NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 12-7055

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

On Appeal from the United States District Court
for the District of Columbia
Civil Action No. 11-cv-1179-RMC

BRIEF FOR DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Appellees hereby certify:

(A) Parties and *Amici*

Reference is made to Appellants' Brief, which lists the parties that appeared before the district court and this Court, except *amicus curiae* the District of Columbia. However, "Esquire Magazine" is not a legal entity and therefore did not in fact appear contrary to Appellants' statement. In addition, Esquire Magazine, Inc. is a non-existent entity (and Appellants do not appeal the dismissal of that non-entity).

Under Circuit Rule 26.1, Hearst Communications, Inc. is an indirect wholly-owned subsidiary of The Hearst Corporation, a privately-held company. No publicly held corporation owns 10% or more of Hearst Communications, Inc.'s stock.

(B) Rulings Under Review

Reference is made to Appellants' Brief, which cites the ruling under review. The Memorandum Opinion is reported at 863 F. Supp. 2d 29 (D.D.C. 2012) (Collyer, J). However, Appellees do not agree that any rulings other than the Memorandum Opinion are subject to review.

(C) Related Cases

There are no related cases. The case cited by Appellants does not involve substantially the same parties.

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GLOSSARY

"SLAPP" stands for Strategic Lawsuits Against Public Participation.

"Act" or "Anti-SLAPP Act" stands for the District of Columbia's Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq*.

"Committee Report" stands for the Report of the D.C. Committee on Public Safety and the Judiciary, Nov. 18, 2010.

INTRODUCTION

This case takes aim at a posting on Esquire's Politics Blog, which satirized the unwavering stance of a group at the center of the national public controversy over President Obama's birthplace and his legitimacy as President. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted). Given the core political speech targeted, the district court correctly found all of Plaintiffs' claims to be barred by the First Amendment, and this Court should affirm.

Plaintiffs are architects of what has been called the "Birther Movement," a group of highly vocal critics of the President who assert that he is not eligible to hold office because he is not a naturally-born citizen. The speech they challenge is political commentary, which is fully protected by the First Amendment. The commentary is in the form of a satirical mock-news blog entry that poked fun at Plaintiffs' book, "Where's the Birth Certificate? The Case that Barack Hussein Obama is Not Eligible to be President," which was published several weeks *after* President Obama released that very birth certificate. Esquire poked fun by "reporting" that Plaintiffs were recalling and "pulping" the entire first printing of their book – released just the day before – and offering refunds to customers. While this would have been a reasonable (if extreme) step by a publisher who

objectively considered the evidence, Esquire's point was that Plaintiffs are *not* reasonable when it comes to the President. Anyone familiar with Plaintiffs' very public, unyielding insistence that the President's birth certificate is a fake and proves nothing other than his role in a claimed forgery would understand in an instant that Esquire's "report" did not convey actual facts about Plaintiffs. If that were not enough, the report was *labeled* as "Humor" on a "Politics Blog" described as "opinion," and included numerous other indicia of fiction. Plaintiff Joseph Farah's immediate reaction proves the point. Taking to the airwaves the same day the blog entry was published, Farah said he "assume[d] it was a parody," and laughingly mocked those calling him for comment saying, "are you guys serious? ... You think I'm gonna pull a best-selling book off the shelves? What's the matter with you?" Plaintiffs nevertheless filed this suit against Hearst Communications, Inc., the publisher of Esquire.com, and Mark Warren, the journalist who posted the blog entry (collectively, "Esquire"),[1] seeking to punish them for their satirical critique, to publicize their own views (and their book) and raise money, purportedly to "take ownership of the magazine."

Plaintiffs' suit is without merit and was properly dismissed. The statements on their face are not actionable because they are incapable of being understood as

[1] Plaintiffs also named as a defendant Esquire Magazine, Inc., which is not a legal entity and was dismissed on that ground. Plaintiffs have not appealed that dismissal.

actual statements of fact or because they are expressions of opinion, and the district court properly disposed of the case under Fed. R. Civ. P. 12(b)(6). All of Plaintiffs' claims stem from Esquire's fully-protected political speech, and Plaintiffs' attempt to creatively plead around the First Amendment or mischaracterize the speech as commercial was correctly rejected. The dismissal was in keeping with this Circuit's long-prescribed mandate that, "[i]n the First Amendment area, summary procedures are even more essential." *Cf. Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966).

The district court also rightly dismissed the suit under the District of Columbia Anti-SLAPP Act, which was passed to protect against this very sort of frivolous, retaliatory litigation targeting speech on public issues. "[D]ebate on public issues should be uninhibited, robust, and wide-open," the Supreme Court held long ago, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and the Anti-SLAPP Act ensures that it is. Because Plaintiffs cannot possibly show at the very outset of this case a likelihood of success on the merits, the court correctly applied the Anti-SLAPP Act to terminate the case before subjecting Esquire to burdensome and harassing discovery.

Plaintiffs clutter their brief with numerous frivolous and irrelevant questions on appeal, including claiming for the first time that Judge Collyer was biased against them. Plaintiffs bury their discussion of the merits at the end of their brief,

and simply rehash the same arguments rejected below. Ultimately, this Court should see Plaintiffs' case for what it is (and what Plaintiffs' themselves admitted it is) – an attempt to punish Esquire for its political speech ridiculing Plaintiffs for their own political views.

COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly dismiss Plaintiffs' defamation claim under Rule 12(b)(6) where the publications in suit, on their face, can only be reasonably understood as political satire or opinion, protected by the First Amendment?

2. Did the district court correctly dismiss the remaining claims under Rule 12(b)(6) as duplicative of the defamation claim and the Lanham Act claim because the statements were not commercial speech?

3. Did the district court correctly dismiss Plaintiffs' state and common-law claims under the substantive protections of the D.C. Anti-SLAPP Act where the claims target speech concerning a matter of public concern and Plaintiffs cannot establish a likelihood of success on their merits?

4. Do Plaintiffs' claims of judicial bias, raised for the first time on appeal, and improper judicial notice warrant reversal?

RELEVANT STATUTORY PROVISIONS

The District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.*, is contained in the Addendum to this Brief.

The relevant section of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and (B), is contained in the Addendum to this Brief.

The Report of the D.C. Committee on Public Safety and the Judiciary, Nov. 18, 2010 is contained in the Addendum to this Brief.

COUNTERSTATEMENT OF FACTS

Plaintiffs disingenuously attempt to characterize this case as one about commercial speech concerning a private business dispute when even a cursory review of the record shows that nothing could be further from the truth.

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

Joseph Farah is the founder, Editor and CEO of WND, a conservative website. (Compl. ¶ 2; Findikyan Decl., Ex. 2) (JA__) In the past, Farah's WND column has included pieces entitled, "Obamageddon" and "Hitler was ineligible for presidency, too." (Findikyan Decl., Exs. 3-4) (JA__) Farah is an author of over one dozen books, the founder and co-publisher of WND Books, and formerly hosted his own nationally-syndicated talk show. (*Id*., Ex. 6) (JA__) Using WND

[2] The materials cited in the Counterstatement of Facts are either incorporated into the Complaint or appropriate matters to which the Court may take judicial notice. *See infra* Part III.B. In addition, the matters outside the Complaint are proper evidence for the purpose of the Anti-SLAPP analysis. *See infra* Part II.D.

as his platform, Farah is one of the most vocal proponents of what has been called the "Birther Movement," a group of Americans who believe that Obama is not eligible to be President because he is not a natural-born citizen and who claim that his birth certificate is fake. (Findikyan Decl., Ex. 7) (JA__)

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

In June 2008, then-Senator Obama released his "Certificate of Live Birth," a short-form certificate indicating that he was born in Hawaii. (Findikyan Decl., Ex. 9) (JA__) From then through March 2011, WND posted over 500 entries that in some form questioned the legitimacy of the certificate, often demanding release of his full birth certificate. (*Id*., Exs. 1, 15-16) (JA__) It sponsored a country wide billboard campaign asking "Where's The Birth Certificate?" (*Id*., Ex.17) (JA__)

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

The Release of President Obama's Long-Form Birth Certificate. In reaction to what President Obama called "silliness" that had gone on for more than two years, on April 27, 2011, he posted his long-form birth certificate on the White House's web page, re-confirming that he was indeed born in Hawaii on August 4, 1961. (*Id.*, Ex. 20) (JA__) In a press conference that day, President Obama urged the nation to end what he described as the baseless conjecture on the long-established fact of his birth and come together to solve the nation's serious problems, continuing that:

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

(*Id.*) (JA__)

Plaintiffs' Insistence that the Long-Form Birth Certificate Is a Fake and Publication of Corsi's Book. Plaintiffs were that "segment of people" for whom the release of the long-form birth certificate did not resolve the issue. That day, Farah went on national television to defend his steadfast position, with WND noting on its website the "fireworks" that ensued. (*Id.*, Ex. 21) (JA__) Two days after the release, Farah posted on WND's website a piece entitled, "It's settled!

