and imputing false statements to Appellants to impede sales. While it is true that Appellants' book related to the Mr. Obama's qualification, this is merely a fact lurking in the background as indicated by that fact that the defamatory speech did not refer to the legitimacy of the book's content. Despite this, Appellees' now seek to use this underlying fact, which has nothing to do with Appellants' causes of actions, as a means to thrust Appellants' claims into a SLAPP defense. As such, Esquire's claim that the speech involved an act in furtherance of public interest is unwarranted. Rather, Esquire's focus on the commercial aspect renders their speech to be unprotected.

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

Appellees urged the Court to use California's Anti-SLAPP law as an instructive guide in applying the statute to this case. Defs.' Special Motion to Dismiss at 16 (JA____). In fact, California's Anti-SLAPP law is alleged to be the model for the Act. *Id.* at 16 (JA____). In examining California's Anti-SLAPP law,

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

Moreover, in *Blumenthal v. Drudge*, the District Court held that even though the law of defamation as applied to public figures might make it difficult for the plaintiffs to ultimately prevail, the District Court cannot characterize the suit as meritless. *Blumenthal*, WL 587860, at 4. The District 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 District 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 District Court refused to grant defendant's Special Motion to Dismiss under the Anti-SLAPP Act. *Id.*

Through examining the legislative intent of enacting such Anti-SLAPP laws, it is evident that it this case is not the type of case that the legislatures intended to prevent. Specifically, Appellants' motives are not to obtain an "economic advantage over the defendant," but rather to vindicate a legally cognizable right. The facts are simple. Esquire published an article that presented false information as true, well aware of the falsity of the information. Esquire, aware of the number of readers of its publications, knew that this publication would not only damage the credibility of Corsi and Farah but would also cause economic damage. After all, Appellee Esquire is a print and internet publication that directly competes with Appellants. Compl. ¶ 5 (JA____). Esquire's intent to damage these individuals is evident. Nothing more prominently expresses Appellees' malicious, defamatory, and false light mindset towards Appellants as Appellee Warren, on behalf of himself and Esquire, calling Appellants an "execrable piece of shit." Compl. ¶ 15 (JA____). Given the damage caused by the false information, it is no wonder that

Appellee Warren would also state that he had "no regrets" in posting the subject stories, that is he does not "regret" acting with malice. *Id.* (JA____). Corsi and Farah have a legally cognizable right to protect their reputations as well as their economic interest. This is the quintessential purpose, after all, of a defamation action. While Appellees argue that Appellants' claims lack merit, this could not be further from the truth. Given the number of purchasers that contacted Appellees and Appellants asking for refunds and the number of distributors and readers inquiring into Appellants' actions, Appellees clearly did not intend "satire' in their publication, and in fact gave no indication of this in their initial publication. Compl. ¶ ¶ 13, 14 (JA____). Acknowledging the ramification of their defamatory statements, Appellees issued a false disclaimer that the article was satire. Compl.¶14 (JA____). However, the damage to Appellants was already done, suffering commercial, economic, and reputational harm. It is clear that Appellants' intent is not to bring a meritless claim but to vindicate their legal rights as a result of the damages caused from Appellees' actions.

Moreover, similar to *Blumenthal*, the Court cannot at this stage, **particularly before discovery has even commenced,** conclude that Appellants' suit is meritless. To the contrary, the evidence clearly provides more than a sufficient basis for Appellants' claims. Further, it is clear that Appellees' free speech rights have not been chilled. Appellee Esquire continues to publish articles in the same

manner and continues the "Blog Post" in which the article in issue was published. Further evidencing the absence of a chilling effect on Appellees' speech is Appellees' unnecessary, highly offensive, and inappropriate comment that Appellants are an "execrable piece of shit." Compl. ¶ 15 (JA____). While free speech rights are important, they are not absolute. It would be contrary to public policy to allow a defendant to so broadly invoke the Anti-SLAPP Act after clearly using the First amendment to maliciously harm Appellants and cause damage to Appellants' reputations and economic interests. Given legislative intent, Appellants' quest to vindicate their legally cognizable right, as well as the absence of a chilling effect on Appellees' free speech rights, the Anti-SLAPP Act simply does not apply to this case.

IV. APPELLEES' SPECIAL MOTION TO DISMISS WAS IMPROPERLY GRANTED GIVEN THAT APPELLANTS WERE LIKELY TO SUCCEED ON THE MERITS OF THE CLAIMS.

