**NOT YET SCHEDULED FOR ORAL ARGUMENT**

*In the*

# United States Court of Appeals

*for the*

# District of Columbia Circuit

14-7070

VINCENT FORRAS; LARRY ELLIOTT KLAYMAN,

*Plaintiffs-Appellants,*

v.

IMAM FEISAL ABDUL RAUF; ADAM LEITMAN BAILEY,

*Defendants-Appellees.*

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA IN CIVIL CASE NO. 1:12-CV-00282

## BRIEF FOR DEFENDANT-APPELLEE ADAM LEITMAN BAILEY

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Defendant-Appellee Adam Leitman Bailey hereby certifies pursuant to Circuit Rule 28(a)(1) that:

### A. Parties and Amicus

The following parties have appeared in the District Court and in this Court: (1) Vincent Forras and Larry Elliot Klayman appeared as Plaintiffs in the District Court and appear as Appellants herein, and (2) Adam Leitman Bailey appeared as Defendant in the District Court and appears as Appellee herein. Contrary to what Plaintiff-Appellants state in their Certificate as to Parties, Defendant Imam Feisal Abdul Rauf was never served with process, did not appear in the District Court, and does not appear herein.

The District of Columbia, by its Attorney General, has filed a notice of its intent to file a brief as *Amicus Curiae*. No *Amici* appeared in the District Court.

### B. Rulings Under Review

The appeal herein is from the Order and Judgment of the U.S. District Court for the District of Columbia, Civil Action No. 12-cv-00282 (BJR), entered on April 18, 2014 by the Honorable Barbara J. Rothstein (the "Judgment Below"). (JA298-99). The Judgment Below is based on Judge Rothstein's Memorandum Opinion Granting Defendants' Special Motion to Dismiss entered on April 18, 2014 and

reported at ___ F. Supp. 2d ___, 2014 WL 1512814 (D.D.C. 2014) (the "Opinion Below"). (JA300-16).

**C. Related Cases**

A related action, which the Opinion Below found to be "identical in substance to" the action herein (JA304), was brought by the Plaintiff-Appellants herein against the Defendant-Appellees herein in the Superior Court of the District of Columbia (the "Superior Court Action") entitled *Vincent Forras & Larry Klayman v. Iman Feisal Abdul Rauf & Adam Leitman Bailey*, Civil Action No. 0008122-11 (Hon. Todd E. Edelman, J.) (JA24-32). The Superior Court Action was dismissed without prejudice on the Plaintiffs' motion in an Order entered by Judge Edelman on August 7, 2012. (JA251-57).

The claims brought herein and in the Superior Court Action relate to an action previously brought in the Supreme Court of the State of New York, New York County (the "New York Action") entitled *Forras v. Rauf*, Index No. 111970/2010 (Hon. Lucy Billings, J.) (JA77-96) by Plaintiff Vincent Forras, through his attorney Plaintiff Larry Klayman, against Imam Rauf and the developer of a proposed Islamic community center. In a September 26, 2012 Decision and Order reported as 39 Misc.3d 1215(A), 2012 N.Y. Slip Op. 52479(U), 2012 WL 7986872 (Sup. Ct., N.Y. Cty., 2012) (JA54-65) (the "New York Dismissal Order"), Justice Billings dismissed the New York Action for

failure to state a cause of action and granted sanctions against Plaintiff Klayman. Although Plaintiffs filed a Notice of Appeal of the New York Dismissal Order (JA296), they have abandoned their appeal by not timely filing their brief and other required appeal papers. New York Appellate Division, First Department Rules § 600.11(a)(3), 22 NYCRR § 600.11(a)(3).

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# GLOSSARY

| | |
|---|---|
| Anti-SLAPP Act | District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501–16-5505 |
| Council Report | Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010," at 4 (Nov. 18, 2010), available at http://dcclims1.dccouncil.us/images/00001/20110120184936.pdf. |
| CPLR | New York Civil Practice Law and Rules |
| Judgment Below | Order and Judgment entered on April 18, 2014 (JA298-99) |
| New York Action | *Forras v. Rauf*, Index No. 111970/2010, Supreme Court of the State of New York, New York County (Hon. Lucy Billings, J.) |
| New York Dismissal Order | September 26, 2012 Decision and Order (JA54-65) |
| Opinion Below | Memorandum Opinion Granting Defendants' Special Motion to Dismiss entered on April 18, 2014 (JA300-16) |
| SLAPP | strategic lawsuit against public participation |
| Superior Court Action | *Vincent Forras & Larry Klayman v. Iman Feisal Abdul Rauf & Adam Leitman Bailey*, Civil Action No. 0008122-11, Superior Court of the District of Columbia (Hon. Todd E. Edelman, J.) |
| Superior Court Dismissal Motion | Superior Court Motion for Judgment on the Pleadings |

