UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VINCENT FORRAS, *et al.*,	)	
	)	
Plaintiffs	)	
	)	**Case No. 1:12-cv-00282-RWR**
v.	)	**Judge Richard W. Roberts**
	)	
IMAM FEISAL ABDUL RAUF, *et al.*	)	
	)	
Defendants	)	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS AND FOR ATTORNEYS' FEES

PRELIMINARY STATEMENT

Plaintiffs' lengthy opposition papers fail to refute any of the reasons why their Complaint should be dismissed, as originally set forth in Defendant Adam Leitman Bailey's ("Defendant Bailey's") motion to dismiss and for attorneys' fees. As such, the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), (2), (3) & (6) and the D.C. Anti-SLAPP Act,[1] and Defendant Bailey should be awarded all his costs, expenses and attorneys' fees incurred in both the Superior Court and Federal Court Actions, pursuant to the D.C. Anti-SLAPP Act, 28 U.S.C. § 1927, as well as this Court's inherent authority to prevent abuse of the judicial process.

ARGUMENT

I. PLAINTIFFS CONCEDE THE ABSENCE OF DIVERSITY.

Plaintiffs do not dispute that they have the burden of pleading and demonstrating that this Court has subject matter jurisdiction based upon diversity of citizenship, per 28 U.S.C. § 1332. *Loughlin v. U.S.*, 393 F.3d 155, 172 (D.C. Cir. 2004). Plaintiffs do not even inform the Court

[1] Defined terms used herein are the same at those used in Defendant's Memorandum of Law in Support, unless otherwise specified.

which states they claim to be citizens of, much less demonstrate that they are citizens of different states than both Defendants.

Most significantly, Plaintiffs admit that diversity was not present at the time the Complaint was filed, depriving this Court of jurisdiction despite any subsequent changes in citizenship of the parties. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570-74 (2004) (finding that diversity must be complete when complaint is filed, and distinguishing *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996) as applying only to removal cases). Plaintiffs admit that "Forras was located in New York . . . at the time of the initial complaint." (Plaintiffs' Opposition ("Pl. Opp.") at 12). The fact that Forras may have changed citizenship afterward does not cure the jurisdictional defect of absence of diversity at the time of filing of the Complaint.

Further, Plaintiffs carefully avoid stating what citizenships they in fact claim. Plaintiff Klayman cryptically states that he *was* a District of Columbia resident, but fails to state where he is now domiciled. (Affidavit of Larry Klayman ("Klayman Aff."), ¶ 4; Pl. Opp. at 11.) Plaintiff Forras is noted to have been found in the New York Action to have no bona fide residence,[2] but nowhere do the papers say where he currently resides. (Pl. Opp. at 11-12.) As such, Plaintiffs have not met their burden of demonstrating that they have properly invoked this Court's diversity jurisdiction.

Though they do not allege it in their Complaint, Plaintiffs now claim federal question jurisdiction under 28 U.S.C. § 1331 for "civil actions arising under the Constitution, laws, or treaties of the United States." However, federal question jurisdiction is determined under the "well-pleaded complaint rule", which provides that "a suit 'arises under' federal law 'only when

[2] To the extent that Forras has no domicile in the U.S., his "stateless" status would destroy diversity jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 827-88 (1989).

the plaintiff's statement of his own cause of action shows that it is based upon [federal law].' . . . Federal jurisdiction cannot be predicated on an actual or anticipated defense." *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)). The Complaint here asserts four state common law causes of action – defamation, false light, assault and intentional infliction of emotional distress – but not any claims based upon federal law.[3] The fact that the Defendants have raised the D.C. Anti-SLAPP Act (itself not a claim arising under federal law) as a *defense* is irrelevant to the question of whether the Plaintiffs have filed a well-pleaded Complaint alleging federal claims.

As such, this Court has no jurisdiction to entertain Plaintiffs' claims.[4]

II. PERSONAL JURISDICTION CANNOT BE EXERCISED OVER DEFENDANT BAILEY.

In the D.C. Circuit, the author of a nationally-distributed publication is not subject to personal jurisdiction for defamation-based claims in the District of Columbia, absent specific contacts with the District, because, as the Circuit has recognized: "*writing* an article for a publication that is circulated throughout the nation, including the District, hardly constitutes doing or soliciting business, or engaging in a persistent course of conduct, *within* the District." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300 (D.C. Cir. 1996) (emphasis in original); *see also Moncreif v. Lexington Herald-Leader Co.*, 807 F.2d 217 (D.C. Cir. 1986). Under this precedent, if the author of a nationally-distributed article is not subject to *in personam* jurisdiction in the District, it follows that a source used by the article's author would likewise not

[3] 28 U.S.C. § 1366 provides that laws applicable exclusively to the District of Columbia are considered state laws for jurisdictional purposes.