While this does not fall within the scope of D.C.'s Anti-SLAPP Act, even if the Act were applicable – which it is not -- Appellees' Special Motion to Dismiss should still have been denied. In a state court, if the Appellees were to make the requisite showing, the motion is granted unless the responding party demonstrates that the claim is likely to succeed on the merits. D.C. Code §16-5502(b). Even if Appellees were to make such an unlikely showing, particularly considering the legislative intent and public policy concerns, Appellants would easily meet their

burden of showing their claims are likely to succeed on the merits. Moreover, the Anti-SLAPP Act provides no protection against a federal Lanham Act claim, further supporting denial of Appellees' Special Motion to Dismiss.

A. Appellants Are Likely To Succeed On The Merits Of Their Defamation Claim.

Even in the unlikely event that Appellees have met the requisite showing that a matter of public interest is involved, Appellants can more than satisfy their burden of establishing they are likely to succeed on the merits of their defamation claim. Primarily, Appellants can clearly satisfy the necessary elements of a defamation cause of action. In addition to the inapplicability of the fair comment privilege, the evidence undoubtedly supports the fact that Appellees' publication was not satire.

i. Appellant Has Satisfied The Elements Of A Defamation Claim And Thus, Appellants Are Likely To Succeed On The Merits Of Their Defamation Claim.

"To prevail in a defamation suit, Plaintiff need show that the statements complained of are i) defamatory; ii) capable of being proven true or false; iii) of and concerning' the Plaintiff; iv) false; and v) made with the requisite degree of intent or fault." *Coles v. Washington Free Weekly, Inc.*, 881 F.Supp.26, 30 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996). A statement is "defamatory" if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community. *Jankovic v. International Crisis Group*, 494

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

1. Appellees' Statements are Defamatory.

The statements made by Appellees are clearly defamatory, lowering Appellants' reputation in their respective community and injuring them in their profession as authors and publishers. Appellants have at all material times covered the issue regarding the eligibility of Mr. Obama to hold the presidential office. Compl. ¶ 8 (JA____). Moreover, about 25% of the American people believe that Mr. Obama is ineligible to be president, not a small percentage. Compl. ¶ 10 (JA____).

Appellants, through continuously covering this issue, have not only become "world-renowned" but have also become the "go-to" source for information regarding Mr. Obama's qualifications and the release of a potentially fraudulent birth certificate. Despite Mr. Obama's release of his birth certificate, Appellants continue to believe in the accuracy of their book and continue to advertise it as such. Compl. ¶17 (JA____).

However, through Appellees' conduct, Appellants' credibility as well as their book was more than questioned, but instead falsely attacked commercially. Alleging that Appellants were recalling 200,000 books, planning to refund purchaser's money, and making up false quotes of Appellants questioning the accuracy of their own book, while bookstores were pulling the book from their shelves, raised doubt as to and destroyed the public perception of the accuracy of Appellants' publication. Compl. ¶ 12 (JA____). In fact, Appellees went as far as to impute manufactured false statements to Appellants that further tarnished Appellants own credibility and the accuracy of their book. *Id.* Contrary to Appellees' allegations, however, not only did Appellants still believe in the accuracy of their book but had every intention to continue with its publication. Compl. ¶ 17 (JA____). The results of Appellees' statements were severely and commercially harmful. No longer did those who continue to question Mr. Obama's birth certificate and qualifications know Appellants as the "go-to" people.

Consumers began requesting refunds and book supporters began inquiring into Appellants' credibility. Compl. ¶ 13 (JA____). Bookstores even began pulling the book from their shelves, and some went as far as not offering it for sale at all. *Id.* In addition to being bombarded with accusations and questions regarding the falsity of their book, Appellants' reputations were shattered. Alleging that Appellants doubted the validity and accuracy of their book caused not only reputational damage but also significant commercial and economic harm. Their reputation and credibility, particularly among the 25% that held similar views, was irreparably damaged. As such, the statements were capable of being understood as defamatory, lowering the reputations of Appellants in their respective communities, and also damaging their commercial credibility in their trade as authors and publishers. See also *Wallace v. Skadden, Arps, Slate, Meagher, & Flom*, 715 A.2d 873, 878 (1998), (holding that a false representation that a client is sufficiently dissatisfied with an attorney's work to seek the attorney's removal is patently defamatory).