## PRELIMINARY STATEMENT

This is a classic strategic lawsuit against public participation ("SLAPP" suit). It is a patently meritless action brought in an inconvenient forum for no purpose other than to harass and intimidate a New York lawyer for his advocacy in a New York litigation concerning a matter that was at the time a matter of substantial national interest and debate, the proposed construction of an Islamic cultural center in lower Manhattan.

After unsuccessfully challenging the statements at issue herein in the New York Action, Plaintiffs, both public advocates, initially commenced this action for defamation and related claims in the Superior Court of the District of Columbia, leading to a dismissal motion based on multiple defects in Plaintiffs' claims, including lack of personal jurisdiction, statute of limitations, judicial proceeding privilege, *New York Times v. Sullivan*[1] privilege, *res judicata* and collateral estoppel, and the D.C. Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501–16-5505 (the "Anti-SLAPP Act"). Apparently realizing that dismissal of their meritless complaint and a judgment against them for attorneys' fees under the Anti-SLAPP Act were inevitable, the Plaintiffs sought to dismiss the Superior Court Action without prejudice and refile their claims in federal court based on their belief that a

[1] 376 U.S. 254 (1964).

federal court dismissal could not include Anti-SLAPP Act damages under a then-recent District Court decision (not followed by any subsequent decision in the District Court). As such, the Plaintiffs filed a federal Complaint "identical in substance to the D.C. Superior Court Action complaint" (JA304), which suffered from the same infirmities requiring its dismissal.

In the District Court, Defendant Bailey filed a motion on grounds similar to those in to his Superior Court motion, seeking dismissal along with attorneys' fees under the Anti-SLAPP Act, 28 U.S.C. § 1927, and the inherent power of the court to prevent abuse of the judicial process. (JA46). The Honorable Barbara J. Rothstein granted the motion, noting that "Defendants present a mélange of reasons why this case should be dismissed," but that she would "resist the temptation to deal with all of Defendants' arguments." (JA304) Judge Rothstein dismissed the Complaint and ordered an award of attorneys' fees under the Anti-SLAPP Act and the statute of limitations, without addressing the myriad other reasons for dismissal and an attorneys' fee award. (JA305).

In their appeal, Plaintiffs ignore virtually all of the "mélange" of reasons why dismissal is required, only half-heartedly arguing that their claims could succeed on their merits, and they raise objection to Anti-SLAPP Act attorneys' fee liability. Accordingly, for the reasons stated

herein, this Court must affirm the District Court's dismissal, and award Defendant attorneys' fees either under the Anti-SLAPP Act, or alternatively under 28 U.S.C. § 1927 or the Courts' inherent power to prevent abusive litigation.

## COUNTER-STATEMENT REGARDING JURISDICTION

Contrary to what Plaintiffs state in their Brief, and as discussed in Point II.A (pages 40-41) below, the District Court did not have diversity subject matter jurisdiction under 28 U.S.C. § 1332 because Plaintiffs did not allege their citizenship in the Complaint. In addition, as discussed in Point II.B (pages 41-44) below, there was no basis for the District Court to exercise "long arm" personal jurisdiction over Defendant Bailey under D.C. Code § 13-423. Further, the District Court had no personal jurisdiction over Defendant Rauf because he was never served with process.[2] In dismissing the Complaint on other grounds, the Opinion Below did not address these jurisdictional defects.

[2] Plaintiffs filed no proofs of service of the Summons and Complaint in the District Court as required by Fed. R. Civ. P. 4(m), and there is no claim or evidence that Defendant Rauf was ever served with process. Defendant Rauf never appeared in the District Court and has not appeared in this appeal. Defendant-Appellee's counsel herein is appearing and filing this brief on behalf of Defendant-Appellee Bailey only, and does not appear as counsel to Rauf.

Notwithstanding the absence of personal or subject matter jurisdiction, the District Court does have jurisdiction to award costs and attorneys' fees against Plaintiffs. *Willys v. Coastal Corp.*, 503 U.S. 131 (1992); *Animal Welfare Institute v. Feld Entertainment, Inc.*, 944 F.Supp.2d 1, 12-13 (D.D.C. 2013); *see also* footnote 9 on page 25 and footnote 25 on page 56, below.

