CASE NO. 12-CV-200 ORIGINAL

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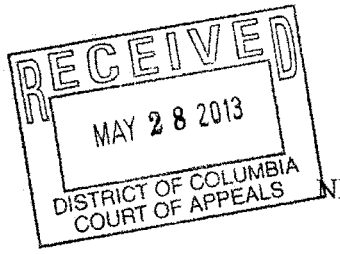
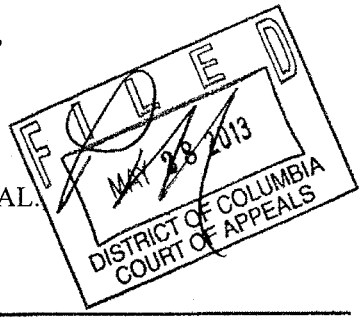
DISTRICT OF COLUMBIA
COURT OF APPEALS



BRADLEE DEAN, ET AL.,
Plaintiffs,

v.

NBC UNIVERSAL (NBC), ET AL.,
Defendants.



APPEAL FROM AN ORDER
OF THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF PLAINTIFFS-APPELLANTS BRADLEE DEAN, ET AL. FOR REVERAL OF THE SUPERIOR COURT'S ORDER AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE AS TO PARTIES AND ATTORNEYS

The Plaintiffs in this proceeding are Plaintiffs Bradlee Dean and You Can Run But You Cannot Hide. The attorney appearing for and representing Plaintiffs is Larry Klayman, Esq.

The District of Columbia was permitted to intervene in this case on December 11, 2011. The attorneys for the District of Columbia, Intervenor, are Ariel B. Levinson-Waldman, Esq. and Andrew J. Saindon, Esq. of the Office of the Attorney General for the District of Columbia.

The Defendants in this proceeding are NBC Universal, Rachel Maddow, and MSNBC. The attorneys appearing for and representing Defendants are Laura R. Handman, Esq., and Micah Ratner, Esq., of Davis Wright Tremaine, LLP, and Susan Weiner, Esq., and Chelley E. Talbert, Esq., of NBC Universal. The Defendants in the trial proceeding also included Defendant Andy Birkey. The attorneys for Defendant Birkey were Elizabeth C. Koch, Esq. and Thomas Curley, Esq. of Levine Sullivan Koch & Schulz.[1]

[1] This action against Defendant Andy Birkey was dismissed on December 23, 2011 and, as such, he is no longer a party in this case.

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STATUTES AND RULES

ISSUES PRESENTED

1. Whether the Superior Court for the District of Columbia erred in awarding attorneys' fees and costs to Defendants, after Plaintiffs, in good faith, dismissed the action in the Superior Court and refiled in the District Court for the District of Columbia?
2. Whether the Superior Court for the District of Columbia's award of attorneys' fees and costs against Plaintiffs, in the amount of $24,624.23, was excessive and unreasonable?
3. Whether the Honorable Joan Zeldon of the Superior Court for the District of Columbia improperly refused to recuse herself from the action?

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.* The legislation was signed on January 18, 2011 and published in the D.C. Register on January 28, 2011.

On July 27, 2011, Plaintiffs filed their initial Complaint against Defendants in the Superior Court for the District of Columbia ("Superior Court"), and the case was assigned to the Honorable Joan Zeldon ("Judge Zeldon"). (JA 12-21).

On September 9, 2011, Defendants filed a Special Motion to Dismiss Pursuant to the D.C. Anti-SLAPP Act of 2010 and Motion to Dismiss Pursuant to Superior Court Civil Rule 12(b)(6). (JA 22-69). Both sides filed additional papers, but no Anti-SLAPP

Motion hearing was set for 2011 because Plaintiffs' counsel, Larry Klayman, Esq., had health problems that required him to forego travel.

During this time, the U.S. District Court for the District of Columbia ("District Court") had issued a decision, holding that D.C. Code §16-5501, *et seq.*, the Anti-SLAPP Act, violated the Federal Rules of Civil Procedure, and thus, was unavailable to a defamation defendant sued in federal court. In addition, the District Court had pending before it other cases addressing the applicability of the Anti-SLAPP Act.

On February 8, 2012, the Superior Court stated in its order that "...the Court is considering treating the Motion to Dismiss as a motion for summary judgment..." (JA 228). On February 17, 2012, during a telephone conference, the Superior Court addressed Plaintiffs' counsel suggestion to voluntarily dismiss the Superior Court case and file in federal court by stating that Plaintiffs can dismiss the action and "can ride both tracks" until Plaintiffs figure out how to approach the issue. (JA 240).

On February 21, 2012, Plaintiffs filed with the Clerk of the Superior Court a Notice of Voluntarily Dismissal Without Prejudice to dismiss the action in the Superior Court. (JA 250). Similarly, Plaintiffs refiled the Complaint in the District Court for the District of Columbia ("District Court"). On February 22, 2012, during another telephone conference, the Superior Court confirmed that the case was considered dismissed and further stated that "the plaintiff, without order of Court, if he files a notice of dismissal anytime before service by the adverse party of an answer or of a motion for summary judgment. [Defendants' counsel] never filed a motion for summary judgment." (JA254-255).

Subsequently, on February 27, 2012, Defendants filed a Motion to Vacate Notice of Dismissal to vacate the Notice of Dismissal filed by Plaintiffs and to reinstate the case. (JA 263-282). On March 26, 2012, Plaintiffs filed an Opposition to Defendants' Motion to Vacate.