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

In addition to establishing these statements are capable of being proved as true or false, the required showing that the statements are false and 'of and concerning' the plaintiff are also satisfied. Through Appellees' own concession, the falsity of the article is apparent. Following publication, Appellee Esquire issued

a disclaimer stating that the article was, in fact, not true. Compl. ¶ 14 (JA____).

Moreover, the facts presented in Appellees' article are clearly capable of being proven as true or false, particularly given that Appellees presented the material in a factual matter, with no indication of opinions. Specifically, the allegation that Appellants' were recalling 200,000 books, the statement that Appellants were refunding the purchase price to buyers of the book, and that Appellants were halting further publication as a result of the book's inaccuracy are sufficiently factual to be receptive of being proved as true or false. See *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 2 (1990) (holding that the connotation that petitioner committed perjury is sufficiently factual to be susceptible as true or false). See Also *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1055 (9th Cir. 1996), (finding the statement "It didn't work" made during Andy Rooney's satirical broadcast could reasonably be viewed as asserting an objective fact, capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness).

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

The alleged defamation at issue is **libel per se** since Appellees falsely claim that Appellants have committed a crime in their trade and profession by commercially defrauding the American public. *See generally Raboya v. Shrybman*

& Associates, 777 F.Supp 58 (D.D.C. 1991). Thus, Appellants need not make a showing of either maliciousness or negligence.

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

The court in *Gertz v. Welch* pointed out that designation of the plaintiff as a public figure could rest on either of two alternative bases: whether an individual has achieved such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contests or whether an individual voluntarily injects himself in a particular controversy and thereby becomes a public figure for a limited range of issues. *Gertz v. Welch*, 418 U.S. 323, 351 (1974). In this case, the mere publication of a book does not thrust the Appellants into a position as public officials. *See Straw v. Chase Revel, Inc*., 813 F2d. 356 (11th Cir. 1987) (where the court held that the plaintiff in a defamation action was not a public figure in the business community by virtue of his being the publisher of a business newsletter).

See also Harris v. Tomczak, 94 F.R.D. 687 (E.D.Cal. 1982), (where the court held that there was insufficient evidence to resolve the issue of whether a psychiatrist who had written a well-known book was a public figure for purposes of a defamation action).

Appellees cannot legitimately contend that Appellants are public figures through achievement of pervasive fame or notoriety. Indeed, the mere publication of Appellants' book, particularly with regard to a subject matter that approximately 25% of the American people follow and believe, is insufficient to conclude that Appellants have achieved such notoriety that they are public figures for all purposes. While Appellants are involved in a particular controversy, specifically the validity of Mr. Obama's birth certificate and his eligibility to hold the presidential office, the defamatory statements were predominately unrelated to this matter. Appellees alleged that Appellant Farah wrote the book's forward and also published Corsi's earlier Best selling work, "Unfit for Command: Swift Boat Veterans Speak out Against Kerry" and "Capricorn One: NASA, JFK, and the Great "Moon Landing" cover-up." Compl. ¶ 12 (JA____). This is blatantly false and defamatory, lowering Appellants' credibility through inferring that Appellants pursue illegitimate causes and conspiracy theories rather than issues with a factual basis. Such defamatory statements are unrelated to Appellants involvement in a particular controversy, specifically Mr. Obama's qualifications. Rather, these

statements involve completely unrelated matters in which Appellants have no involvement. Thus, Appellants have not voluntarily thrust themselves in these controversies in a manner that would make them public figures for these limited purposes.

Given that Appellants would likely not be forced to be public figures, the requisite intent is mere negligence. Appellees were clearly – at the very least -- negligent in their publication of the defamatory article. Appellees were well aware of the falsity of their statements, trying, once exposed, to cover it up with later bogus claims of satire. Even if they intended the article to be a parody, Appellees' poor attempt at satire undoubtedly establishes their negligence. Appellees published this article without even a reference to satire, aware of the recent release of Appellants' books while knowing that this article would lead many to question the accuracy of the book. The article was published in a factual manner, even alleging that Appellants had made certain statements and imputing to Appellants such comments as "I cannot in good conscience publish it and expect anyone to believe it." Compl. ¶ 12 (JA____). Further evidencing Appellees' negligence is the fact that recent to the book's publication, Mr. Obama had in fact released his birth certificate. Compl. ¶ 11 (JA____).