This Court has jurisdiction under 28 U.S.C. § 1291, as the Judgment Below is considered a final order, notwithstanding that the amount of the attorneys' fee award remains to be determined by the District Court.[3] *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S.Ct. 773 (2014).

## ISSUES PRESENTED

1. Did the District Court properly find that the Anti-SLAPP Act could be enforced in a federal diversity action and thus properly grant dismissal and attorneys' fees against the Plaintiffs?

   The District Court properly found that it could enforce the Anti-SLAPP Act and granted attorneys' fees against the Plaintiffs.

[3] In an Order entered November 6, 2014 (JA345), based on the Memorandum Opinion entered on that date (JA340-44), the District Court held its determination of the amount of attorneys' fees to be awarded in abeyance pending the outcome of this appeal. Thus, consideration of the amount or reasonableness of any fee award which may be made is outside the jurisdiction of this Court on this appeal.

Was the Complaint herein, which seeks damages for defamation, false light, assault, and intentional infliction of emotional distress, properly dismissed based on: (i) failure to allege diverse citizenship; (ii) absence of "long arm" personal jurisdiction, (iii) statute of limitations, (iv) the judicial proceeding privilege, (v) *New York Times v. Sullivan* privilege and (vi) *res judicata* and collateral estoppel?

The District Court properly dismissed the Complaint based on Anti-SLAPP Act and statute of limitations grounds, not reaching the other grounds for dismissal, but had such grounds been reached, the result would have been the same.

2. Where Plaintiffs, after a New York court rejected their challenge to language in litigation papers, filed a patently meritless action based on the same language in the same litigation papers in a local forum distant from the original controversy with no basis for personal jurisdiction, then voluntarily dismissed the action without prejudice in the face of inevitable dismissal on the merits, and refiled an identical action in federal court without addressing any of the deficiencies identified in the prior dismissal motion, should attorneys' fees be assessed against the Plaintiffs under 28 U.S.C. § 1927 and the inherent power of the courts to prevent abusive litigation?

The District Court did not reach this question because it awarded attorneys' fees under the Anti-SLAPP Act.

## STATUTES AND REGULATIONS

The District of Columbia Anti-SLAPP Act of 2010, D.C. Code §§ 16-5501–16-5505, is set forth in the Addendum.

28 U.S.C § 1927, titled "Counsel's liability for excessive costs," provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

## STATEMENT OF THE CASE

### A. The New York Action

This litigation springs out of the efforts of members of the Islamic community in New York City who sought to build an Islamic community center on Park Place in lower Manhattan, several blocks away from the site of the tragic destruction of the World Trade Center in the September 11, 2001 attacks. The proposed community center, which its opponents characterized as the "Ground Zero Mosque" (though it was neither a mosque nor located at Ground Zero) became the subject of vigorous and extensive debate in American politics, centering on such subjects as the effects of the

September 11th terrorist attacks, national security, freedom of religion, freedom of speech, and religious and ethnic tolerance.[4]

Plaintiff Vincent Forras claims to have been a "first responder" to the terrorist attacks of September 11, 2001, but the veracity of his claims regarding his work in the aftermath of the attacks has been sharply disputed.[5] What is undisputed, however, is that Forras has made himself an outspoken public advocate on issues regarding the September 11 attacks, personally and through an organization he founded, the Gear Up Foundation. *See* Complaint ("Compl.") ¶ 7 (JA8); "About Vincent Forras" from Gear Up Foundation website (JA204-05). Further, Forras ran as a candidate in the

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[4] A sampling of news stories from major media outlets covering the public debate include: Michael Barbaro, *Debate Heats Up About Mosque Near Ground Zero*, N.Y. Times, July 31, 2010 at A1; Philip Kennicott, *Designs for NYC's Park51 Islamic Center Show a Literally Enlightened Building*, Washington Post, October 7, 2010 at C01; Annie Gowen, *Near Ground Zero, Mosque Supporters Gather to Show Their Support*, Washington Post, September 11, 2010; Jeff Jacoby, *A Mosque at Ground Zero*, Boston Globe, June 6, 2010; ABC News, "Ground Zero 'Mosque' is Approved," (August 3, 2010), available at http://abcnews.go.com/WNT/video/ground-zero-mosque-clears-final-hurdle-wtc-world-trade-center-911-debate-muslim-community-center-11317471 (visited Feb 17, 2015); CBS News, "Obama Defends Ground Zero Mosque," (August 13, 2010), available at http://www.cbsnews.com/video/watch/?id=6771227n (visited Feb. 17, 2015); *see generally* Wikipedia, *Park51: Controversy*, available at http://en.wikipedia.org/wiki/Park51#Controversy (visited Feb. 17, 2015).