He's ineligible." (*Id.*, Ex. 22) (JA__) The post claimed an "Exclusive: Joseph Farah notes birth certificate of Obama proves opposite of what media think" and that he "for the first time, can report with confidence that there is no way on earth Obama is eligible to be sitting in the White House." (*Id.*) (JA__)

Over the next three weeks, Farah promoted Corsi's Book, refusing to "stand[] down" and reiterating his belief that the birth certificate is not legitimate, citing the Book as forcing Obama's hand to release it. (*Id.*, Ex. 7) (JA__) WND published nearly 50 articles questioning the validity of the long-form birth certificate and supporting the soon-to-be-released Book. The Book was published on May 17, 2011, and was heralded on WND's website with an article entitled, "It's out! The book that proves Obama's ineligible. Today's the day Corsi is unleashed to tell all about that 'birth certificate.'" (*Id.*, Ex. 26) (JA__)

The Satiric Blog Post, Post-Publication Speech, and Esquire's Satirical History. The next morning, Esquire.com published in "The Politics Blog" section of its website Mark Warren's satirical blog post (hereinafter, the "Blog Post"), hyperbolically headlined "BREAKING: Jerome Corsi's Birther Book Pulled from Shelves!" (*Id.*, Ex. 27) (JA__)[3] "The Politics Blog" explicitly notes that it is a place for opinion. (*Id.*) (JA__) Tongue-in-cheek descriptions accompany the

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

names of each of the Esquire contributors, such as: "Skeptic;" "Big Rolodex;" "Reads other blogs and watches Fox News so you don't have to." (*Id.*) (JA__)

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

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

> birth certificate, thus resolving the matter of Obama's legitimacy for "anybody with a brain."
>
> "He called up Corsi and really tore him a new one," says the source. "I mean, we'll do anything to hurt Obama, and erase his memory, but we don't want to look like fucking idiots, you know? Look, at the end of the day, bullshit is bullshit."
>
> Corsi, who graduated from Harvard and is a professional journalist, could not be reached for comment.

(*Id*.) (JA__)

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

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

(*Id*.) (JA__) (hereinafter, the "Update"). When contacted by the *Daily Caller*, Mark Warren opined that Corsi is "an execrable piece of shit" (hereinafter, the "Warren Statement"). (*Id*., Ex. 28) (JA__)

The satirical Blog Post followed in a decades-old tradition of satire and humor at Esquire about national issues and public figures and officials. To name a

few examples, the magazine famously published in the 1960s a series of articles by Harvard economist John Kenneth Galbraith (writing under the pseudonym Mark Epernay) including a fake experiment by a fictional "Dr. McLandress" that tested the longest time span various public figures' and officials' thoughts remained on something other than his or her own personality. (*Id*., Exs. 29, 30, 31, 32) (JA__) 1966's "Joy To the World And Especially To Pickens, S.C." pokes fun at President Lyndon B. Johnson, purporting to be a campaign "speech." (*Id*., Ex. 33) (JA__) In 1995's "Learning New Steps," Senator Bob Dole has a fictional conversation with Senator Alfonse D'Amato, while President Bill Clinton has a fictional meeting in the Oval Office with Leon Panetta and George Stephanopoulus. (*Id*., Ex. 34) (JA__) In "Sex Tips From Donald Rumsfeld," the former Secretary of Defense responds to readers' sex questions. (*Id*., Ex. 35) (JA__)

Esquire's Politics Blog followed in this tradition. In "EXCLUSIVE: Bernie Kerik's Prison To-Do List Leaked!," which contains a headline similar to the Blog Post at issue in this litigation, Esquire fictionally "reported" that it had come into possession of the former Police Commissioner's "to-do" list while imprisoned, which included: "[p]repare for routine visits from Rudy Giuliani and other 'friends for life'; and "[s]tockpile sunscreen for head at yard-time with cigarette trades." (*Id*., Ex. 36) In "From the White House Transcription Department," President Obama and the First Lady conduct a fictionalized book club session with author

Jonathan Franzen about his book *Freedom*. (*Id*., Ex. 37) (JA__) In "Bin Laden Home-Video Leak Continues with Osama's DVR," Esquire reported that Osama bin Laden's DVR cache, which, like the Blog Post at issue here, was purportedly "released exclusively to The Politics Blog," indicated that bin Laden watched shows called, among others, "Dubai's Got Talent," "That Yemeni Show," and "So You Think You Can Dance: Gaza." (*Id*., Ex. 38) (JA__) The list goes on.[4]

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

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

"take ownership of the magazine," seeking donations from loyalists to support his legal cause. (*Id*., Ex. 44) (JA__)

The Complaint. On June 29, 2011, Plaintiffs held a press conference to announce the filing of their Complaint against Defendants, seeking in excess of $100 million in actual and compensatory damages and in excess of $20 million in punitive damages. (Compl. ¶ 38) (JA__) They used the press conference to restate their views that the President is complicit in forgery and ineligible to hold office, and to promote their book. (Findikyan Decl., Ex. 45) (JA__) The Complaint alleges defamation (Count I), false light invasion of privacy (Count II), tortious interference with business relations (Count III), violations under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and (B) (Count IV), and misappropriation invasion of privacy (Count V).

The District Court Decision. Defendants moved to dismiss the Complaint, both under Fed. R. Civ. P. 12(b)(6) and under the District of Columbia Anti-SLAPP Act. On June 4, 2012, the district court granted the motion in its entirety. The court, on the parties' joint motion, stayed pending this appeal its determination of whether to grant attorneys' fees to Defendants under the Anti-SLAPP Act.

SUMMARY OF ARGUMENT

Plaintiffs' claims all target core political speech in the form of a satirical blog post lampooning Plaintiffs' dogged insistence that the President was not born in the United States even in the face of his release of his long-form birth certificate. Because that speech is deserving of the highest protection under the First Amendment, the district court properly dismissed all of Plaintiffs' claims for failure to state a claim under Rule 12(b)(6) and under the more demanding standard of the D.C. Anti-SLAPP Act.

The district court correctly found Esquire's speech to be fully-protected satire on a matter of public concern that cannot form the basis of a defamation claim. On its face, the speech offered numerous clues that it was not intended to convey actual facts – not the least being the "humor" label attached to it. The larger context of the speech – Plaintiffs' unwavering public stance on the President's illegitimacy – and history of satire at Esquire, which are proper subjects of judicial notice, further serve to inform the reasonable reader of the satiric nature of the speech. Plaintiffs' claim that some readers may have been deceived is legally irrelevant and that Plaintiffs disagree with the opinions conveyed is constitutionally immaterial.

The district court also rightly rejected Plaintiffs' attempt to plead around the First Amendment through claims sounding in privacy or tortious interference.

These claims, when targeted at pure speech, are subject to the same limitations as the defamation claim and fail for the same reasons. In addition, as discussed below, Plaintiffs cannot satisfy the elements of these claims, providing a further ground for affirmance. Similarly, Plaintiffs' attempt to use the Lanham Act to publish political speech was soundly rejected, as that law does not apply to non-commercial speech.