One can soundly resolve that, because of Appellees' publication and the surrounding circumstances, potential readers would accept and believe the

allegations of the book's inaccuracies without ever inquiring into the foundation for the author's arguments. Even if Appellees were attempting satire, the clues that would indicate such parody were absent from the article. In addition to the Appellants being bombarded by consumers requesting refunds and questioning the accuracy of the book, Appellees were also met with similar reactions. In fact, Appellees acknowledged that a great number of people did not recognize the satire, motivating Appellees to later issue a disclaimer. Compl. ¶ 14 (JA____). Thus, it is clear that Appellees have acted negligently, satisfying the requirements of defamation.

Even if it were determined that Appellants are public figures, the actual malice requirement is also satisfied. Actual malice requires that the statement be made with knowledge that it was false or with reckless disregard of whether it was false or not. *Beeton*, 779 A.2d at 923. There is no doubt that this requirement is satisfied. Appellees were clearly aware of the falsity of the article and yet, continued to publish it. Additionally, knowing that the publication caused harm to Appellants, Appellee Warren announced publicly on the Daily Caller that he had "no regrets" in posting the subject stories. Compl. ¶ 15 (JA____). Further evidence of the malice towards Appellants is Appellees outrageous and unfounded comment that Appellants are an "execrable piece of shit." *Id.* Rather than removing the false and defamatory comments, particularly after knowing that these statements caused

harm to Appellants and after receiving reactions from readers indicating their belief in the false article, Appellees continue to allow these actionable statements to remain on the Internet. Compl. ¶ 16 (JA____). Appellees have clearly acted with knowledge of the falsity, and at minimum reckless disregard for the truth. As a result, the requirements of defamation are clearly met and Appellants are likely to succeed on the merits of their defamation claim.

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

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

In order to invoke this First Amendment's protection, Appellees must show that a reasonable reader would understand that the satire does not state actual facts. *Hoppe v. Hearst Corp.*, 770 P.2d 203, 206 (Wash. Ct. App. 1989). Further, "…even where the general tenor of a work is humorous and satirical, defamation still may lie where…the specific statement could reasonably be viewed as an assertion of objective fact." *Chapman v. Journal Concepts*, 2008 WL 5381353 at 12 (D.Haw. 2008). *See also Unelko Corp. v. Rooney*, 912 F.2d at 1055 (9th Cir. 1996) (finding the statement "It didn't work" made during Andy Rooney's satirical broadcast could reasonably be viewed as asserting an objective fact, capable of being understood as an assertion that the product failed to meet certain objective indicia of effectiveness). After all, "the principle is clear that a person shall not be allowed to murder another's reputation in jest. If a man in jest conveys a serious imputation, he jests at his peril." Appellee incredulously argues that the Blog Post had "numerous clues" that would give a reasonable reader notice that the post was not conveying statements of actual facts. Def.'s Special Motion to Dismiss at 31 (JA____). These purported "clues" include the fact that the headline claimed "BREAKING" news, complete with an exclamation point. *Id.* (JA____). According to Appellees, a reasonable reader would be put on notice since exclamations points are not typically seen in real "news" headlines. *Id.* (JA____).

Moreover, according to Appellees, a reasonable reader would know that "breaking" news has never been used by Esquire. *Id.* (JA____). Appellees make continued references to these so-called clues that supposedly would alert a reasonable reader that the article is satire. However, Appellees' allegation is nothing more than a far-fetched attempt to remedy the damage caused by the intentional defamatory statements found in the post. Rather, given the nature of the article, the publication could reasonably be viewed as asserting an objective fact. In addition to alleging, as fact, that Appellants were recalling 200,000 books, Appellees falsely indicated that purchasers would be refunded the book's purchase price. Compl. ¶ 12 (JA____). Further, the article falsely stated that Appellant Farah commented that the book contained factual inaccuracies and that he could no longer publish it. Compl. ¶ 12 (JA____). Consistent with *Unelko*, such statements were capable of being understood as an assertion that the book failed to meet certain objective indicia of accuracy. As such, these statements can clearly be viewed as asserting an objective fact. Further evidencing this obvious "fact," is the circumstances surrounding Appellee's publication. Appellees post was published on May 18, 2011 only a couple of weeks after Mr. Obama released his birth certificate, which had raised much controversy. Compl. ¶ ¶ 11, 12 (JA____). It is plausible that a publisher would discontinue publication of a book, questioning the accuracies of the content, especially when the book still questions the validity of