On April 23, 2012, the Superior Court ordered that the notice of dismissal filed by Plaintiffs was vacated that the case was reinstated (JA 301-302). The Superior Court further ordered that dismissal of the case without prejudice was on the condition that Plaintiffs pay reasonable attorneys' fees and costs to cover what Defendants cannot use in the lawsuit that Plaintiffs filed in federal court. (JA 301-302). On May 7, 2012, Defendants Filed A Motion to Recover Fees. (JA 304-317). On May 23, 2012, Plaintiffs filed a Motion for Reconsideration, Opposition to Defendants' Motion to Recover Attorneys' Fees and Costs, and Cross Motion for Sanctions. (JA 364-376). On June 4, 2012, Defendants filed an Opposition to Plaintiffs' Motion for Reconsideration and Sanctions. (JA 377-384).

The Superior Court denied Plaintiffs' Motion for Reconsideration, Opposition to Defendants' Motion to Recover Attorneys' Fees and Costs, and Cross Motion for Sanctions, and, on June 25, 2012, the Superior Court held that the reasonable fees and costs totaled $24,625.23. (JA 403). On July 9, 2012, Plaintiffs filed an Affidavit and Certification for Recusal or Disqualification of Judge, pursuant to Superior Court Rule 63-I. (JA 398-404) (JA 405-422). On July 20, 2012, Defendants filed an Opposition to Plaintiff's Superior Court Rule 63-I Affidavit for Recusal. On November 5, 2012, Judge Zeldon issued an order denying recusal. (JA426).

On July 17, 2012, Plaintiffs filed a notice of appeal of the June 25, 2012 order. Plaintiffs then filed a Motion to Stay the June 25, 2012 Order pending an appeal. The Superior Court subsequently denied Plaintiffs' Motion to Stay the June 25, 2012 Order. (JA at 438). Plaintiffs then filed a Motion for Reconsideration regarding the denial of Plaintiffs' Motion to Recuse, which the Superior Court denied on November 14, 2012. (JA 439). The Superior Court subsequently dismissed the case with prejudice on November 14, 2012. (JA 441).

STATEMENT OF FACTS

Plaintiff Bradlee Dean is a Christian preacher who seeks to positively influence young people and others through restoring Judeo-Christian and family values. In 2001, he founded a non-profit foundation, "You Can Run But You Cannot Hide," as a means to instill such morals. In order to further his message, he also broadcasts these values through the radio show "Sons of Liberty." In addition to discussing issues related to alcoholism, abortion and drug use, Plaintiff Dean has often addressed the issue of homosexuality and the dangers of promoting homosexuality to young, vulnerable, and susceptible children. Specifically, Plaintiff Dean focused on the dangers of promoting children to experiment with the same sex and setting children on a path ridden with emotional distress, depression, and suicidal tendencies.[1]

[1] In fact, studies suggest that severe emotional distress is more common among gay teenagers than straight ones. See *"Mental Health Disorders, Psychological Distress, and Suicidality in a Diverse Sample of Lesbian, Gay, Bisexual, and Transgender Youths,"* by Brian S. Mustanski, PhD, stating "LGBT youths had higher prevalence of mental disorder diagnoses than youths in national samples." See Also New York Times Article (http://www.nytimes.com/2011/01/04/health/04brody.html)

On August 9, 2010, and May 11, 2012, Defendants broadcasted a defamatory segment on The Rachel Maddow Show, which is televised nationally and is infamous for adhering to a leftist, liberal, anti-religious agenda. During the broadcasts, Defendants deliberately took Plaintiffs' statements out of context and added their own fabricated statements in order to maliciously and knowingly mislead the public regarding Plaintiffs' actual comments and views regarding homosexuality. Immediately, Defendants' false and defamatory statements had a profound impact on viewers, leading many viewers not only to discredit Plaintiffs' views but to also threaten Plaintiff Bradlee Dean's life.

Moreover, as a result of their conduct, Defendants caused extensive harm to Plaintiffs' reputation and business and significantly impaired Plaintiffs' credibility in order to perpetuate their own political agenda. In fact, the president of MSNBC, which airs The Rachel Maddow Show, admitted that the network's progressive tagline "Lean Forward" is intended to connote adherence to liberal views and its marketing strategy is to corner the "leftist progressive" market, thus explaining Defendants' rationale in making the defamatory remarks. Plaintiffs sought to redress the harm caused by Defendants by filing a Complaint in the Superior Court, seeking damages caused by Defendants' willful and intentional conduct in making defamatory remarks and presenting Plaintiffs in a false light. (JA 12-21).

Despite Defendants' malicious conduct, which was motivated by a desire to boost ratings, financial performance, and political advantage among its very liberal viewing audience, Defendants sought to improperly hide behind the District of Columbia's Anti-Strategic Lawsuits Against Public Participation Act of 2010 ("Anti-SLAPP Act" or "Act"). However, since Plaintiffs filed their initial Complaint, the Anti-SLAPP Act has

become embroiled in significant legal challenges, raising serious doubts as to its validity, and subjecting it to extensive judicial review. In fact, the District Court has addressed the applicability of the Anti-SLAPP statute in federal courts and has, before it, multiple cases that [illegible] Civil Procedure, and thus, was unavailable to a defamation defendant sued in federal court. See *3M Co. v. Boulter,* Civil No. 11-1527(RLW), 2012 WL 386488 (D.D.C. Feb. 2, 2012) (Wilkins, J.).