While the district court's dismissal for failure to state a claim under Rule 12(b)(6) can be affirmed without reference to the Anti-SLAPP Act, the statute clearly applies and was passed to address exactly the sort of speech-chilling claims at issue. The statute confers a substantive immunity from suit enforceable in federal court, as every circuit court addressing the issue has found.

Finally, Plaintiffs' allegation of judicial bias, which was not raised below and should be rejected for that reason alone, smacks of sour grapes. As Judge Collyer observed: "Those who speak with loud voices cannot be surprised if they become part of the story." *Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 37 (D.D.C. 2012).

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss de novo. *Al Maqaleh v. Gates*, 605 F.3d 84, 94 (D.C. Cir. 2010). While there is no established standard of review for orders striking cases under the D.C. Anti-SLAPP Act, courts reviewing orders under similar statutes review them de novo. *See, e.g.*, *Roberts v. McAfee, Inc.*, 660 F.3d 1156, 1163 (9th Cir. 2011) ("We review *de novo* a district court decision on a motion to strike under California's anti-SLAPP statute."). Decisions regarding the admissibility of evidence, such as decisions to take judicial notice of records, are reviewed for an abuse of discretion. *Alsabri v. Obama*, 684 F.3d 1298, 1307 (D.C. Cir. 2012).

ARGUMENT

I. PLAINTIFFS' CLAIMS WERE PROPERLY DISMISSED PURSUANT TO FED. R. CIV. P. 12(b)(6)

The simplest basis on which to affirm the dismissal of Plaintiffs' claims is under Fed. R. Civ. P. 12(b)(6). As the district court found, all of the counts of the Complaint fail to state a claim. Given this facial lack of merit, the dismissal should be affirmed regardless of the applicability of the Anti-SLAPP Act. Moreover, the Blog Post and Update alone, which are both quoted from and incorporated into the Complaint, provide all of the necessary facts on which to grant the motion to dismiss, obviating the need to decide whether there are other materials over which the Court may properly take judicial notice.

Under the familiar 12(b)(6) standard, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Instead, the complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In short, "Rule 8(a)(2) ... requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Twombly*, 550 U.S. at 555 n.3. In addition, this Court has long instructed that, "[i]n the First

Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (discussing summary judgment, but offering reasoning equally relevant to motions to dismiss).

For the numerous reasons discussed below, the district court correctly found that Plaintiffs failed to state any claim.

A. Plaintiffs Have No Cognizable Defamation Claim

In order to state a claim for defamation, a plaintiff must show that the statements at issue convey facts, which are capable of being proven false, and that are actually false, among other things.[5] *See Moldea v. N.Y. Times Co.*, 22 F.3d 310, 316-17 (D.C. Cir. 1994) ("*Moldea II*").

Plaintiffs cannot carry their burden with respect to these threshold elements as a matter of law because: (a) the Blog Post is satire, which is fully protected by the First Amendment; and (b) the Update and Waren Statement are pure opinion, incapable of being proven true or false, and fair comment.

1. The Blog Post is Fully-Protected Satire

Esquire's political critique of the Book and Birther Movement is satire, a literary technique used since ancient times to convey opinions on matters of public concern. Courts have treated political satire as fully protected by the First

[5] There are other requirements to prove a defamation claim that Plaintiffs cannot satisfy, such as fault, but they are not at issue on this appeal.

Amendment, recognizing its essential role in a well-functioning democracy. Shielding satiric speech from liability provides "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990).

a. The history and function of satire

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

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

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

Satire is one of the oldest literary modes, with a long and rich history dating back to ancient Greece of addressing social and political issues. *See* Brown & Kimmey, at 1-3. Perhaps the most famous example of satire is "A Modest Proposal," the 1729 essay by Jonathan Swift. *See id*. at 196. Swift's essay attacks repressive English taxes imposed on the Irish poor by proposing an alternative means to raise revenue – slaughtering Irish children and selling them for meat. At the time of its publication, many people read Swift's "Modest Proposal" as a serious recommendation of economically motivated cannibalism. Benjamin Franklin, another skilled political satirist, used the form to criticize, among other things, England's treatment of the American colonies.[6] In "The Speech of Miss Polly Baker" (1747), Franklin critiqued the double standards towards marriage and illegitimacy by recounting the (fictitious) speech of a woman reportedly prosecuted

[6] *See* The Papers of Benjamin Franklin, http://franklinpapers.org (digital editions of Yale University's Franklin Papers) (last visited Feb. 10, 2013).

for the fifth time for having a bastard child, who pleads her case to the judges, inducing one of them to marry her.[7] The article caused significant controversy when first published because many people reading the newspaper believed the story to be true.[8] That political satiric tradition has carried on throughout history to today, with many examples of how a skilled satirist can and does initially deceive even the most sophisticated members of the public until the intended meaning becomes apparent.[9]

b. The long history for protection for satire

Constitutional protection for satire and other forms of humor is well-established. "'Humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalist expose, or the religious tract.'" *New Times*, 146 S.W.2d at 151 (citation omitted); *see also* Hon. Robert D. Sack, Sack on Defamation § 5.5.2(G)(1) (4th ed. 2011) ("Despite its typical literal 'falsity,' any effort to control [humor] runs severe risks

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[7] *See id*.

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

[9] *See, e.g.*, Maureen Dowd, *Is You Wicked?*, N.Y. Times, May 7, 2003, at www.nytimes.com/2003/05/07/opinion/07DOWDD.html (highlighting comedian Sasha Baron Cohen's Ali G character's deception of former Secretary of State James Baker, former CIA Director James Woolsey, former U.S. Attorney General Richard Thornburgh, and former National Security Advisor and Air Force General Brent Scowcroft) (last visited Feb. 10, 2013).

to free expression as dangerous as those addressed to more 'serious forms of communication.'"). Without strong First Amendment protection, "satirists would be subjected to damages awards without any showing that their work falsely defamed its subject" because "caricature" requires "deliberately distorted" imitation "for satirical effect" and explores "politically embarrassing events" often "to injure the feelings of the subject of the portrayal." *Falwell*, 485 U.S. at 53-54; *see also Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 801 (9th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972 (10th Cir. 1996); *Groucho Marx Prod., Inc. v. Day & Night Co.*, 689 F.2d 317, 319 n.2 (2d Cir. 1982).

Satire's protection flows from the First Amendment's protection for expressions of opinion, as a hypothetical reasonable reader would understand that satire does not state actual facts. *See, e.g., Weyrich v. New Republic, Inc.*, 235 F.3d 617, 625 (D.C. Cir. 2001) ("Never does the article claim to make a psychological pronouncement, nor would a reasonable reader understand it to do so…. Presented in such a loose manner, in such a well-understood context, the article's reference to 'bouts of ... paranoia' is neither verifiable nor does it imply specific defamatory facts about appellant. Likewise, the caricatures, though biting, are not actionable."); *Garvelink v. Detroit News*, 522 N.W.2d 883, 886 (Mich. App. 1994) ("[I]t is the function of this Court to review the column to determine whether it

could reasonably be understood as describing actual facts about plaintiff."); *see also, e.g.*, *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982); *New Times*, 146 S.W.3d at 157; *Hoppe v. Hearst Corp.*, 770 P.2d 203, 206 (Wash. Ct. App. 1989).

"[T]he hypothetical reasonable person – the mythic Cheshire cat who darts about the pages of the tort law – is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity." *New Times*, 146 S.W.3d at 157 (citation and quotation omitted). The reasonable reader is also fully familiar with the broader context in which the satire is set, and the more immediate context of the publication, including its details. *See Moldea II*, 22 F.3d at 317; *Knievel v. ESPN*, 393 F.3d 1068, 1078 (9th Cir. 2005) ("Read in the context of the satirical, risqué, and sophomoric slang found on the rest of the site, the word 'pimp' cannot be reasonably interpreted as a criminal accusation."); *Lane v. Arkansas Valley Publ'g Co.*, 675 P.2d 747, 752 (Colo. Ct. App. 1983) ("[I]n the context of a heated recall campaign, ... the comments of a fictional character with an unlikely background cannot be taken as serious allegations of illegal use of county funds or other illegal activity and were protected opinions."); *Myers v. Boston Magazine Co.*, 403 N.E.2d 376, 379 (Mass. 1980) (courts must "examine the statement in its totality in the context in which it was uttered," including "the medium by which

the statement is disseminated and the audience to which it is published") (citation omitted); *Hoppe*, 770 P.2d at 206. For example, when Rev. Jerry Falwell sued Hustler Magazine over a satirical advertisement – similarly featuring a fake "interview" – that depicted Falwell discussing having sex with his mother, the Court found that "the ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'" *Falwell*, 485 U.S. at 48-49.