the presidency after the release of the President's birth certificate. It is also reasonable that readers would demand refunds after the credibility and accuracy of the book have been attacked. Working in conjunction with the recently released Obama birth certificate, Appellees belated attempt to avoid liability by claiming "satire" ex post facto, could reasonably be viewed as asserting an objective fact, failing in qualifying for First Amendment protection. Moreover, the conduct that ensued after Appellees' publication further indicates that a reasonable reader would conclude that the statements were actual facts. News organizations, readers of WorldNetDaily, purchasers and distributors of WND Books and others began contacting Appellant for confirmation of the story. Consumers also began requesting refunds while book supporters began attacking Farah and Corsi. Compl. ¶ ¶ 13, 17 (JA____). Bookstores began pulling the books from their shelves or and some went as far as not offering it for sale at all. Compl. ¶ 17 (JA____). The conduct of such people indicate that the article was anything but satirical, reasonably viewed as asserting objective facts. It was simply defamatory.

Appellees own conduct further supports the fact that a reasonable reader would conclude actual facts were stated. Adding "insult to injury," Appellees later published the following information: "…For those who didn't figure it out yet, and the many on Twitter for whom it took a while: we committed satire this morning…" Compl. ¶ 14 (JA____). The inference is simple. The reasonable reader

(including the *many* on Twitter) believed that actual, objective facts were stated. Despite Appellees allegation, the supposed clues were not sufficient to allow a reasonable reader to understand that the post did not state actual facts. Thus, Appellees' claim that the post was merely satirical is unfounded, clearly failing in providing indication of its satirical intent. Rather, the only thing that is indicated is Appellees' desperate attempt to insulate themselves from liability by claiming that the publication was satire. After all, Appellees seek the best of both worlds: causing extensive damage to their competitors' commercial publication and then insulation from liability by later falsely claiming their damaging statements constituted satire.

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

It is true that statements of opinion that do "not contain a provable false factual connotation" are fully protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994). An opinion is not actionable if it cannot be objectively verified as false or cannot "reasonably be interpreted as stating actual facts" about the plaintiff. *Milkovich*, 497 U.S. at 18-20. However, a statement of opinion may become actionable if it has an explicit or implicit factual foundation and is, therefore, objectively verifiable. *Guilford Transp. Industries, Inc. v. Wilner*,

760 A.2d 580, 596 (D.C. Cir. 1999). *See also* ("*Moldea* II") (statements of opinion actionable only "if they imply a provable false fact, or rely upon stated facts that are provably false"). In this case, Appellees statements can objectively be verified as false, both in its explicit as well as implicit reliance in a factual foundation.

Appellees' subsequent comments, while attempting to brand their initial publication as satire, continued to make further defamatory statements while still failing to amount to mere opinion. Specifically, Appellees allege that despite the recent release of Mr. Obama's birth certificate, Appellants continue their position in their book "Not because this claim is in any way based on reality, but to hold their terribly gullible audience captive to their lies, and to sell books." Compl. ¶ 14 (JA____). Appellees falsely claim that Appellants' book is not based on reality, but rather based on lies and inaccuracies. *Id.* (JA____). Appellees even go as far as claiming that Appellants, in keeping their "terribly gullible audience" captive, are simply attempting to sell books. *Id.* (JA____). Despite Appellees' malicious, malevolent and poor attempt at trying to deflect the obvious, Appellees only compounded the damage to Appellants by continuing to make false, objectively verifiable statements. Simply put, it is objectively verifiable that Appellants' book has a basis in reality, establishing the falsity of Appellees' statement. Appellees ignored the fact that it took Mr. Obama many years before releasing his birth certificate, releasing the document without ever providing an adequate justification

for the long delay in its production. Def.'s Special Motion to Dismiss at 7-8 (JA____). In fact, it took Mr. Obama more than two years before producing his long-form birth certificate. Def.'s Special Motion to Dismiss at 7 (JA____). As many continue to believe, it is plausible that the birth certificate may, in fact, be fraudulent – and many other than Appellants have so stated with objective analysis of the document. Considering the context in which the publication arose, it is clear that a reasonable reader could conclude that Appellees' statements expressed a verifiable false fact regarding Appellants. *See Weyrich v. New Republic, Inc.*, 235 F.3d 617,624 (stating that the court must consider the statement in context). Regardless of whether Appellees wish to continue their tenuous claim that the post-publication statements were merely opinion, they were based on objectively verifiable facts, explicitly and, at a minimum, implicitly and thus, deemed to be defamatory.