In light of the change of circumstances whereby the District of Columbia's Anti-SLAPP statute was ruled no longer applicable in federal court, Plaintiffs had a good faith legal basis to voluntary dismiss the action in the Superior Court. Specifically, Plaintiffs wished to dismiss the Superior Court action in an effort to conserve judicial resources and to avoid parallel claims that would require both parties to needlessly expend the time and expense required to litigate the same claim in two courts. Plaintiffs were even encouraged by the Honorable Joan Zeldon, who initially agreed with Plaintiffs that a voluntary dismissal without prejudice (and no assessment of attorneys' fees and costs) was appropriate, particularly as Plaintiffs sought to expedite the resolution of this case by not leaving open the issue of the Anti-SLAPP Act and its applicability. (JA 237-238, 240). Specifically, on February 17, 2012, during a telephone conference, the Superior Court addressed Plaintiffs' counsel suggestion to voluntarily dismiss the Superior Court case and file in federal court by stating that Plaintiffs can dismiss the action and "can ride both tracks" until Plaintiffs determined how to approach the issue. (JA 240).

As such, Plaintiffs moved to dismiss the Superior Court action and refiled the action in the District Court for the District of Columbia, which was identical to the action in the Superior Court. (JA 250). On February 22, 2012, during another telephone conference, the Superior Court indicated that the case was considered dismissed. (JA 255). In light of the Superior Court's determination that the case was considered dismissed, Defendants moved to vacate Plaintiffs' Notice of Dismissal and to reinstate the case on February 27, 2012. (JA 263).

Despite initially agreeing that Plaintiffs could voluntarily dismiss the Superior Court action without paying attorneys' fees, Judge Zeldon "changed her mind" and, on April 23, 2012, she ordered that the Notice of Dismissal be vacated and that the case be reinstated.[2] (JA 300). Judge Zeldon further ordered that the dismissal of the action would be on the condition that attorneys' fees be considered for some of the legal work completed. (JA 301-302).

Moreover, in spite of the fact that the parties would be in the same legal position in the District Court action, Judge Zeldon denied Plaintiffs' Motion for Reconsideration, Opposition to Defendants' Motion to Recover Attorneys' Fees and Costs, and Cross Motion for Sanctions. (JA 396). Instead, Judge Zeldon ordered a calculation of "work that cannot be applied to the subsequent lawsuit." (JA 300). Judge Zeldon named the

[2] Interestingly, in an obvious attempt to "justify" her change of position, Judge Zeldon stated, in her April 23, 2012 Order, "When during a status call the Court acknowledged that the case had been dismissed, all the Court was saying was that the docket reflected the filing of the Notice of Dismissal resulting in the closure of the case by the Clerk. The Court did not address whether the filed Notice was proper and when, informed by counsel for Defendants that it was not, the Court invited Defendants to file the instant Motion to Vacate the Dismissal so that the issue could be properly presented to the Court, together with Plaintiffs' Opposition." (JA 300). This was clearly in direct contradiction to her statement during the status conference in which she explicitly stated, "This case is right now dismissed." (JA 255).

items of legal work to be calculated, which included: (1) work in preparation for the hearing of February 24, 2012; (2) participation in conference calls about Defendants' request to continue the hearing; (3) Defendants' Motion to Vacate and Supplemental [illegible] support the calculations filed as a response to the order. (JA 301-302).

To further punish Plaintiffs and to make it more difficult for Plaintiffs to redress their claims, Judge Zeldon further assessed attorneys' fees and costs against Plaintiffs by sanctioning Plaintiffs for appropriately filing a Motion for Reconsideration. (JA 394-396). Given that Judge Zeldon had initially agreed to the voluntary dismissal without the assessment of attorneys' fees and costs, Plaintiffs had rightfully brought this issue before the Superior Court's attention and were subsequently punished for doing so. Despite Plaintiffs' valid contentions, Judge Zeldon's June 25, 2012 Order clearly indicated her intent to punish Plaintiffs, explicitly stating: "If Plaintiffs now wish to pursue their claim in a forum they believe is likely to give them a more favorable result, they made do so."(JA 395). Judge Zeldon further held, unjustifiably, that:

> "[Plaintiffs'] decision to change forums seven months later gives rise to a concomitant obligation to make that change 'on their own dime,' and not on that of the Defendants, who undoubtedly will continue to fight this dispute before the Federal Court with considerable costs. This Court's Order of April 23, 2012, requiring Plaintiffs, as a condition of dismissal without prejudice, to pay the additional costs for work that cannot be used in the federal case is eminently fair and reasonable. It will not be modified." (JA 395).

In response to the Court's Order, Defendants subsequently submitted billing statements that allegedly "evidenced" the amount of fees incurred per the court's limitation, which requested nearly $25,000 in attorneys' fees. (JA 304-317) (JA 318-363)

(JA 384-390). However, it is inconceivable that Defendants' counsel could substantiate incurring approximately $25,000 in attorneys' fees, given the very limited areas of fee consideration set forth by the Superior Court. Moreover, Defendants' counsel only [illegible] and pre-trial [illegible], redundant, and an unnecessary amount of fees, particularly as Defendants allegedly needed a "team" of at least four attorneys to do the job of one. However, despite the fact that Defendants' counsels had clearly submitted grossly inflated and unreasonable billing statements, Judge Zeldon ruled, on June 25, 2012, that the "reasonable" fees and costs totaled $24,625.23. (JA 396).