[5] *See* Graham Rayman, *Controversy Swells Over 9/11 Nonprofit Event and its Founder, Vincent Forras*, Village Voice, Sept. 11, 2012 (JA188-90); Graham Rayman, *9/11: The Winners: For Some People, the Terrorist Attacks have been a Gold Mine*, Village Voice, Aug. 31, 2011 (JA192-202).

November 2010 election for United States Senator from the State of Connecticut. Vincent Forras, Statement of Candidacy, June 12, 2009 (JA207-09); website of Vincent Forras for US Senate (JA213-16).

Plaintiff Larry Klayman describes himself as "a publicly known civil rights and individual rights activist." Compl. ¶ 7(JA8). Personally and through an organization he founded, Freedom Watch, he engages in political commentary and institutes litigation on behalf of causes he advocates. "About Us" & "About Larry Klayman", website of Freedom Watch (JA217-18).

On September 9, 2010, the complaint in the New York Action (JA76-96) was filed in the Supreme Court of the State of New York, New York County (New York's trial court of general jurisdiction) on behalf of Plaintiff Forras by Plaintiff Klayman as his attorney, alleging causes of action – all later dismissed for failure to state a claim (JA54-61) – for public and private nuisance, intentional and negligent infliction of emotional distress and assault, seeking compensatory damages of more than $150,000,000 and punitive damages of more than $200,000,000. (JA89-95).

Immediately after filing the New York Action, both Plaintiffs actively courted and successfully obtained publicity about their views on the "Ground Zero Mosque" controversy and their New York Action, including

issuing a press release and holding a September 10, 2010 press conference on the filing of the New York Action and jointly appearing on Fox News on September 13, 2010 to discuss the Action and related issues.[6]

On October 7, 2010, the defendants in the New York Action, represented by their attorney, Defendant Bailey, brought the motion to dismiss (JA67-134) that was ultimately granted in the New York Dismissal Order. (JA53-65). Reporting on the dismissal motion, the New York Post published a brief article by Annie Karni entitled *Anti-Mosque Lawsuit*

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[6] *See* Freedom Watch, Press Release, *Ground Zero Mosque Sued for Terror Threat on Eve of September 11*, (Sept. 10, 2010), available at http://www.freedomwatchusa.org/ground-zero-mosque-sued-for-terror-threat-on-eve-of-septembe/ (visited Feb. 17, 2015); Fox News, *9/11 Responder Suing 'Ground Zero Mosque' Developers* (Sept. 13, 2010), available at http://video.foxnews.com/v/4336572/911-responder-suing-ground-zero-mosque-developers/ (visited Feb 17, 2015); Larry Klayman, *Unmasque the Mosque*, World Net Daily (October 8, 2010), available at http://www.wnd.com/2010/10/212701/ (visited Feb. 17, 2015); Andy Soltis and Doug Auer, *Smoke Screen*, N.Y. Post, Sept. 10, 2010 at 5; Dareh Gregorian, *9/11 First Responder Files Suit Against Ground Zero Mosque Developers*, N.Y. Post (website posting), (Sept. 9, 2010), available at https://web.archive.org/web/20100912230908/http://www.nypost.com/p/news/local/manhattan/first_responder_files_suit_against_Fs0ugfjYjDq3gMwZ4YK3oN (visited Feb 17, 2015); Maggie Haberman, *Freedom Watch Boosts 9/11 Responder Lawsuit Against the Mosque*, Politico (September 9, 2010) available at http://www.politico.com/blogs/maggiehaberman/0910/Freedom_Watch_lawsuit_against_the_mosque_.html (visited Feb. 17, 2015); Bob Unruh, *Lawsuit: Ground Zero Mosque Would be 'Terror'*, World Net Daily (Sept. 10, 2010) available at http://www.wnd.com/2010/09/201377/ (visited February 17, 2015).