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

hypothetical reader, for purposes of defamation law, does not." *New Times*, 146 S.W.3d at 158.

Courts across the country analyzing satiric speech have concluded that publications similar to Esquire's Blog Post are fully protected by the First Amendment. In *New Times*, the Texas Supreme Court dismissed a defamation claim by a district attorney and judge, who challenged a satiric newspaper article that attributed false quotations to them in connection with a fictional incident. The article was a reaction to a real incident that attracted immense local and national news coverage – plaintiffs' arrest and detainment of a seventh grader for the content of a school assignment. The newspaper penned a satiric article entitled "Stop the Madness," which related the story of a six-year-old child arrested and detained by plaintiffs for writing a cannibalistic book report about the Maurice Sendak classic, *Where the Wild Things Are*. The article contained false quotations and "facts," reporting that the child was shackled and had a school record for spraying a boy with pineapple juice. It "quoted" the district attorney as considering, but rejecting, trying the girl as an adult, and the judge as stating that any implication of violence in a school "is reason enough for panic and overreaction." The article was published in the "News" section of the newspaper and had no overt indicia, such as a humor tag or "opinion" label, to signal the reader that it was satire. *See id*. at 159-60. Nevertheless, considering the totality

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

Similarly, *Knox v. Mink*, 613 F.3d 995 (10th Cir. 2010), concerned a student's "editorial column" addressing community issues called the *Howling Pig*, which employed a fictional editor named Junius Puke, who was identified using altered photographs of a professor, Junius Peake, and included fabricated quotes from Puke. *Id.* at 998, 1008-10. The Tenth Circuit held the student's First Amendment rights were violated when a prosecutor, based on Professor Peake's complaint of libel, authorized the search and seizure of the student's computer. *Id.* The court held the "comments asserted as defamation constituted satire in the classic sense" because no reasonable person could believe the allegedly defamatory statements stated facts "that covered subjects and used language that Mr. Peake, a professor of finance, surely would not have." *Id.* at 1008-10 & n.10 (collecting cases on protected satire). It emphasized that "[t]he test is not how Mr. Peake would characterize The Howling Pig's editorial column, but how a reasonable person would understand those statements in that context." *Id.* at 1009; s*ee also Pring*, 695 F.2d at 443 (finding article describing acts of fellatio at Miss America contest that caused recipients to levitate were "no more than rhetorical

hyperbole" and not actionable); *Busch v. Viacom Int'l, Inc.*, 477 F. Supp. 2d 764, 775-76 (N.D. Tex. 2007) (finding no reasonable viewer could believe fake endorsement of diet shake on *The Daily Show* stated actual fact about plaintiff body-builder).[10]

c. Esquire's Blog Post clearly is protected satire

Here, it is clear from the face of the Blog Post that it is satire, a conclusion reinforced by its context and Plaintiff Farah's own contemporaneous recognition of the Post as "parody." The Blog Post's thesis was completely antithetical to the position consistently and very publicly espoused by Plaintiffs, even after President Obama's release of his birth certificate. This broader context made the challenged Blog Post patently absurd to anyone who was aware of the controversy. Moreover, "[t]he Blog Post itself bore indicia of its satiric nature," which gave a reasonable

[10] *See also Boston Magazine*, 403 N.E.2d at 376-77 (finding statement that sportscaster was "enrolled in a course for remedial speaking" to be opinion); *Garvelink*, 522 N.W.2d 883 (finding editorial column relaying fictional interview with school superintendent to be satire); *Patrick v. Superior Court*, 27 Cal. Rptr. 2d 883, 883 (Cal. Ct. App. 1994) (unpublished) (finding phony memo on judicial letterhead penned by a local newspaper and distributed to judges in the courthouse, was satire and that no reasonable person could conclude otherwise); *San Francisco Bay Guardian*, 21 Cal. Rptr. 2d at 467 (finding phony letter to the editor in newspaper's April Fool's edition to be parody); *Arkansas Valley Publ'g*, 675 P.2d 747 (finding newspaper article conveying conversation with fictional character with unlikely background was protected opinion); *Hoppe*, 770 P.2d 203 (columnist's parody of Raymond Chandler detective novel was protected speech).

reader numerous "clues" that the Blog Post was not conveying statements of actual facts. *Farah*, 863 F. Supp. 2d at 38. Specifically, the Blog Post:

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

and referencing the 1978 movie *Capricorn One* (starring, among others, O.J. Simpson) about a government-inspired Mars landing hoax;

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

(Findikyan Decl., Ex. 27) (JA__) The Blog Post also claimed to have the "exclusive interview" with Plaintiff Farah, implying that Esquire was the mouthpiece of a dubious right-wing cause, a position no reasonable reader familiar with Esquire would believe.

These clues alone would lead a reasonable reader to understand the Post to be satire, a conclusion only reinforced by the fact that a reasonable Esquire reader would be acquainted with its history of political satire and understand the absurdity that Farah and the Plaintiffs would suddenly, for no reason, reverse their very public position that Obama's birth certificate was a fake the day after their much-touted Book was released and then give Esquire an "exclusive" as to their about-face. *See New Times*, 146 S.W.3d 159 ("'The comic effect is achieved because the reader sees the words as the absurd expression of positions or ideas associated with the purported author.'") (citation omitted). Additionally, the Blog Post appeared only on the Internet, where a reader with any doubt of whether the Blog Post

conveyed actual facts could instantaneously search the web for Plaintiffs and their position and learn that the Blog Post made no sense at all. Readers of blogs are familiar with the Internet's "freewheeling, anything-goes writing style." *Sandals Resorts Int'l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407, 415 (N.Y. App. Div. 2011) (quotation omitted). Because no reasonable reader would believe that the Blog Post was conveying actual facts, the satire is fully-protected opinion under the First Amendment and the dismissal of the defamation claim should be affirmed.

Plaintiffs' argument on appeal ignores both the rich history of political satire in this nation (including the printed and virtual pages of Esquire) as well as the courts' robust jurisprudence protecting that satire. Instead, Plaintiffs focus on the fact that some people may have "f[allen] for the joke" – a fact that is legally irrelevant as discussed above. Indeed, if a hypothetical reasonable reader is incapable of recognizing that an over-the-top piece containing outlandish quotations, labeled as humor, in an opinion section, is not a straight news story, then the concept is meaningless. *See Carpenter v. King*, 792 F. Supp. 2d 29, 35 (D.D.C. 2011) ("'The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news'") (citation omitted). In short, Plaintiffs' contention that some of the "facts" stated in the Blog Post could have been taken as true misses the point. Of course the Blog Post purported to be stating facts – that is the very nature of satire. But, as

explained above, taken together and especially in context, the reasonable reader would understand that the Post was not intended to and did not convey actual, literal facts. Indeed, Plaintiffs' suggestion that a publisher plausibly might pull a book if the factual basis for it were proven false but that they would never do so simply highlights the conceit of the Blog Post – that Plaintiffs did not and would not act reasonably even in the face of President Obama's release of his long-form birth certificate.

Finally, the cases cited by Plaintiffs concern entirely different circumstances and their reasoning has no application here. *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), involved a claim based on Andy Rooney's factual statement that plaintiff's product "didn't work." *Id.* at 1051. There was no mischaracterization or exaggeration in the Rooney report that would indicate that it was a fake news item. So too in *Robinson v. Radio One, Inc.*, 695 F. Supp. 2d 425 (N.D. Tex. 2010), where the court found none of the hallmarks of parody or satire – "mischaracterization or exaggeration" – in a radio show that simply identified the plaintiff as gay. And *Chapman v. Journal Concepts, Inc.*, 2008 WL 5381353 (D. Haw. Dec. 24, 2008), concerns a magazine article that was intended to be and was presented as a true story, but was simply written in a humorous manner, *id.* at *2, *12. None of these cases involved the sort of exaggerated, clearly counter-factual account like the Blog Post here.