Judge Zeldon added insult to injury by denying Plaintiffs' Motion to Stay the June 25, 2012 Order pending appeal, despite being fully aware that this would inevitably result in the case being dismissed with prejudice. (JA 427). In fact, Judge Zeldon was keenly aware that the amount of attorneys' fees awarded was so financially severe to Plaintiffs that it would effectively end litigation, since Plaintiffs lacked the financial resources to pay the $25,000 attorney fee award.[3] (JA 395). Unsurprisingly, on November 14, 2012, Judge Zeldon dismissed the case with prejudice. (JA 441).

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[3] The Superior Court recognizes Plaintiffs' lack of resources, stating, in the June 25, 2012 Order, that "Plaintiffs argue that they have 'few resources' and that 'it would be a manifest injustice to assess punitive damages and attorneys' fees and costs' against them. However, they have created 'this problem' for themselves by choosing to litigate before this Court for seven months and then changing to what they apparently perceive to be a more favorable forum. Having created this dilemma, they cannot reasonably be excused for the consequences of their actions. Moreover, the purpose of the Court's order to pay reasonable attorneys' fees and costs is not to punish but to compensate and to avoid having the Court's processes be used by a party so as to unnecessarily increase the costs of litigation." (JA 395). Moreover, this is clearly indicative of the Court's bias and prejudice towards the Plaintiffs, evidence Judge Zeldon's intent of punishing Plaintiffs

Undoubtedly, Judge Zeldon recognized the apparent disparity of income between the parties, as Defendants clearly have significant assets valued in the billions, unlike Plaintiffs, who are an individual preacher and a small non-profit seeking to instill values in young people. Moreover, it was clear that Defendants were egregiously attempting to use Plaintiffs' out of state residency as a means to litigating their causes of action, by seeking an egregious amount of attorneys' fees to avoid the merits of the case. Despite this, Judge Zeldon awarded Defendants an exorbitant amount of attorneys' fees, which Plaintiffs could not and cannot afford to pay, and thus, resulted in Plaintiffs' losing the right to proceed in federal court.

In light of the apparent misrepresentation by Defendants' counsel, Plaintiffs requested that discovery be allowed to inquire into the validity of Defendants' attorneys' fees. Undoubtedly, Judge Zeldon could have simply held a hearing to determine the true amount of attorneys' fees and costs, and allowed for cross-examination but she refused to do so. (JA 395). Instead, rather than allow Plaintiffs' to rightfully conduct, even limited, "discovery," Judge Zeldon summarily denied Plaintiffs' request to inquire into the accuracy of Defendants' attorneys' fees and ordered Plaintiffs to pay nearly $25,000 in attorneys' fees and costs as a condition of dismissal without prejudice. The Court further ordered that Plaintiffs' "failure to pay these Court-ordered costs will lead to a dismissal with prejudice" on or about August 3, 2012 (JA 396). Thus, if Plaintiffs did not pay this exorbitant amount of attorneys' fees, Judge Zeldon intended to dismiss the case **with** prejudice thereby barring a federal action through the doctrine of res judicata.

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for pursuing their claim in federal court and thus, depriving Judge Zeldon of the ability to rule dispositively in the case.

In light of Judge Zeldon's inappropriate and unreasonable rulings, particularly in awarding an excessive amount of attorneys' fees and denying Plaintiffs the ability to conduct discovery, it became clear that Judge Zeldon harbored an extra-judicial bias and prejudice against Plaintiffs. [illegible] Plaintiffs' also became evident through [illegible]. Specifically, Judge Zeldon made snide and offensive comments regarding Plaintiffs' counsel's appearance by telephone when he was recovering from an injury that prevented him from traveling. Despite the lack of relevancy to her order of attorneys' fees and costs, Judge Zeldon stated, gratuitously and without any legal or rational basis to raise Plaintiff's counsel's health problems: "Both sides filed additional papers, but no Anti-SLAPP motion was set for 2011 because Plaintiff's counsel, Larry Klayman, Esq., was living in California and informed the Court that health problems required him to forgo travel. During this time, numerous conferences on the record were held via telephone, and a hearing on the record by phone was held on January 24, 2012, also to accommodate Mr. Klayman." (JA 393).

In addition, Judge Zeldon mocked and ridiculed Plaintiffs and their counsel and, to the contrary, gratuitously referred to Defendants' counsel approvingly as "distinguished," inferring in effect that Plaintiffs and their counsel were not "distinguished." (JA 395-396). In denying Plaintiffs request to conduct discovery, Judge Zeldon went so far as to imply that Plaintiffs were scoundrels for daring to challenge the inflated amount of fees set forth by Defendants, despite the fact that Plaintiffs legitimately presented evidence that Defendants' counsels' fees were duplicative, wasteful, and contrived to harm Plaintiffs. In berating and castigating Plaintiffs' legitimate right to argue that the fees and costs proffered by Defendants were inflated and

fraudulent, Judge Zeldon offensively writes, "... the Court finds that Plaintiffs' accusations that the Defendants conduct in this litigation 'is a bad faith attempt to further harm Plaintiffs" or that Defendants are engaging in 'underhanded and extreme methods [illegible] time and expense..." (JA 394-395).