*Slammed as Bigotry* that was posted on the Post's website and appeared on page 2 of the Post's print edition on October 11, 2010. (JA136-37)

In later proceedings in the New York Action, Plaintiff Klayman filed a January 5, 2011 cross-motion for sanctions objecting to the same language from the dismissal motion papers, as quoted in the New York Post article, that the Plaintiffs complain of in this action. (JA139-156). On April 5, 2011, Justice Billings orally denied Plaintiff's sanctions cross-motion, ruling from the bench that:

> I'm going to deny the cross motion for sanctions, because all Mr. Bailey has disseminated here were public documents.
>
> It appears that each side's allegations are hardly controversial, but I don't believe that the allegations by defendants have risen to the level of threatening a party or counsel with violence.
>
> And I don't see any evidence through affidavits or otherwise that defendants or defendants' counsel's conduct has caused plaintiffs or witnesses on behalf of plaintiffs or on behalf of any party not to step forward for fear of being harmed.
>
> Similarly, I don't believe the conduct rises to a level of violation of rules of professional conduct.
>
> While I might not find all of the remarks entirely relevant to the specific motions that are before me, it's not that the statements were so far removed from the subject matter of this action.

(JA160-61, at 3:23 - 4:15). This ruling from the bench was confirmed in the New York Dismissal Order, in which Justice Billings held: "The parties' and their attorneys' controversial statements related to their litigation do not

amount to frivolous conduct. Therefore the court denies plaintiff's cross-motion for sanctions . . . insofar as it is based on that conduct." (JA63).

Justice Billings further found that the Plaintiffs claims in the New York Action claims were "poorly pleaded" though "not entirely frivolous" (*id.*), leading her to caution: "Nevertheless, should plaintiff commence a further similar action, the history of this litigation may lead to a finding that he and his attorneys have engaged in vexatious, frivolous litigation." (JA64).

**B. The Superior Court Action**

After Justice Billings' bench ruling foreclosed the ability of Plaintiffs to continue to harass Defendant Bailey with the threat of sanctions in New York, Plaintiffs filed the Superior Court Action against the Defendants herein in the Superior Court of the District of Columbia on October 12, 2011, (JA239-247). After filing an Answer, Defendant Bailey filed a December 19, 2011 motion for judgment on the pleadings, seeking dismissal of the Superior Court Action (the "Superior Court Dismissal Motion"). (JA252) Defendant Rauf was not served with did not participate in the Superior Court Action.

Plaintiffs sought three extensions of time to respond to the Superior Court Dismissal Motion, each of which was granted, though in granting the

third extension, Judge Edelman, after noting that Plaintiffs' request was untimely, ordered that Plaintiffs' response papers would be due February 21, 2012, and that "no further extensions will be granted." (JA259-60).

On February 21, 2012 instead of responding to the Superior Court Dismissal Motion as ordered by Judge Edelman, Plaintiffs commenced this action in federal District Court and at the same time electronically filed in the Superior Court a procedurally improper Notice of Dismissal. (JA262). The Notice of Dismissal candidly explained that the Plaintiffs' reason for refiling the action in District Court was to avoid Anti-SLAPP Act liability under a then-recent District Court decision, stating:

> Pursuant to Rule 41(a)(1) Plaintiffs, Vincent Forras and Larry Klayman, respectfully file this voluntary notice of dismissal without prejudice. The Complaint has been refiled in the U.S. District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*, No. 11-cv-1527 (RLW) (D.D.C.) [842 F.Supp.2d 85 (D.D.C. 2012)]. (*Id.*)

After Klayman was advised that his Notice of Dismissal was void under D.C. Superior Court Civil Rule 41(a)(1) because unilateral dismissal is not permitted after an answer has been filed, Plaintiffs moved on February 29, 2012 for an order of dismissal without prejudice under Superior Court Civil Rule 41(a)(2). Defendant Bailey opposed Plaintiffs' motion, arguing that Judge Edelman should dismiss the case with prejudice and award Anti-

SLAPP Act attorneys' fees pursuant to the previously-filed Superior Court Dismissal Motion.