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

Esquire's post-publication speech – the Update and the Warren Statement – are textbook examples of fully-protected opinion and the Update is also independently protected by the common law fair comment privilege. As an initial matter, while Plaintiffs baldly characterize the Warren Statement as "false light" in their argument summary, they never offer any further argument as to how the statement is actionable, and having failed to present any argument, Plaintiffs have waived any claims based on the Statement.[11]

Statements of opinion that do "not contain a provably false factual connotation" are protected from liability under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Moldea II*, 22 F.3d at 313. In addition, an opinion is not actionable if it cannot be objectively verified as false or cannot "reasonably be interpreted as stating actual facts" about the plaintiff. *Milkovich*, 497 U.S. at 18-20; *Washington v. Smith*, 80 F.3d 555, 556-57 (D.C. Cir. 1996).

[11] Even after failing to discuss the Statement below and on appeal, Plaintiffs fault the district court for ignoring it. (Appellant's Brief at 12) (hereinafter, "Br.") In any event, the Warren Statement is classic rhetorical hyperbole not capable of being proven true or false. Whether or not someone is an "execrable piece of shit" is exactly the type of loose epithet about a public figure that is not actionable under the First Amendment. *See, e.g., Lund v. Chi. & NW Transp. Co.*, 467 N.W.2d 366, 369 (Minn. Ct. App. 1991) (finding use of the word "shitheads" opinion as not suggesting verifiably false facts); *accord Silk v. City of Chicago*, 1996 WL 312074, at *35 (N.D. Ill. June 7, 1996) ("useless piece of shit"); *Yeagle v. Collegiate Times*, 497 S.E.2d 136 (Va. 1998) ("Director of butt-licking").

Rhetorical language that is "loose, figurative [and] hyperbolic" tends to negate that a statement contains an assertion of verifiable fact. *Milkovich*, 497 U.S. at 21.

Whether the allegedly defamatory statements are non-actionable opinion is a question of law for the court. *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("*Moldea I*"). The court must analyze the challenged statements in their entirety, taking into account both the immediate context and the larger social context in which they appeared. *See Moldea II*, 22 F.3d at 314; *see also Weyrich*, 235 F.3d at 624; *Thomas v. News World Commc'ns*, 681 F. Supp. 55, 64 (D.D.C. 1988).

As a separate but related defense, "[t]he common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable." *Lane v. Random House, Inc.*, 985 F. Supp. 141, 150 (D.D.C. 1995). The fair comment privilege applies "'even if the facts upon which [the statement] is based are not included along with the opinion.'" *Coles v. Washington Free Weekly*, 881 F. Supp. 26, 32 (D.D.C. 1995), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996) (citation omitted).

Here, the Update is protected speech both as opinion and fair comment. A simple read of the text make plain that it contains Esquire's opinion about Plaintiffs' Book and the Birthers' position on President Obama's presidency. The

Update lays out (again) the factual predicate for the satire: Plaintiffs' continued allegiance to their position even though the Book's "core premise and reason to exist" was usurped by President Obama's release of the long-form birth certificate, or stated differently, "gutted by the news cycle, several weeks in advance of publication." (Findikyan Decl., Ex. 27) (JA__) The Update opines that their actions are "despicable" and deserving of satiric "ridicule." Such statements, in the context of a highly charged political issue of national importance, are classic examples of opinion and fair comment and deserving of immunity from liability.

Plaintiffs fall back to the argument that the Update branded them as liars by referencing the "terribly gullible audience captive to their lies." (Br. at 44) But that statement, both on its face and in context, is clearly protected opinion and rhetorical hyperbole based on the stated facts that the President proved his citizenship and Plaintiffs refuse to accept the proof. *Schnare v. Ziessow*, 104 F. App'x 847, 851-52 (4th Cir. 2004) ("A reasonable reader would recognize this 'accusation' of lying as just an expression of outrage.").

B. Plaintiffs' Other Claims Fail as a Matter of Law

As the district court explained, "[a]ll of Plaintiffs' common law claims are based on the same underlying allegations regarding the Blog Post." *Farah*, 863 F. Supp. 2d at 40. "Because the Blog Post is satire on a matter of public interest that is protected by the First Amendment, Plaintiffs' common law claims of defamation

(Count I), false light invasion of privacy (Count II), tortious interference with business relations (Count III), and misappropriation invasion of privacy (Count V) [must] be dismissed." *Id.* In short, since all of these claims seek relief from alleged reputational harm based on the same speech, Plaintiffs cannot perform an end-run around the constitutional limitations that doom their defamation claim. *See Klayman*, 783 A.2d at 619 ("[A] plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light invasion.") (quoting *Moldea II*, 22 F.3d at 319); *Zandford v. Nat'l Ass'n of Secs. Dealers*, 19 F. Supp. 2d 1, 3-4 (D.D.C. 1998) ("Given the Court's determination that Zandford cannot make a prima facie showing of defamation, Zandford fails to show that such defamation interferes with his business relationships."); *Christakis v. Mark Burnett Prods.*, 2009 WL 1248947, at *5 (C.D. Cal. Apr. 27, 2009). And, as the Blog Post and post-publication statements are all non-commercial speech, Plaintiffs' Lanham Act claims must also fail, as the Lanham Act only concerns commercial speech. *Farah*, 863 F. Supp. 2d at 40-41. While there is no need to delve deeper into any of these claims, a brief discussion of the other fundamental flaws in the claims is provided below.[12]

[12] Plaintiffs never developed their misappropriation invasion of privacy claim below and do not discuss it on appeal. It is, therefore, waived and not discussed here.

1. Plaintiffs' False Light Claim Also Fails Because the Speech at Issue Is Not Highly Offensive

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

2. Plaintiffs Fail to State a Claim For Tortious Interference

Independently from being derivative of the defamation claim, Plaintiffs' tortious interference claim fails on its own terms. Such a claim requires Plaintiffs to plead and prove, among other things, the existence of a valid business relationship between the plaintiff and a third party, a breach or termination of that relationship by the third party, that the breach was caused by defendant's interference, and damages. *See, e.g.*, *Bennett Enters., Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1995). The Complaint fails to allege even the most basic facts regarding the alleged business relationships with which Esquire

supposedly interfered or a breach of those relationships. The Complaint's conclusory allegations themselves warrant dismissal. *See, e.g., Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008); *accord Gov't Relations Inc. v. Howe*, 2007 WL 201264, at *9 (D.D.C. Jan. 24, 2007).

Plaintiffs do not – and cannot – plausibly allege that Esquire had "a 'strong showing of intent' to disrupt [plaintiff's] ongoing business relationships." *Soliman v. George Washington Univ.*, 658 F. Supp. 2d 98, 104 (D.D.C. 2009) (quoting *Bennett Enters.*, 45 F.3d at 499)). Courts considering the issue have made clear that journalism is neither improper nor intended to disrupt contractual relationships. Indeed, one court questioned "whether this common law cause of action could ever be stretched to cover a case involving news gathering and publication." *Seminole Tribe of Fla. v. Times Publ'g Co.*, 780 So. 2d 310, 318 (Fla. Dist. Ct. App. 2001); *see also Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983); *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 465 (D. Md. 2008); *Dulgarian v. Stone*, 652 N.E.2d 603, 609 (Mass. 1995); *Huggins v. Povitch*, 1996 WL 515498, at *9 (N.Y. Sup. Ct. Apr. 19, 1996). The cases Plaintiffs cite do not assist them. One of the cases concerns purely commercial speech and therefore has no application here, as discussed *infra* at page 41-44. *World Wrestling Fed'n Entm't, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001). And the other

affirmed dismissal of the tortious interference claim based on the same failure of proximate cause from which Plaintiffs' claim suffers, as discussed next. *Browning v. Clinton*, 292 F.3d 235, 245 (D.C. Cir. 2002).