In light of Judge Zeldon's apparent bias and prejudice, Plaintiffs filed a Motion for Recusal requesting that Judge Zeldon recuse herself from the case, given her favoritism towards Defendants and the fact that it became apparent that Judge Zeldon clearly identified with Defendant Rachel Maddow and the other NBC Defendants. Unsurprisingly, Judge Zeldon improperly denied Plaintiffs' Motion for Recusal, despite the mandatory requirements of the law that she recuse herself. Further, Judge Zeldon, in an attempt to punish Plaintiffs, also denied Plaintiffs' Motion to Stay the June 25, 2012 Order pending an appeal. (JA 427).

Even more, Judge Zeldon chose to hold on to this action at the initial stages of the case, despite having already announced her retirement from the bench. When Plaintiffs chose to refile the action in federal court, Judge Zeldon vindictively threw unnecessary obstacles towards Plaintiffs by threating to dismiss the case before her with prejudice, thereby cutting off Plaintiffs' legal rights in federal court. It is clear that Judge Zeldon became resentful that Plaintiffs were taking a case away from her that she obviously wanted to decide "on the merits" out of bias for Defendants and their counsel, which she called "distinguished," and thus, ordered a punitive amount of attorneys' fees to punish Plaintiffs. In fact, Judge Zeldon's Order of June 25, 2012 reveals where in large part her

the same claim in two courts. Thus, Plaintiffs in good faith dismissed the action in the Superior Court and re-filed in the District Court.

Defendants, who are financial giants compared with the tiny and financially [illegible] Plaintiffs, have [illegible] their wealth [illegible] grossly inflated calculation of attorneys' fees, [illegible] purpose of burying Plaintiffs with time and expense in order to put an effective end to this litigation. Interestingly, despite Defendants' counsels' "experience, skill and reputation," no less than a "team" of attorneys was needed to defend this simple action for defamation and false light. The sheer number of attorneys involved in the defense, with four attorneys being unnecessarily involved in this matter, multiplied the costs of this litigation, and caused excessive, unnecessary, and redundant attorneys' fees to incur.

Moreover, Defendants counsel inappropriately requested, and the Superior Court erred in ordering, fees for work that undoubtedly is applicable to the action pending in the District Court and, as such, was improperly included in the Superior Court's calculation of the attorneys' fee award. Thus, in reviewing Defendants' counsel's billing statements, it is clear that Defendants' counsel were attempting to commit an ultimately successful fraud on the court, and force Plaintiffs to give up their claims as a result of the over abundance of legal fees.

In addition, evidence of judicial bias presented itself throughout the proceeding and in the memorandum opinion that was issued along with the Superior Court's order awarding attorneys' fees and costs to Defendants. In light of the apparent bias and prejudice, Judge Zeldon improperly refused to recuse herself from the case and vacate her dismissal order with prejudice, despite the ***clear requirements*** mandating recusal.

ARGUMENT

I. The Superior Court Improperly Awarded Attorney's Fees and Costs To Defendants, Since Plaintiffs Were Acting In Good Faith In Dismissing the Superior Court Action And Refiling This Action In The District Court.

The award of attorneys' fees [illegible]

[illegible] (D.C. 1997) (reversing the award of attorneys' fees due to counsel's good faith). In fact, the awarding of attorneys' fees against a party that has shown good faith may be an abuse of discretion. *Schwartz v. Franklin Nat'l Bank*, 718 A.2d 553(D.C. 1998) (holding that the awarding of sanctions was an abuse of discretion because the filing was warranted by a good faith argument). Moreover, it is well-established that "the court must scrupulously avoid penalizing a party for a legitimate exercise of the right of access to the courts." *Synanon Foundation, Inc. v. Bernstein*, 517 A.2d 28, 37 (D.C. 1986). The *Synanon* Court reversed the awarding of attorneys fees when it found that the party seeking them was using bad faith litigation tactics throughout the proceedings. *Id.*

Throughout this lawsuit, Plaintiffs have been constantly met with a mega- and inflated legal contingent seeking to prolong these proceedings and financially punish Plaintiffs in order to end litigation. Nevertheless, Plaintiffs have acted in good faith in re-filing this action in the federal court. As predicted, Defendants refiled essentially the same pleadings and motions, and the district court action has precisely picked up right where this action had left off. To award these attorneys' fees now would stifle Plaintiffs' ability to seek justice in the judicial system. This is precisely the outcome that the *Synanon* court instructed to scrupulously avoid. As such, an award of attorneys' fees and

costs to Defendants is clearly unwarranted and unjust and the Superior Court erred in ordering Plaintiffs to pay $24,625.23 towards Defendants' attorneys' fees and costs.

II. Defendants Calculation of Attorneys' Fees and Costs Are Excessive and Unreasonable

[illegible] amount awarded must respectfully be lower than the amount set forth by Defendants and subsequently awarded by the Superior Court. In order to determine the amount of attorneys' fees, the trial court must establish a reasonable fee. As has been previously held, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours *reasonably* expended on the litigation multiplied by a *reasonable* hourly rate." *District of Columbia v. Patterson*, 667 A.2d 1338, 1343 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983)) (emphasis added).

Moreover, "[i]n determining reasonable hours expended, . . . billing judgment must be exercised, and hours that are **'excessive, redundant or otherwise unnecessary' must be excluded**." *Henderson v. District of Columbia*, 493 A.2d 982, 999 (D.C. 1985), quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1984) (emphasis added).