For the same reasons, Appellees' claim that the common law privilege of fair comment applies is invalid. Under the fair comment principle, comment was generally privileged when it concerned a matter of public concern, was based upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. *Milkovich*, 497 U.S. at 14, citing Restatement of Torts, Sec. 606. Moreover, as the court in *Milkovich* held, "It is worthy of note that at common law, even the privilege of fair comment did not

extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." *Milkovich*, 497 U.S. at 19, citing Restatement (Second) of Torts, Sec. 566. Conclusions based on a misstatement of fact is not protected by the Fair Comment Privilege. *Jankovic v. International Crisis Group*, 593 F.3d 22, 29 (D.C. Cir. 2010). Additionally, where readers would understand a defamatory meaning, liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation, or even a question. *Afro- American Pub. Co. v. Jaffe*, 366 F.2d 649, 655 (D.C.Cir. 1966).

While Appellees may strain to contend that their post-publication speech is subject to the Fair Comment Privilege, it is clear that Appellees' assertions constituted nothing more than a false statement of an verifiable fact strategically disguised as an expression of opinion. Appellees alleged that Appellants' book was not at all based on reality and simply relied on lies in an effort for Appellants to sell their book. Compl. ¶ 14 (JA____). This is the standard example of a conclusion reached based on a misstatement of fact, and thus, precluded from protection under the Fair Comment Privilege. Despite Appellees questionable contention, there are factual bases for Appellants' position, including the length of time it took the President to produce the birth certificate, the lack of adequate justification by Mr. Obama for the lengthy delay, and the possibility that the birth-certificate may, in fact, be fraudulent. Appellees ignore these arguments. Rather,

Appellees rely on the misstatement of fact that Appellants' book is, in fact, not based on reality, and use this as a means to further defame Appellants by concluding that Appellants, in their desire to sell books, are attempting to hold their "terribly gullible audience" captive.

Further evidencing the absence of an opinion is Appellees' allegation that Appellants seek to hold their audience captive through their lies. The obvious defamation is found in Appellees accusation that Appellants are liars. While Appellees may argue this is merely an opinion, this too is an objectively verifiable fact. Appellees, continuing to act with malice, further sought to disgrace Appellants and their credibility as authors and publishers. Using whatever means possible, including resorting to crafting defamatory statements, Appellees sought to compound the harm to Appellants through couching misstatements of facts as expressions of opinions.

However, it is clear that Appellees attempt is meritless, given that the false allegations of fact intending to disgrace another is not privileged. *Washington Times Co. v. Bonner*, 66 App. D.C. 280, 286 (1936), (stating that "…false allegations of fact, as, for instance, that the candidate had committed disgraceful acts, were not privileged, and that, if the charges were false, good faith, and probably causes were no defense…"). As such, Appellees' misstatement of facts, particularly in their attempt to disgrace Appellants by labeling them as liars, fail to

qualify for the Fair Comment Privilege. Appellants' book is based on reasonable, objective facts and inferences drawn from such basis and Appellees' statement is nothing more than a false statement of fact disguised as an expression of opinion. Therefore, the Fair Comment Privilege does not protect Appellees' post publication speech.

B. Appellants' False Light Claim Is Likely To Succeed On Its Merits And Thus, Appellees' Special Motion To Dismiss Was Improperly Granted By The District Court.

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

requirements for a false light claim and thus, are likely to succeed on the merits of the claim. As such, Appellees' Special Motion to Dismiss was improperly granted.