Plaintiffs also cannot plausibly allege that the claimed lack of interest in their book was proximately caused by Esquire's conduct and not by other factors. *See, e.g., Connors, Fiscina, Swartz & Zimmerly v. Rees*, 599 A.2d 47, 51 (D.C. 1991). Plaintiffs' public statements following the publication of the Blog Post belie their allegation that the Blog Post proximately caused them any damage. Farah immediately took to the airwaves, laughing, and announced that the Book continued selling well. (Findikyan Decl., Exs. 28, 43) (JA__) However, even if the Book was not a success, it is simply not plausible that the Blog Post, which was only on the Internet without the Update explicitly stating it was satire for approximately ninety (90) minutes, was the proximate cause of any alleged damage. Indeed, Plaintiffs own Complaint sets forth the more likely explanation for why booksellers and the public at large might not have been interested in a book arguing that President Obama was not a naturally-born citizen eligible to be President: namely, the President himself had released his long-form birth certificate documenting that he was born in the State of Hawaii and obliterating the very premise of the Book. Indeed, the Update noted that very reason. *See id.*, Ex. 27 (JA__).

As the Supreme Court recently observed, "[t]he term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011). Plaintiffs' Complaint makes plain that their tortious interference claim is little more than an improper attempt to make Esquire somehow responsible for the fact the Book's core argument was mooted by the news cycle.

3. Plaintiffs Fail to State a Lanham Act Claim

Plaintiffs purport to assert a Lanham Act claim through conclusory allegations that fail to meaningfully identify the conduct challenged or the theory upon which the claim rests. Accordingly, the Complaint fails to meet the pleading requirements. Moreover, any Lanham Act claim Plaintiffs might articulate would fail because the targeted speech is protected non-commercial speech outside the reach of the Lanham Act, and the statutory requirements could not be met in any event.

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

in fraud or misrepresentation, and Plaintiffs have never challenged its application to their Lanham Act claim.[13]

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

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

(Compl. ¶ 32) (JA__) While *Iqbal* requires more than a bare recitation of the legal standard underlying a claim to support that claim, Plaintiffs do not even do that. Plaintiffs simply cite to Lanham Act sections 43(a)(1)(A) and (B), 15 U.S.C. §§ 1125(a)(1)(A)-(B), in the heading of Count IV. This is plainly insufficient.

As to the merits, Plaintiffs' Lanham Act claim is grounded in publication of the Politics Blog by *Esquire* – the epitome of non-commercial speech. *See United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (defining commercial speech as "speech that does no more than propose a commercial transaction"); *see*

[13] *Compare CardioNet, Inc. v. Life Watch Corp.*, 2008 WL 567031, at *2 (N.D. Ill. Feb. 27, 2008) ("Claims that allege false representation or false advertising under the Lanham Act are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b)."), *with John P. Villano Inc. v. CBS, Inc.*, 176 F.R.D. 130, 131 (S.D.N.Y. 1997) ("[A] claim of false advertising under [the Lanham Act] falls outside the ambit of Rule 9(b) ....").

also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980) (defined as "expression related solely to the economic interests of the speaker and its audience"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 & n.13 (1983) (finding commercial speech based on three combined factors of advertising format, explicit reference to a product, and economic motivation). The Blog Post is a political critique of Plaintiffs' Book and the Birther devotees' single-minded stance opposing the President's eligibility to hold office, notwithstanding the objective evidence to the contrary. The Update and Warren Statement are pure opinion, fair comment and rhetorical hyperbole. There is no credible argument that the challenged speech is commercial – it would be tantamount to declaring the parody of the Campari ad in *Falwell* to be commercial speech.[14]

Every Court of Appeals to decide the question has held, as the district court did, that the Lanham Act only applies to commercial speech.[15] Plaintiffs ignore all

[14] Plaintiffs' argument that the speech is commercial because they claim to be competitors to Esquire and because the speech was about their book (which they apparently believe is itself commercial speech) makes no sense. (Br. at 15) Unsurprisingly, Plaintiffs cite no law at all, much less any decisions that have found core political speech to be commercial.

[15] *See Podiatrist Ass'n, Inc. v. La Cruz Azul De Puerto Rico, Inc.*, 332 F.3d 6, 19 (1st Cir. 2003); *Boule v. Hutton*, 328 F.3d 84, 90 (2d Cir. 2003); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996); *Taubman Co. v. Webfeats*, 319 F.3d 770, 774 (6th Cir. 2003); *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 803 (7th Cir. 2001) (holding that the Lanham Act's "commercial advertising or promotion" requirement is even narrower than the breadth of commercial speech doctrine); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109,

of these cases, instead asserting that "many courts" have held that the Lanham Act applies to non-commercial speech. (Br. at 14-15) But the single district court case they cite, *PAM Media, Inc. v. American Research Corp.*, 889 F. Supp. 1403 (D. Colo. 1995), treats the speech at issue as either commercial or mixed speech, and therefore has no relevance. Moreover, that case predated the Tenth Circuit's *Lighthouse Ministry* decision, which would override any arguable holding that the Lanham Act reaches non-commercial speech.

In any event, Plaintiffs do not even attempt to explain how they could make out a Lanham Act claim even if the Lanham Act applied, and the dismissal of the claim should be affirmed on that ground as well. The very terms of the provisions Plaintiffs cite refute the possibility that they could state a claim. The first subsection is clearly inapplicable as it is beyond implausible to suggest that a reader of the Blog Post could be misled into believing that *Esquire* is affiliated with Plaintiffs. 15 U.S.C. § 1125(a)(1)(A). And, for the reasons discussed above, the second subsection is inapplicable on its face as it is limited to "commercial advertising and promotion." 15 U.S.C. § 1125(a)(1)(B).

1120 (8th Cir. 1999); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 674 (9th Cir. 2005); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1051-52 (10th Cir. 2008); *Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298, 1322-23 (11th Cir. 2010). The Fourth Circuit declined to resolve the question in *Lamparello v. Falwell*, 420 F.3d 309 (4th Cir. 2005), because it held that the claims asserted failed on their merits.

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

II. PLAINTIFFS' CLAIMS WERE PROPERLY DISMISSED PURSUANT TO THE D.C. ANTI-SLAPP ACT

While the district court properly dismissed all of Plaintiffs' claims under Rule 12(b)(6), it also correctly dismissed the state and common-law claims under the D.C. Anti-SLAPP Act. In addition to affirming the 12(b)(6) dismissal, which is sufficient to dispose of all of Plaintiffs' claims, the Court should affirm the Anti-SLAPP ruling, as the statute was tailor-made to apply to the facts here.

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

The District of Columbia's Anti-SLAPP Act of 2010 (the "Act"), D.C. Code § 16-5501 *et seq.*, was enacted to combat "Strategic Lawsuits Against Public Participation" – frivolous actions, like this one, filed "not to win the lawsuit but punish the opponent and intimidate them into silence."[16] The Act allows defendants to "file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-

[16] Report of the D.C. Committee on Public Safety and the Judiciary, Nov. 18, 2010 ("Committee Report") at 4.

5502(a). Under the Act, "[i]f a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion *shall* be granted unless the responding party demonstrates that the claim is *likely* to succeed on the merits." D.C. Code § 16-5502(b) (emphases added).

The Act applies to claims based on statements made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and also to "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1)(A), (B). An "issue of public interest" is defined broadly as one "related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).

The law applies to *any* claim that "arises from an act in furtherance of the right of advocacy on issues of public interest." *Id.* § 16-5502(b). The Committee Report expressly recognized that SLAPP cases come in all forms, not just defamation, including "such business torts as interference with contract." (Committee Report at 2) Courts regularly apply state Anti-SLAPP laws to each of the claims alleged by Plaintiffs. *See, e.g.*, *Gardner v. Martino*, 563 F.3d 981, 983

(9th Cir. 2009) (affirming dismissal of "defamation, false light invasion of privacy, intentional interference with economic relations, and intentional interference with prospective economic advantage" claims under Oregon's Anti-SLAPP statute); *Mefford v. Cameron Park Cmty. Servs. Dist.*, 2010 WL 2816877 (E.D. Cal. July 16, 2010).[17]

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

Plaintiffs' primary argument on appeal regarding the Anti-SLAPP decision is that the district court should not have applied the statute at all because it is inapplicable in federal court. This argument is contrary to every federal Court of Appeals decision on the issue and should be rejected. *See Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) ("[F]ederal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must."); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168-69 (5th Cir. 2009); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 972 (9th Cir. 1999).