The Superior Court improperly awarded attorneys' fees for work that was done needlessly or in an effort to unfairly harm Plaintiffs for daring to bring a lawsuit against the Defendants. Counsel for Defendants go out of their way to emphasize the reasonableness of their respective hourly rates, but do not in any way address the reasonableness of the *number* of hours set forth in their calculations. Yet both of these factors must be taken into consideration. There is clear evidence of Defendants drove up

these billable hours, needlessly churning the fees and costs to strategically and "cleverly" force Plaintiffs to give up their claims due to an overabundance of legal fees. As a billion-dollar enterprise, Defendants do not need the $24,000 in attorneys' fees and costs [illegible] time allegedly leading to the massive attorneys' fees.

Given the patently excessive amount of attorneys' fees alleged by Defendants, the Superior Court should have, at a minimum, provided Plaintiffs an opportunity to be heard or to at least conduct discovery into the accuracy of the amount of attorneys' fees. Judge Zeldon, however, denied Plaintiffs request to hold a fees and costs hearing or to conduct discovery and refused to allow Plaintiffs any opportunity to inquire into and question the validity of the amount of attorneys' fees and costs alleged by Defendants' counsel. (JA 395). Moreover, the Superior Court unjustifiably denied Plaintiffs the ability to test the accuracy of the attorneys' fees and costs alleged and, instead, improperly awarded Defendants a grossly excessive and inflated amount of attorneys' fees. Specifically, Plaintiffs disputed the attorneys' fees and costs as follows:

A. The Hearing of February 24, 2012

There are many instances in which the cost of the work has been multiplied simply because of the sheer number of attorneys involved in the defense. No less than four attorneys have been involved in this matter, causing Defendants counsel to spend *hours* conferring and communicating amongst themselves. Counsel's own statements describe their "experience, skills and reputations." (JA 320-321). Yet an entire mega-contingent was allegedly necessary in order to defend this action. Counsels' summary of

time includes *over six hours* of internal "communication" and "conference." (JA 318-363). To award thousands of dollars to Defendants simply for *coordinating*, instead of actually performing legal work, is clearly "excessive, redundant, and unnecessary." This [illegible] claims are specifically issues Defendants' law firm has previously briefed in many of its cases. Moreover, vague statements such as "communication" and "conference" do not detail what specifically was discussed nor why it was *necessary* for the defense. It is simply not reasonable to force Plaintiffs to cover the extensive time necessary to coordinate Defendants' legal defense, especially given the expertise of the firm and its attorneys. Plaintiffs would like to suggest that no more than one hour be granted for the time spent by counsel conferring amongst themselves.

B. Conference Calls

Counsel allegedly spent .7 hours (42 minutes) sending out a simple email requesting the availability of the parties to participate in the conference calls. (JA 318-363). Even more, this was done *for each* conference call, for a total of 2.1 hours. (JA 318-363). It is simply unreasonable for Plaintiffs to be forced to compensate Defendants for more than 5-10 minutes of a simple administrative task. Plaintiffs therefore urge the Court to reverse the Superior Court's ruling.

Moreover, on many of the conference calls in which counsel participated, two billable attorneys were "present." Defendants needlessly provided two attorneys for appearances in order to churn their legal fees and costs. It is not reasonable for Defendants to be compensated for their decision to provide two attorneys when one of

them did not even participate in the conference. Thus, the Superior Court improperly awarded Defendants "excessive, redundant or otherwise unnecessary" fees associated with Defendants' having an additional attorney present during the conference calls.

C. Motion to Dismiss

A large portion of the time spent on the pleadings to Dismiss motion to Vacate. Counsel allegedly spent over seventeen hours to research and draft this motion and no less than four attorneys "consulted" in the preparation. (JA 318-363). Ms. Handman has "35 years of litigation experience" and Mr. Eastbrook has "more than five." (JA 318-363). The amount of time billed by attorneys of such expertise and experience is excessive. And with the advent of LexisNexis and Westlaw, there is no more need for attorneys to spend hours researching. The relevant case law simply comes straight to the computer, ready to be copied to a word processor. It is unreasonable for the motion to have taken any more than three hours, and the Superior Court improperly included the excessive and grossly inflated amount in its calculation in awarding attorneys' fees.

D. Pro Hac Vice Motions

This Court only required the calculation of work that could not be applied to the subsequent lawsuit. The same is true for the work done in preparation of Ms. Talbert and Ms. Weiner's applications for pro hac vice admission. Nearly three hours were spent in preparation and drafting of these simple documents. (JA 318-363). Furthermore, nearly the same motions were re-submitted in the District Court case. These and any other duplicated motions should be excluded from the calculation of attorneys' fees and costs. In the event that it is considered in the calculation, it should not have taken Defendants counsel more than.2 hours to copy the motion onto a new caption page.

E. Fee Motion and Associated Documents

With the knowledge that the Superior Court would now be considering the award of legal fees, Defendants' counsel spent *over ten billable hours* preparing the Motion for [illegible] believing it had the backing of the Superior Court, has once again artificially inflated the amount of time and effort needed to put forth their motion. This singular motion was responsible for *the second largest portion* of the attorneys' fees calculated. Thus, the amount included in the calculation of attorneys' fees in regard to the Attorneys' Fee Motion and Associated Documents was grossly excessive and unreasonable.