The Superior Court Action remained pending until Judge Edelman issued an August 7, 2012 Order granting Plaintiffs' motion for dismissal of the Superior Court Action without prejudice and, as a result, denying Defendant Bailey's Superior Court Dismissal Motion seeking dismissal on the merits as moot. (JA251-57). In his Dismissal Order, Judge Edelman explained that:

> The Court sympathizes with the Defendant's frustration: the lawsuit against him is likely based on litigation activity that is privileged, and Plaintiffs only moved to dismiss and re-filed their lawsuit in federal court after obtaining multiple extensions of time to respond to Defendant's Motion for Judgment on the Pleadings. (JA254)

## C. The Federal Action

On February 21, 2012, Plaintiffs commenced the Federal Action by filing their Complaint in the District Court (JA7-13), which was "identical in substance" (JA304) to the Superior Court Action complaint (JA24-32). However, because Plaintiffs' identical, previously-filed Superior Court Action remained active when the District Court Complaint was filed, Defendant Bailey moved (JA14-45) to stay the Federal Action on the grounds that the District Court was required to abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), as well

as this Court's controlling holding that "Plaintiffs do not have a right actively to pursue parallel state and federal actions simultaneously," and that a District Court must stay its action "during the pendency of the parallel action in the District of Columbia courts." *Maheffy v. Bechtel Associates P.C.*, 699 F.2d 545, 546-47 (D.C.Cir. 1983). The District Court granted the stay in a March 28, 2013 Minute Order. (JA2). The stay was not dissolved until the Court entered a June 19, 2013 Minute Order lifting the stay after Judge Edelman's ruling. (JA3)

On May 15, 2013, Defendant Bailey filed the motion to dismiss and for attorneys' fees that is the subject of this appeal. Specifically, Bailey sought dismissal and fees because:

> The Plaintiffs' fail to establish diversity of citizenship to support subject matter jurisdiction and there is no basis for personal jurisdiction over Defendant Bailey under the District's long-arm statute. In addition, the claims are time-barred, fail to state a claim and are unsupported by the evidence. This lawsuit is barred by the doctrines of *res judicata* and collateral estoppel and it is part of a long history of vexatious and improper litigation by the Plaintiffs. For these reasons, and under 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, Defendants are entitled to full attorneys' fees and costs. (JA46)

On April 18, 2014, Judge Rothstein issued the Judgment Below (JA298-99) and Opinion Below (JA300-16) awarding Defendant Bailey all of the relief sought – dismissal and attorneys' fees – and setting a schedule

for Bailey to document the attorneys' fees he had incurred. In granting dismissal, Judge Rothstein explained:

> Defendants present a mélange of reasons why this case should be dismissed. They have filed a motion to dismiss under Rules 12(b)(1), (2), (3) and (6) and a special motion to dismiss under the Anti–SLAPP Act, which authorizes dismissal where a defendant shows that the claims at issue arise from an act in furtherance of the right of advocacy on issues of public interest.[7] The Court will resist the temptation to deal with all of Defendants arguments and will instead focus on Defendants' Anti–SLAPP Act and statute of limitations arguments. (JA304 (footnote in original)).

In the Opinion Below, Judge Rothstein carefully and cogently analyzed Defendant Bailey's Anti-SLAPP Act and statute of limitations defenses, granted dismissal on those grounds, found an award of attorneys' fees proper, and found it unnecessary to address the other grounds argued by Defendant Bailey for an award of such relief. (JA305-15).

On May 16, 2014, Plaintiffs timely appealed from the Judgment Below (JA338-39). Thereafter, on July 7, 2014, Plaintiffs filed a motion for reconsideration pursuant to Fed. R. Civ. P. 60(b), which Judge Rothstein

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[7] Although D.C. Code § 16–5502 provides that a special motion to dismiss should be filed within forty-five days of the service of the claim, here Defendants moved promptly to stay this action because of the pendency of the Superior Court Action. As such, considering the circumstances under which the action was brought, the time to file the special motion to dismiss is equitably tolled and this motion is considered timely.

denied in an November 6, 2014 Memorandum Opinion, reported at ___ F.Supp.3d ___, 2014 WL 5794768, on the grounds that the pending appeal divested the District Court of jurisdiction. (JA343)

Defendant Bailey timely submitted documentation of his attorneys' fees incurred in defense of the District of Columbia litigation. (JA317-37). Plaintiffs objected and requested that the District Court stay consideration of the amount of the attorneys' fees to be awarded pending the determination of this appeal. In her November 6, 2014 Memorandum Opinion, Judge Rothstein held, pursuant to District Court Local Civil Rule 54.2(b), that the remaining attorneys' fee issues would be held in abeyance pending this appeal. (JA341-42).