The District of Columbia explicitly intended to create "*substantive rights* with regard to a defendant's ability to fend off lawsuits filed by one side of a

[17] Because the Lanham Act claim here clearly has no merit and was properly dismissed pursuant to Rule 12(b)(6), this Court need not reach whether the D.C. Anti-SLAPP Act reaches the Lanham Act claims.

political or public policy debate aimed to punish or prevent the expression of opposing points of view" and a substantive "immunity to individuals engaging in protected actions." (Committee Report at 1, 4 (emphasis added); *see also id.* at 6).

"It was certainly the intent of the D.C. Council and the effect of the law – dismissal on the merits – to have substantive consequences."[18] *Farah*, 863 F. Supp. 2d at 36 n.10. The Act's burden-shifting mechanism is substantive; "it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law." *Godin*, 629 F.3d at 89. Further, the Act provides attorneys' fees and costs to the prevailing party, which are substantive provisions. *Id.* at 86 n.10, 89 n.15; *Newsham*, 190 F.3d at 971-73. As such, the Act comes within the *Erie* doctrine as a state substantive law applicable in diversity cases in federal court. *See Burke v. Air Serv Int'l*, 685 F.3d 1102, 1107 n.4 (D.C. Cir. 2012) (D.C. law is considered state law under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

And contrary to Plaintiffs' contention, there is no conflict between the Federal Rules and the Anti-SLAPP Act. The test for whether a federal rule of civil procedure precludes application of a state law in a diversity action, is first, whether the "'scope'" of the Federal Rule is "'sufficiently broad to control the issue before

[18] *Accord Sherrod v. Breitbart*, 843 F. Supp. 2d 83 (2012), *appeal docketed*, No. 11-7088 (D.C. Cir. Aug. 29, 2011).

the Court.'" *Burke*, 685 F.3d at 1107-08 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1451 (2010) (Stevens, J., concurring); *see Godin*, 629 F.3d at 86-88 (following *Shady Grove* to apply Maine's anti-SLAPP statute). The Federal Rules should be "reasonably [] interpreted to avoid" abridging, enlarging, or modifying substantive rights. *Godin*, 629 F.3d at 87 (quoting *Shady Grove*, 130 S. Ct. at 1452) (Stevens, J., concurring); *accord Shady Grove*, 130 S. Ct. at 1441 n.7). This Circuit recently clarified that the Federal Rule is not "sufficiently broad" when the Federal Rule and District law "'can exist side by side, ... each controlling its own intended sphere of coverage without conflict.'" *Burke*, 685 F.3d at 1108; *Walker*, 446 U.S. at 749-50, 752.

The Federal Rules and Anti-SLAPP Act "can exist side by side" "each controlling its own intended sphere of coverage without conflict" and applying the Act in federal court does not "directly interfere with the operation of Rule 8, 12, or 56," in part, because, "[i]f unsuccessful, the litigant remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment." *Newsham*, 190 F.3d at 972-73. Further, as the Ninth Circuit found, "there is no indication that Rules 8, 12, and 56 were intended to 'occupy the field'" for "pretrial procedures aimed at weeding out meritless claims." *Id*. at 972. Without undermining federal interests, the "Anti-SLAPP statute, moreover, is crafted to serve an interest not

directly addressed by the Federal Rules: the protection of 'the constitutional right[] of freedom of speech[.]'" *Id.* at 973 (citation omitted); *accord Godin*, 629 F.3d at 89 n.16, 91. Thus, the Act's substantive protections provide "a mechanism for a defendant to move to dismiss a claim on an entirely different basis": that the claims in question rest on the defendant's protected core political speech and "that the plaintiff cannot meet the special rules [the District] has created to protect such [] activity against lawsuits." *Godin*, 629 F.3d at 89.

As in *Burke*, the Anti-SLAPP Act can also be applied simultaneously with Rules 12 and 56 – just as the district court here also dismissed under Rule 12(b)(6). *See Godin*, 629 F.3d at 90 & n.17 ("Some [SLAPP] motions, like Rule 12(b)(6) motions, will be resolved on the pleadings," while others "will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does."); *Burke*, 685 F.3d at 1108 (D.C.'s expert rule can be applied "simultaneously" with the Federal Rule, and thus "'can exist side by side'") (citation omitted). Finally, "the twin purposes of the *Erie* rule – discouragement of forum-shopping and avoidance of inequitable administration of the law – favor application of [the] Anti-SLAPP statute in federal cases." *Newsham*, 190 F.3d at 973 (internal quotations marks omitted); *accord Godin*, 629 F.3d at 91-92.

Plaintiffs rely on a single case in arguing that the Anti-SLAPP Act's substantive protections should not apply. (Br. at 17-19 (quoting *3M Co. v. Boulter*,

842 F. Supp. 2d 85 (D.D.C. 2012), *appeal dismissed*, 2012 WL 5897085 (D.C. Cir. Oct. 19, 2012)).[19] The district court here expressly declined to follow *3M*, finding the circuit cases cited above to be better-reasoned. Indeed, the *3M* decision, which escaped this Court's review based on a settlement while the appeal was pending, is contrary to every other circuit decision on the issue. *3M*, 842 F. Supp. 2d at 107-10. And its reasoning pre-dates *Burke's* clarification of the *Erie* and Rules Enabling Act test and manufactures a conflict where none exists, finding, contrary to First and Ninth Circuit decisions, that Rules 12 and 56 occupy the field for summary disposition procedures. *Id*. at 106-07.[20]

This Court should follow the First, Fifth, and Ninth Circuits and apply the Act, which is modeled after statutes universally found to apply in federal courts.

C. Plaintiffs' Claims Fall Within the Scope of the Anti-SLAPP Act

Defendants' threshold burden of showing that the claims fall within the scope of the Act is easily met here. This is a classic SLAPP case, not least because

[19] The three other cases cited by Plaintiffs – *Turkowitz v. Town of Provincetown*, 2010 WL 5583119 (D. Mass. Dec. 1, 2010), *Saint Consulting Group, Inc. v. Litz*, 2010 WL 2836792 (D. Mass. July 19, 2010), and *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 2008 WL 4595369 (D. Mass. Sept. 30, 2008) – were all effectively overturned by the First Circuit decision in *Godin*.

[20] The forum-shopping effect of the *3M* decision was made palpable when two cases then pending in D.C. Superior Court were voluntarily dismissed and the identical suits refiled in D.C. federal district court by counsel to Plaintiffs in this case explicitly to take advantage of the *3M* decision. *See Dean v. NBC Universal*, No. 1:12-cv-00283-RJL, ECF No. 5-1 (D.D.C. filed Feb. 21, 2012); *Forras v. Rauf*, No. 1:12-cv-282, ECF No. 2-3 (D.D.C. filed Feb. 21, 2012).

Plaintiffs *admit* it is intended to chill speech and punish their (perceived) political enemies, rather than redress any legitimate grievance. Plaintiffs even established a "Justice From Esquire Fund," where they ask for donations to fund the lawsuit in order to "teach arrogant media establishment figures like Warren that they are not unaccountable to the rule of law just because they work for billion-dollar corporate giants."[21]

As the district court held, Esquire's speech is clearly protected under D.C. Code § 16-5501(1)(B), which extends the statute's protection to any statement made "in connection with … an issue of public interest." *See Berg v. Obama*, 586 F.3d 234, 239 & n.4 (3d Cir. 2009) (collecting cases and noting "the public's interest in the final resolution of" the "'birther' cases").[22] *See also McCree v. McCree*, 464 A.2d 922, 928 (D.C. 1983) (adopting the "general rule of statutory construction" that a "remedial statute should be construed liberally in order to effectuate the purposes for which it was enacted").