F. Costs

Finally, Defendants requested the costs of filing fees that were paid by Defendants in the course of litigation. Plaintiffs incurred numerous filing fees responding to Defendants' repeated disingenuous attempts to prolong and incur costs of litigation upon the Plaintiffs. As such, these filings fees balance out the fees and costs of those incurred by the Defendants and the award of fees and costs to Defendants is unjust and improper.

III. Recusal Of Judge Zeldon Was Mandatory Since Evidence of Judicial Bias Manifested Itself Throughout The Proceeding And Thus, Judge Zeldon's Failure To Recuse Herself Was Improper

In order to preserve the integrity of the judiciary, and to ensure that justice is carried out in each individual case, judges must adhere to high standards of conduct." *York v. United States*, 785 A.2d 651, 655 (D.C. 2001). "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ."

ABA Code Of Judicial Conduct Canon 3(C)(1) *see also Scott v. United States*, 559 A.2d 745, 750 (D.C. 1989) (en banc).

Recusal is required when judicial remarks create the appearance that the court's [illegible] 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.")

In the Superior Court for the District of Columbia, recusal is by statute. Civil Procedure rule 63-I, which is analogous to 28 U.S.C. § 144, provides in its entirety:

> Rule 63-I. Bias or prejudice of a judge.
>
> (a) Whenever a party to any proceeding makes and files a sufficient affidavit that the judge before whom the matter is to be heard has a personal bias or prejudice either against the party or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned, in accordance with Rule 40-I(b), to hear such proceeding.
>
> (b) The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be accompanied by a certificate of counsel of record stating that it is made in good faith. The affidavit must be filed at least 24 hours prior to the time set for hearing of such matter unless good cause is shown for the failure to file by such time.

Super. Ct. Civ. R. 63-I. It is clear that there is no discretion involved. Rule 63-I states "such judge *shall* proceed no further therein." *Id.* (emphasis added). Indeed, As the Court of Appeals for the District of Columbia has consistently held, "[t]he rule is by its terms

mandatory." *In re Evans*, 411 A.2d 984, 993 (D.C. 1980) *citing Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 380 F.2d 570, 576 (D.C. 1967), cert. denied, 389 U.S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560. "If an [illegible] Ed. 1291, 52 S. Ct. 640 (1932) (Emphasis added).

It is evident that Judge Zeldon held a bias against the Plaintiffs and in favor of Defendants. Judge Zeldon's favoritism toward Defendants and prejudice against Plaintiffs and their lawsuit, caused Judge Zeldon to be unable to impartially rule on this case. Plaintiffs set forth an affidavit showing with particularity the material facts, which established Judge Zeldon's clear extra-judicial bias and prejudice. Specifically, as set forth in the 28 U.S.C. § 144 Affidavit of Plaintiffs. Judge Zeldon made the following prejudicial remarks and rulings:

1. Judge Zeldon made snide and offensive comments regarding Plaintiffs' counsel's appearance by telephone when he was recovering from an injury that prevented him from traveling. Despite the lack of relevancy to her order of attorneys' fees and costs, Judge Zeldon stated, without any legal or rational basis to raise Plaintiff's counsel's health problems: "Both sides filed additional papers, but no Anti-SLAPP motion was set for 2011 because Plaintiff's counsel, Larry Klayman, Esq., was living in California and informed the Court that health problems required him to forgo travel. During this time, numerous conferences on the record were held via telephone, and a hearing on the record by phone was held on January 24, 2012, also to accommodate Mr. Klayman." (JA 393). Judge Zeldon ridicule, mocking tone, suggestion that Plaintiffs' counsel was intentionally delaying the case, and

irrelevancy of the recitation regarding Plaintiffs' counsel held prima facia prejudicial.

2. Further evidence of Judge Zeldon's bias became prominent, particularly when she reneged on her agreement with Plaintiffs to voluntary dismiss the case [illegible] "justify" her change of position, Judge Zeldon stated, in her April 30, 2012 Order, "When during a status call the Court acknowledged that the case had been dismissed, all the Court was saying was that the docket reflected the filing of the Notice of Dismissal resulting in the closure of the case by the Clerk. The Court did not address whether the filed Notice was proper and when, informed by counsel for Defendants that it was not, the Court invited Defendants to file the instate Motion to Vacate the Dismissal so that the issue could be properly presented to the Court, together with Plaintiffs' Opposition." (JA 300). This was clearly an attempt to cover her bias towards Plaintiffs and was in direct contradiction to her statement made during the status conference in which she explicitly stated, "This case is right now dismissed." (JA 255).

3. In addition, Judge Zeldon mocked and ridiculed Plaintiffs and their counsel and, to the contrary, gratuitously referred to Defendants' counsel approvingly as "distinguished," inferring in effect that Plaintiffs and their counsel were not "distinguished." (JA 395-396) Indeed, to prove that the proffered fees and costs were inflated and fraudulent, Plaintiffs requested discovery, but was shot down by Judge Zeldon, obviously to protect "distinguished counsel" and their clients. (JA 394-396).

4. Judge Zeldon could also have properly held a hearing to determine the true amount of attorneys' fees and costs, and allowed for a hearing on discovery and thus, cross examination, given Plaintiffs' assertion that they were inflated, but would not do so since Defendants counsel are "distinguished" and Plaintiffs thus are not. (JA 395-396).