[4] Even though this Court lacks subject matter jurisdiction to determine Plaintiffs' claims, it retains the power to impose fees, costs and sanctions based on the improper conduct of Plaintiffs and their attorney. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-39 (1992).

be subject to such jurisdiction. *See Clemens v. McNamee*, 615 F.3d 374 (5th Cir. 2010) (Texas courts had no personal jurisdiction over claim of Texas-resident baseball player for allegedly defamatory statements made in New York regarding steroid use that were published in nationally-distributed and widely-publicized investigative report by baseball commissioner's office).

Though their papers improperly and deliberately conflate them, Plaintiffs actually allege two distinct publications of purported defamatory language. First, Plaintiffs allege that Defendant Bailey provided a non-party New York-based reporter for the *New York Post*, a non-party New York newspaper, with copies of certain papers filed in the New York Action. There is no allegation that the act of providing the New York Action papers to the *Post* took place in the District of Columbia or involved the District in any fashion. Rather, it is undisputed that the act of providing information regarding New York litigation to a New York reporter for a New York newspaper took place entirely in New York, and thus cannot itself be the basis for personal jurisdiction in the District of Colombia.

Second, Plaintiffs allege that the *New York Post* published an allegedly defamatory story describing the New York Action and quoting from the court papers, which was – as part of the *Post*'s national distribution – available on the internet and in print within the District of Columbia. Plaintiffs do not allege that either Defendant took any action directly targeting the District of Columbia, but rather they claim that the *New York Post*'s reporting on the New York Action, based in part on information provided by Defendant Bailey, was distributed electronically and in print in the District. Other than this mere fact that an article in a New York newspaper was distributed in the District, among many other places, and purportedly caused

reputational and emotional injury to an attorney with an office in the District, Plaintiffs allege no connection between any Defendant or his actions and the District of Columbia.

In *Clemens*, the Fifth Circuit considered whether "allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state." 615 F.3d at 376. Using an analysis similar to that used by the D.C. Circuit in *McFarlane* and *Moncreif*, the Fifth Circuit held that a connection between the alleged defamation and the forum state was necessary to obtain personal jurisdiction over a non-resident defendant. *Id.* at 380. The Fifth Circuit expressly rejected the argument that the Plaintiffs here make – that jurisdiction is available where Defendants knew that the alleged defamation would cause harm to Plaintiffs in the forum state – holding that:

> In support of jurisdiction, Clemens points to the harm he suffered in Texas and to McNamee's knowledge of the likelihood of such damage in the forum. Yet . . . Clemens has not made a prima facie showing that McNamee made statements in which Texas was the focal point: the statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state. As such, the district court did not err in dismissing Clemens' suit for lack of personal jurisdiction over McNamee. *Id.*

Here Plaintiffs have failed to allege any connection between the "content and context" of the allegedly defamatory statements and the District of Columbia. Instead, Defendants' statements, made in New York to a New York newspaper, exclusively concerned litigation brought in New York concerning the use of real property located in New York. Because Plaintiffs have failed to allege any purposeful connection with the District of Columbia beyond

the incidental distribution there of a national publication, this Court has no personal jurisdiction over Defendants.[5]

III. PLAINTIFFS' TIME-BARRED CLAIMS CANNOT BE REVIVED BY RELATION BACK OR EQUITABLE TOLLING.

Plaintiffs implicitly concede that the February 21, 2012 filing of the Complaint in this Federal Action is beyond the one year statute of limitations period running from the October 12, 2010 (or earlier) publication of the allegedly defamatory statements.[6] Neither of the doctrines that they rely upon – relation back and equitable tolling –can save Plaintiffs' claims from being time barred.