[21] *See* WND Superstore, http://superstore.wnd.com/justice-from-esquire-fund (last visited Feb. 10, 2013).

[22] This same language has been broadly interpreted by California courts. In *Hilton*, for example, the Ninth Circuit instructed that courts "must construe … 'issue of public interest' … broadly" to include any "topic of widespread, public interest" or "person … in the public eye." *Hilton v. Hallmark Cards*, 599 F.3d 894, 906-07 (9th Cir. 2010) (holding that a greeting card poking fun at Paris Hilton's reality-television persona met the statute's public interest requirement).

There is no doubt that the controversy over the President's qualifications for office is a matter of the highest public interest. Plaintiffs' Complaint concedes as much. *See* Compl. ¶¶ 8, 10 (JA__) (describing the presidential "controversy," where 25% of Americans believe Obama is ineligible). The statements are also "related to … public figure[s]" – the President of the United States and two media personalities who are leading proponents in questioning the President's eligibility for office and concede in their Complaint they are public figures (and only resist that conclusion when it becomes legally advantageous). *See id*. ¶¶ 2-3 (JA__); *see also* Findikyan Decl., Exs. 6, 46 (JA__).

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

2009), *aff'd*, 368 F. App'x 154 (D.C. Cir. 2010) (per curiam). Thus, the speech at issue here plainly concerned an issue that was the subject of "official" and "judicial" proceedings, as well as review by an executive body.

In short, the challenged speech concerned matters of public interest involving high profile public figures, including official proceedings involving the executive and judicial branches. Plaintiffs attempt to evade the Act by characterizing the case as merely a private business dispute. This contention was properly rejected below. Plaintiffs conveniently ignore the fact that the Blog Post on its face discussed the release of President Obama's "long-form" birth certificate and the very public and longstanding controversy between the leaders of the Birther movement and President Obama, including Plaintiffs' book. (Findikyan Decl., Ex. 27) (JA__) These were not "fact[s] ... lurk[ing] in the background" (Br. at 22), but the express premise for all the challenged statements.

Plaintiffs' attempt to paint the dispute as a "commercial" fares no better. Plaintiffs start with the implausible contention that Esquire is a commercial "competitor" of WorldNetDaily.com and WND Books. (Br. at 1, 3) They go so far as to claim that Mr. Warren, an individual defendant in this action, is "a direct competitor of Appellants." (Br. at 53) The notion is simply not plausible on its face. There is no allegation, much less evidence, to support Plaintiffs' fantastic, self-serving conclusions, which are clearly crafted in an effort to avoid application

of the Anti-SLAPP Act and the First Amendment protections afforded non-commercial speech. Plaintiffs do not contend (much less advance evidence, which does not exist) that Esquire has a competing book on the Birther controversy. The fact that Esquire and Plaintiffs – along with countless other publications – have written about the Birther controversy – from different perspectives for different audiences – does not make the parties commercial competitors or transform this case into a commercial dispute. The only two cases relied on by Plaintiffs, *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120 (C.D. Cal. 2009), and *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 2011 WL 3812695 (S.D. Cal. Aug. 29, 2011), were commercial disputes between entities and representatives associated with competing consumer products, which is not the case here.

D. Plaintiffs' Claims Clearly Cannot Survive the Special Motion to Dismiss

For the reasons that Plaintiffs fail to state a claim for relief, Plaintiffs a fortiori cannot meet the much higher burden of showing through admissible evidence that they have a probability of success on any of their claims. Indeed, were there any question whether Plaintiffs' conclusory allegations state a possible claim for relief (which Defendants submit there is not), it is plain in any event that Plaintiffs have not "demonstrate[d] that the claim[s] [are] likely to succeed on the merits." In addition, while none of the materials that Plaintiffs claim were

improperly considered through judicial notice are necessary to reject their claims, there can be no question that they are properly considered under the Anti-SLAPP Act. And, given Plaintiffs' own recognition that the Blog Post was intended to be humorous and a "parody," it is impossible to see how they could prevail on their claims, which are founded on the notion that the Blog Post conveyed true facts.

III. PLAINTIFFS' ARGUMENTS CONCERNING BIAS AND JUDICIAL NOTICE ARE MERE DISTRACTIONS

Rather than address the fundamental failings in their claims, Plaintiffs devote much of their appeal to questions of judicial bias and whether the district court considered improper evidence. These issues barely warrant consideration, as the former is not properly presented and has no basis and the latter is incorrect and irrelevant.

A. Plaintiffs' Claim of Bias Was Not Preserved and Is Frivolous

Plaintiffs open their appeal with the contention that Judge Collyer's opinion revealed bias against them warranting reversal. As an initial matter, having failed to move for recusal or reconsideration of the dismissal because of judicial bias, Plaintiffs' argument is not properly preserved for review. *United States v. Barrett*, 111 F.3d 947, 951-53 (D.C. Cir. 1997) ("Barrett did not request recusal below and has therefore waived his right to do so here."); *accord United States v. Ruzzano*, 247 F.3d 688, 694 (7th Cir. 2001).

Moreover, Plaintiffs' bias allegation is founded entirely on Judge Collyer's recitation of contextual facts in her opinion. In particular, Plaintiffs complain that Judge Collyer discussed "wholly unauthenticated internet postings," which, in fact, include Plaintiffs' own writings provided simply as background. Their other complaint is that Judge Collyer recounted the fact that President Obama is a natural-born American citizen qualified to hold the office of the presidency, a finding consistent with his inaugurations and the findings of numerous other courts. *See Grinols v. Electoral Coll.*, 2013 WL 211135, at *5 (E.D. Cal. Jan. 16, 2013) ("Courts across the country have uniformly rejected claims that President Obama is ineligible to serve as President because his Hawaiian birth certificate is fake or forged.") (citing myriad cases). Plaintiffs' disagreement with this fact cannot disqualify Judge Collyer from hearing the case.

B. The District Court Properly Employed Judicial Notice But the Records at Issue Are Not Necessary to Its Decision in Any Event

Plaintiffs claim that the district court committed reversible error in considering various materials from outside of the Complaint in making its ruling. Initially and dispositively, the Complaint itself and the Blog Post (which is extensively quoted in the complaint and both central to it and incorporated by reference, and therefore properly considered on a motion to dismiss, *see Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006)), provide a sufficient basis on which to dismiss the complaint as discussed above. Indeed, in their bias

argument, Plaintiffs themselves argue that the materials are not relevant. (Br. at 14) But, in any event, the materials considered by the court – articles published by Plaintiffs and by Defendants – are publicly available historical materials, the existence of which cannot reasonably be questioned and in fact are not in question. Moreover, the court pointed out that it was not considering the materials to establish the truth of any facts, but rather to put the publications at issue into their proper context. This practice of taking notice of contextual publications is both commonplace and entirely proper under Federal Rule of Evidence 201(b). *See, e.g.*, *Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir 1991) (judicial notice of newspaper articles); *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) (judicial notice of a speech); *Sprint Nextel Corp. v. AT&T Inc.*, 821 F. Supp. 2d 308, 325 n.29 (D.D.C. 2011) (judicial notice of website). In short, while the materials to which the district court took judicial notice were not necessary to its decision, which can be affirmed without deciding whether notice was properly taken, there was nothing wrong with the court's taking notice of published materials for historical context.

CONCLUSION

"[T]he Constitution leaves matters of taste and style ... to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). As Judge Lamberth wrote,

dismissing another suit brought by a conspiracy theorist – this one focused on President Kennedy rather than President Obama – upset by critical press coverage:

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

Lane, 985 F. Supp. at 149. For the reasons set forth above, Defendants respectfully request that the Court affirm the decision of the district court in all respects.

Dated: February 11, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Circuit Rule 32(a)(2)(A) because it contains 13,947 words, excluding the parts of the brief exempted by Circuit Rule 32(a)(1), as determined by the word-counting feature of Microsoft Word.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: February 11, 2013

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CERTIFICATE OF SERVICE

I hereby certify under Circuit Rule 25(C), that on this 11th day of February, 2013, I electronically filed the foregoing Brief for Defendants-Appellees with the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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