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

their careers as authors, credibility and honesty are fundamental aspects to journalism. Thus, falsely accusing journalists, such as Appellants, of being liars who questioned the accuracy of their own book would be highly offensive to a reasonable person. Appellees clearly placed Appellants in a position where their honesty, credibility and motive were questioned. As authors, this placed their commercial livelihood in jeopardy. In fact, consumers did request refunds and booksellers did remove the books from their shelves. Some went as far as to refuse to sell the books at all. Compl. ¶ ¶ 13, 17 (JA____). The statements were not only false but outrageous and caused Appellants to be subject to extreme ridicule in their respective communities, particularly where their works are viewed and read. Compl. ¶ 22 (JA____). Given Appellants' position as authors, their continued coverage of the eligibility of Mr. Obama to hold office, as well as Appellees' jeopardizing Appellants' livelihood, Appellees clearly placed Appellants in a false light that would be highly offensive to a reasonable person.

C. Appellants are Likely to Succeed on the Merits of the Claim for Tortious Interference with a Business Relationship and thus, Appellees' Special Motion to Dismiss Was Improperly Granted By The District Court.

Appellants are likely to succeed in their claim for tortious interference. As Appellees note, in such a claim, a plaintiff must prove the existence of a valid business relationship or expectancy, knowledge of the expectancy on the part of the interferer, intentional interference inducing or causing a breach or termination

or expectancy, and damages. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The business expectancy must be commercially reasonable to anticipate. *Id.* Under District of Columbia law, a legally recognizable business expectancy may include the opportunity of obtaining customers that is commercially reasonable to anticipate. *National R.R. Passenger Corp. v. Veolia Transp. Services, Inc*., 592 F.Supp.2d 86, 98 (2009). In evaluating these elements, it is evident that Appellants are likely to satisfy the requirements for their claim of tortious interference and First Amendment protection is inapplicable. Thus, Appellees' Special Motion to Dismiss was improperly granted.

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

While a business expectancy must be commercially reasonable to anticipate, a legally recognizable business expectancy may include the opportunity of obtaining customers. *Id. See also Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002) (holding that it was commercially reasonable for an author to anticipate selling her book, given allegations regarding encouragement that she received from her editor and regarding favorable press that the book received). Given the controversy surrounding the President's qualification, it was commercially reasonable for Appellants to anticipate selling their book and the opportunity of obtaining customers. Appellees Esquire Magazine and Hearst Communications are both greatly involved in print and internet publications. Comp. ¶ ¶ 5, 6 (JA____).

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

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

Appellees, knowing about the recent publication, should have known (and likely did know) that Appellants would be seeking business relationships with such entities. Appellees, knowing that such business expectancy existed, intentionally sought to induce termination of such expectancy. After all, "an interferer's knowledge of a plaintiff's relationship or expectancy may be shown by the interferer's conduct or spiteful or threatening words. *National R.R. Passenger Corp.*, 592 F.Supp.2d at 99. Appellees' article explicitly sets-out such intent through inducing consumers who purchased Appellants' books to contact

Appellants for refunds. Compl. ¶ 12 (JA____). Furthermore, through Appellees statements, the accuracy of the book came into question, leading many prospective buyers to refrain from purchasing the book as well as causing purchasers and distributors of the book to contact Appellant for confirmation and comment. Compl. ¶ ¶ 13, 17 (JA____). Through perpetuating the allegation of inaccuracies in the book, even alleging that Appellants believed the book to be inaccurate, Appellees knew that business relationships and expectancy would be terminated. Compl. ¶ 12 (JA____). Specifically, purchases that were commercially reasonable to anticipate would decline and booksellers would be reluctant to sell the book given the lack of interest that would ensue over the alleged inaccuracies. It is no coincidence that Appellees' article was published at the exact time of Appellants' book publication. Compl. ¶12 (JA____). Appellees' malicious intent is further evidenced by the callous remarks made by Appellee Warren, a direct competitor of Appellants, claiming he had "no regrets" in publishing the article even after Appellants informed Appellees that legal action may be taken given the damage they suffered. Compl. ¶15 (JA____). Given the spiteful conduct of Appellees, it is clear that Appellees not only had knowledge of the business relations but also sought to terminate such expectancy.

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

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

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

Appellees claim that Appellants' tortious interference claim fails because of the First Amendment protection. Specifically, Appellees claim that journalism is neither improper nor intended to disrupt contractual relationships. Def.'s Motion to Dismiss at 39 (JA____). However, Appellees fail to recognize that it is not to say that cases involving journalism cannot constitute a valid claim for tortious

interference. *See World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F.Supp.2d 514 (S.D. N.Y. 2001) (holding that an entertainment company sufficiently pled a claim for tortious interference against a media monitoring group by alleging that the group, using allegedly defamatory statements, intentionally interfered with the company's business relationships by attempting to induce third parties not to sponsor or advertise on company's programs).