Both Fed. R. Civ. P. 15(d) and D.C. Sup. Ct. Civil Rule 15(d) provide that in certain circumstances an amended pleading may relate back to the date of filing of the original pleading for limitations purposes. Each of those court rules, however, is applicable only to an amendment of a pleading within a particular action pending in their respective courts. Neither rule authorizes a pleading filed in an action in one court to relate back to another pleading filed in a different action in an entirely different court. As such, neither the Federal nor the D.C. Superior Court rule permits the filing of the Complaint in this Federal Action to relate back to the date of the filing of a Complaint in a different action brought in D.C. Superior Court.

Plaintiffs concede that they filed this Federal Action and dismissed the Superior Court Action to gain what they perceived to be a tactical advantage: avoidance of liability under the

[5] Plaintiffs have also failed to demonstrate that they obtained personal jurisdiction over Defendants by service of process because they have failed to file affidavits of service with the Court as required by Fed. R. Civ. P. 4(l) & (m).

[6] Plaintiffs note that false light and intentional infliction of emotional distress are not expressly mentioned as having a one year statute of limitations in D.C. Code § 12-301(4), but provide no authority to refute established D.C. precedent that claims for false light and infliction of emotional distress through allegedly false and injurious statements are "intertwined" with defamation and thus share its one-year statute of limitations. *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 298 (D.C. 2001); *Saunders v. Nemati*, 580 A.2d 660, 662 (D.C. 1990); *Bond v. U.S. Department of Justice*, 828 F.Supp.2d 60, 78 (D.D.C. 2011).

D.C. Anti-SLAPP act under then-recent District Court precedent. Pl. Opp. at 10 & 17-18. Although courts may equitably toll the statute of limitations under extraordinary circumstances, such as when a defendant has affirmatively "lolled" a plaintiff into delaying commencing an action, here there is no claim that any actions of Defendants caused Plaintiffs to discontinue in the Superior Court and re-file in this Court. Instead, Defendants moved the Superior Court to vacate the Plaintiffs' procedurally improper voluntary dismissal notice and to consider and decide the merits of the case. Because Plaintiffs knowingly and deliberately chose to dismiss the Superior Court Action (which was itself untimely) and refile this action in this Court for their own tactical purposes, equitable tolling of the Statue of Limitations is unavailable.

Accordingly, this Action must be dismissed under the statute of limitations, D.C. Code § 12-301(4).

IV. PLAINTIFFS' OPPOSITION FAILS TO REBUT DEFENDANT'S ARGUMENTS REGARDING JUDICIAL STATEMENT PRIVILEGE, THE D.C. ANTI-SLAPP ACT, ACTUAL MALICE, *RES JUDICATA* AND COLLATERAL ESTOPPEL, OR DEFENDANT BAILEY'S ENTITLEMENT TO ATTORNEYS' FEES.

In his original moving papers, Defendant Bailey established that: (1) the statements at issue were made within the scope of a judicial proceeding and are thus absolutely privileged; (2) Defendants are entitled to the protection of the D.C. Anti-SLAPP Act, which this Court may enforce; (3) the Defendants have failed to show the falsity of the statements at issue or that they were made with *New York Times v. Sullivan* (376 U.S. 254 (1965)) "actual malice" as required for defamation claims brought by public figure plaintiffs regarding a matter of public controversy; (4) that Plaintiffs' claims in this action are barred by *res judicata* and collateral estoppel based on the prior judgment and findings of Justice Billings in the New York Action;

and (5) that Defendants should be awarded the reasonable attorneys' fee incurred in connection with this Federal Action and the Superior Court Action under the D.C. Anti-SLAPP Act, 28 U.S.C. § 1927 and this Court's inherent power to prevent abuse of the judicial process. The arguments contained in Plaintiffs' opposition are ineffective to rebut these points, and Defendant Bailey rests on the arguments made in his original moving papers.

CONCLUSION

Accordingly, for the foregoing reasons, and the reasons set forth in his original moving papers, this Court should grant the motion of Defendant Bailey to dismiss the Complaint under F. R. Civ. P. 12(b)(1), (2), (3) & (6) and the D.C. Anti-SLAPP Act, and for the award of costs and attorneys' fees pursuant the D.C. Anti-SLAPP Act, 28 U.S.C. § 1927 and the inherent power of this Court to prevent abuse of the judicial process, as well as grant such other relief as may be just and proper.

Respectfully Submitted,

DEFENDANT ADAM LEITMAN BAILEY
By Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served via electronic filing this 12th day of June, 2013 to:

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