## SUMMARY OF ARGUMENT

The District Court properly granted dismissal and awarded attorneys fees under the D.C. Anti-SLAPP Act because: (A) the Anti-SLAPP Act is enforceable in federal courts as it does not conflict with Federal Rules of Civil Procedure 12 and 56; (B) Plaintiffs' Seventh Amendment right to trial by jury, an issue that they failed to raise below, is not impaired because they have not raised any disputed issues of fact requiring jury determination and the Anti-SLAPP Act has not been interpreted in a manner inconsistent with the Seventh Amendment; (C) the Anti-SLAPP Act motion was timely

because it was equitably tolled due to *Colorado River* abstention; and (D) the Anti-SLAPP Act motion was properly granted because the challenged statements were made in connection with a judicial proceeding and concerned plaintiffs in their status as limited purpose public figures.

Dismissal was also proper because: (A) Plaintiffs have failed to allege the parties have diverse citizenship as required for jurisdiction under 28 U.S.C. § 1332; (B) there is no long-arm jurisdiction over Defendant Bailey, who has no contacts with the District of Columbia; (C) Plaintiffs claims are all time-barred under the one year statute of limitations applicable to each of their claims; (D) because the allegedly defamatory statements were made in New York Action litigation papers, they are protected by the judicial proceedings privilege; (E) the challenged statements are also protected by the *New York Times v. Sullivan* First Amendment privilege as they concern public figures in a matter of public controversy; and (F) rulings in the New York Action bar the plaintiffs claims under the doctrines of *res judicata* and collateral estoppel.

Finally, should this Court hold that Defendant Bailey is not entitled to attorneys fees under the Anti-SLAPP Act, he should nevertheless be awarded attorneys' fees based on the Defendants bad faith and vexatious

litigation conduct under 29 U.S.C. § 1927 and the inherent power of the courts to control abusive litigation practices.

## ARGUMENT

## I

## THIS ACTION FALLS SQUARELY WITHIN THE SCOPE OF THE D.C. ANTI-SLAPP ACT, THE ENFORCEMENT OF WHICH IS PROPER IN THE FEDERAL COURTS

### A. The Anti-SLAPP Act May Be Enforced in Federal Court

Plaintiffs' sole justification for bringing these proceedings in federal court is that they believed– erroneously – that they could avoid liability for attorneys' fees under the D.C. Anti-SLAPP Act because enforcement of the Act is unavailable in federal courts. Plaintiffs made this explicit in their February 21, 2012 Notice of Dismissal filed in the Superior Court Action, wherein they indicated that they were refiling their Complaint in federal court to avoid application of the D.C. Anti-SLAPP Act, "due to the Court's recent decision in *3M v. Boulter*," 842 F.Supp.2d 85 (D.D.C. 2012), which had held earlier that month that the Anti-SLAPP Act could not be enforced in federal diversity actions. (JA262).

In the Opinion Below, however, Judge Rothstein properly rejected *Boulter* as being in "conflict[] with the weight of authority," including the

three Circuits (now four)[8] that had addressed the question and the four post-*Boulter* D.C. District Court decisions that each rejected *Boulter*. (JA305-06). More significantly, Judge Rothstein properly concluded that, because the reasoning of "the Courts of Appeals cases and the recent D.C. District Court cases [was] persuasive, . . . the Anti– SLAPP Act empowers defendants with the substantive right to fend off SLAPP lawsuits." (JA305-06).

Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity must apply the substantive law of the forum jurisdiction , but federal procedural rules. Consistent with this, the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that federal rules of procedure "shall not abridge, enlarge or modify any substantive right." However, as the Supreme Court has noted, even where there is an apparent conflict between state law and a federal procedural rule, courts need "not wade into *Erie's* murky waters unless the federal rule is inapplicable or invalid."

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[8] *Godin v. Schencks*, 629 F.3d 79, 85-92 (1st Cir.2010); *Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164, 169 (5th Cir.2009); *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir.1999); *see also Adelson v. Harris*, 774 F.3d 803, 809 (2d Cir. 2014). In their Brief (at 26), the only authorities other than *Boulter* that the Plaintiffs cite for the proposition that the Anti-SLAPP Act should not apply in federal court are three District of Massachusetts cases, but each of those cases appears have been overruled by the subsequent decision of the First Circuit in *Goldin*.

*Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393, 398 (2010). Because the D.C. Anti-SLAPP Act provides substantive rights and does not render any federal rule of procedure inapplicable or invalid, it must be enforced in federal courts.