Similarly, in this case, Appellees are blatantly using defamatory statements to induce consumers and booksellers not to purchase Appellants' books and to discontinue further sales of the publication. Appellees, through obvious dislike and malice towards the Appellants, sought to harm the Appellants by prompting reduction of the books' sales. Further perpetuating the reduction of book sales and distribution, Appellees proceeded to attribute false statements to the potential readers, calling readers of Appellants' book a "terribly gullible audience." Compl. ¶ 15 (JA____). Holding the view that Appellants' views and speech is "despicable, and deserves only ridicule," Appellees, through defamatory statements, attempted to induce third parties not to purchase or distribute Appellants' books. Compl. ¶ 14 (JA____). Conducting business in the publishing arena themselves, there is no doubt that Appellees were well-aware of the impact their defamatory speech would have on Appellants' business relations. Appellees cannot legitimately contend that such business relations were not commercially reasonable to anticipate. As such,

despite Appellees' claim, the fact that journalism is involved does not bar Appellants' claim for tortious interference with Business Relations.

V. APPELLEES' MOTION TO DISMISS UNDER RULE 12(b)(6) WAS IMPROPERLY GRANTED BY THE DISTRICT COURT.

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

Additionally, Appellants' Lanham Act claim was sufficiently pled and thus, Appellees' Motion to Dismiss under FRCP 12(b)(6) was improperly granted. Lanham Act 15 U.S.C. §1125(a)(1)(A) applies when any person who uses in

commerce any word, term, name, symbol or device, or any false designation of origin, false or misleading description of fact, or false or misleading misrepresentation of fact which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his goods, services, or commercial activities by another person. Appellees' conduct is the quintessential example of actions covered within the Lanham Act. First, it is important to note that Appellees are commercial competitors of Appellants. Compl. ¶31 (JA____). Both publish articles on the internet, and oftentimes the subject matter on both sites overlap on issues such as current news, politics, sexuality, and gun control. Appellees, through their false publication, caused public confusion as to the accuracy, nature, characteristics, and quality of Appellants' book. Compl. ¶ 32 (JA____). Specifically, Appellees falsely attributed statements to Appellants, alleging that Appellants intended to return purchaser's money, and claimed that Appellants had acknowledged that their book was inaccurate. Compl. ¶12 (JA____). Thus, in causing public confusion, Appellees' forced Appellants to deal with inquiries from purchasers and distributors regarding the validity of the book as well as the availability of refunds. Compl. ¶ ¶ 13, 4 (JA____). Amidst the confusion, the false statements made by Appellees, in their malicious attempt to sabotage their competitors, damaged Appellants' reputation,

credibility, and anticipated success. In fact, Appellees were forced to issue a disclaimer in order to mitigate the confusion caused by their statements. Compl. ¶14 (JA____). As such, Appellants claim under the Lanham Act is more than sufficient and thus, Appellees' Motion to Dismiss was improperly granted.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's ruling and hold that Appellees' Blog Post is not satire protected by the First Amendment but rather that it is commercial speech that falls under the Lanham Act. In addition, this Court should respectfully hold that the Anti-SLAPP Act is inapplicable in federal court and that Appellant sufficiently pled claims under common law defamation, false light invasion of privacy, and tortious interference. Finally, this Court should respectfully remand this case to a new District Court judge who does not hold a bias against Appellants so that Appellants may receive a fair trial.

That the book at issue concerns a controversial topic should not enter into this Court's decision-making. As John Adams, perhaps our greatest Founding Father argued when "advocating" for a free country leading up to the signing of the Declaration of Independence, we were to become a nation of laws, and not of men. Whether or not Mr. Obama is eligible to be President of the United States, as Judge Collyer seemed to think at issue, is indeed not pertinent to the case. The law is.

Oral argument is respectfully requested.

Dated: January 9, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 2013 a true and correct copy of the foregoing Brief Of Plaintiffs-Appellants Joseph Farah, Jerome Corsi, Worldnetdaily.Com And WND Books For Reversal Of The District Court's Order (No. 12- 7055) was filed electronically via CM/ECF to the United States Court of Appeal for the District of Columbia Circuit and served via CM/ECF upon the following:

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