5. Tellingly, Judge Zeldon fails to indicate how she came to the conclusion that defense counsel are "distinguished" and that they and their clients are incapable of fraud and inflating fees. Clearly, Judge Zeldon's conclusion resulted from her biased opinion, which was rendered and emanated from outside the proceeding. [illegible] evidencing her bias opinion, "…this case involves a serious attack on [Defendants] First Amendment rights. They had every right to retain distinguished counsel to defend them." (JA 395-396).

6. In denying Plaintiffs request to conduct discovery, Judge Zeldon went so far as to imply that Plaintiffs were scoundrels for daring to challenge the inflated amount of fees set forth by Defendants, despite the fact that Plaintiffs legitimately presented evidence that Defendants' counsels' fees were duplicative, wasteful, and contrived to harm Plaintiffs. In berating and castigating Plaintiffs' legitimate right to argue that the fees and costs proffered by Defendants were inflated and fraudulent, Judge Zeldon offensively writes, "… the Court finds that Plaintiffs' accusations that the Defendants conduct in this litigation 'is a bad faith attempt to further harm Plaintiffs" or that Defendants are engaging in 'underhanded and extreme methods of delaying or raising the cost of this litigation' to be a gross and transparent distortion of the record. It is Plaintiffs—not Defendants—who have created the possibility of increase time and expense…" (JA 394-395).

7. Despite ordering a punitive amount of attorneys' fees and costs against Plaintiffs, Judge Zeldon evidently recognizes Plaintiffs' lack of resources, stating, in the June 25, 2012 Order, that "Plaintiffs argue that they have 'few resources' and that 'it would be a manifest injustice to assess punitive damages and attorneys' fees and costs' against them. However, they have created 'this problem' for themselves by choosing to litigate before this Court for seven months and then changing to what they apparently perceive to be a more favorable forum. Having created this dilemma, they cannot reasonably

be excused for the consequences of their actions. Moreover, the purpose of the Court's order to pay reasonable attorneys' fees and costs is not to punish but to compensate and to avoid having the Court's processes be used by a party so as to unnecessarily increase the costs of litigation." (JA 395). Moreover, this [illegible] in federal court and thus, depriving Judge Zeldon of the ability to rule in the case.

In fact, Judge Zeldon's Order of June 25, 2012 reveals where in large part her bias and prejudice emanates from when she offensively and snidely writes: "If Plaintiffs now wish to pursue their claim in a forum they believe is likely to give them a more favorable outcome than what they believe they obtain from this Court, they may do so." (JA 395).

Moreover, at the initial stages of this case, Judge Zeldon chose to hold on to this action, despite having already announced her retirement from the bench. This was obviously done so that she could ultimately dismiss Plaintiffs' claims, with prejudice, and protect the Defendants while punishing the Plaintiffs. Despite her retirement, and Plaintiffs' legitimate re-filing of this action to the federal court, Judge Zeldon threw unnecessary obstacles into the federal action by threatening to dismiss the case before her with prejudice if Plaintiffs did not pay these inflated and exorbitant fees and costs within thirty days. (JA 395-396). Plaintiffs had an absolute right to bring the action against Defendants in the federal court. *Id.* Indeed, both parties were set to continue Plaintiffs' claims in federal court, and were in the same legal position as before Defendants moved to reinstate this action. A reasonable person could conclude that these actions were an effort to put an end to Plaintiffs' claims against Defendants.

With all the evidence set forth demonstrating Judge Zeldon's extra-judicial bias in favor of Defendants and against Plaintiffs, and since Plaintiffs had submitted the requisite affidavit and certification, Judge Zeldon was required to remove herself from the proceedings in accordance with Superior Court Civil Rule 1:12-1(g) and prior [illegible] (JA 193-194). Despite the dictates of [illegible] Zeldon refused to do so. (JA 423).

CONCLUSION

Plaintiffs have acted in good faith throughout these proceedings and should therefore not be subject to harsh attorneys' fees. Plaintiffs simply wished to pursue their legal rights because they were harmed by Defendants' defamatory statements, and sought to continue their legal claims in the federal court to seek justice from those statements. The federal court action has picked up right where this Court left off, and the parties are in the same legal position as before. Any award of attorneys' fees will unjustly punish Plaintiffs and may prevent them from further pursuing their rightful legal claim.

In the unlikely event this Court upholds the award of attorneys' fees and costs, the Court should respectfully not award the full amount requested. As the *Henderson* Court determined, many of these "excessive, redundant or otherwise necessary" legal fees should be reversed. Counsel for Defendants has set forth excessive and unnecessary claims of "attorneys' fees" in an effort to avoid the merits of Plaintiffs' lawsuit and to effectively deny Plaintiffs the ability to pursue their legal claims because of their lack of financial resources. Defendants are clearly acting in bad faith and the amount of attorneys' fees and costs awarded to Defendants were excessive and unreasonable.

Finally, even if the full amount is upheld, this Court should respectfully order that Plaintiffs can, if they can somehow muster the funds, pay it and purge the dismissal with prejudice. Clearly, Plaintiffs had a right to appeal, particularly after their Motion to Stay

Plaintiffs respectfully request oral arguments.

Dated: May 28, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of May, 2013 a true and correct copy of the foregoing Apellate Brief (Case Number 12-CV-2002) was submitted electronically to the Superior Court of the District of Columbia Civil Division and served via courier or electronic mail upon the following:

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