In adopting the Anti-SLAPP Act, the D.C. Council found:

> Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 [adopted as the Anti-SLAPP Act] extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. . . . The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Council of the District of Columbia, Committee on Public Safety and the Judiciary, Report on Bill 18-893, "Anti-SLAPP Act of 2010," at 4 (Nov. 18, 2010), available at http://dcclims1.dccouncil.us/images/00001/20110120184936.pdf ("Council Report"). Indeed, Plaintiffs' conduct in these proceedings demonstrates the substantive effects of the Anti-SLAPP Act, with Plaintiffs dismissing the Superior Court Action, in which Anti-SLAPP Act attorneys' fees were undoubtedly available, and refiling the same claims in the District Court, where they believed that they would be immune from an attorneys' fee judgment.

The Circuit Court cases that have considered similar Anti-SLAPP statutes have unanimously held that there is no "direct collision" between an Anti-SLAPP special motion to dismiss and Federal Rules of Civil Procedure 12 and 56, which they have found "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Newsham*, 190 F.3d at 972 (quoting *Walker v. Armco Steel*, 446 U.S. 740, 749-50, 752 (1980)); *see also Henry*, 566 F.3d at 168-69 (citing *Newsham*, 190 F.3d at 972-73).

The First Circuit undertook a detailed analysis of the interaction between a similar state Anti-SLAPP statute and the Federal Rules, finding that the state statute "does not seek to displace the Federal Rules or have Rules 12(b)(6) and 56 cease to function." Instead the state statute "created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56, to defendants who are named as parties because of constitutional petitioning activities." *Godin*, 629 F.3d at 88. Specifically, the First Circuit explained:

> Given that neither Fed.R.Civ.P. 12(b)(6) nor Fed.R.Civ.P. 56 is so broad as to encompass the special [Anti-SLAPP motion to dismsiss], we might go no further. We do acknowledge the district court's concern about some differences in the mechanics, particularly as to the record on which the motion is evaluated. Whether the procedures outlined in [the Anti-SLAPP statute] will in fact depart from those of Rule 12 and Rule 56 will depend on the particulars in a given case of the claim and

> defense. Some [Anti-SLAPP] motions, like Rule 12(b)(6) motions, will be resolved on the pleadings. In other cases, [the Anti-SLAPP statute] will permit courts to look beyond the pleadings to affidavits and materials of record, as Rule 56 does. In this way, some [Anti-SLAPP] motions, depending on the particulars of a case, will be resolved just as summary judgment motions under Fed.R.Civ.P. 56 are.

*Id.* at 90. Likewise, in enacting Anti-SLAPP statutes, legislatures recognize that existing summary judgment and dismissal procedures, like those of Federal Rules of Civil Procedure 12 and 56, may be inadequate to protect free expression rights:

> That the California legislature enacted both an analog to Rule 12 and, additionally, an anti-SLAPP statute is strong evidence that the provisions are intended to serve different purposes and control different spheres. Moreover, the anti-SLAPP statute asks an entirely different question: whether the claims rest on the SLAPP defendant's protected First Amendment activity and whether the plaintiff can meet the substantive requirements California has created to protect such activity from strategic, retaliatory lawsuits.

*Makaeff v. Trump University, LLC*, 736 F.3d 1180, 1181-1184 (9th Cir. 2012) (Wardlaw & Callahan, JJ. concurring in denial of rehearing *en banc*).

More generally, the Second Circuit has found that the immunity from liability and attorneys' fees provisions of a state Anti-SLAPP statute apply in federal court because:

> Each of these [statutory provisions]: (1) would apply in state court had suit been filed there; (2) is substantive within the meaning of *Erie*, since it is consequential enough that enforcement in federal proceedings will serve to discourage

> forum shopping and avoid inequity; and (3) does not squarely conflict with a valid federal rule.

*Adelson*, 774 F.3d at 809.

In addition to the Opinion Below, four other judges of the D.C. District have analyzed the text and history of the Anti-SLAPP Act, as well as the Court of Appeals precedent and found that the Act may be enforced in federal diversity actions, and Judge Rothstein succinctly summarized why their opinions were proper and persuasive:

> In *Sherrod v. Breitbart*, a D.C. District Court case decided after *3M Co.*, the court held that the Anti-SLAPP Act "is substantive—or at the very least, has substantive consequences" and thus is applicable in federal court. 843 F.Supp.2d 83, 85 (D.D.C.2012) (Leon, J.) *aff'd on other grounds* 720 F.3d 932 (D.C.Cir.2013). In *Sherrod*, the plaintiff—former Georgia State Director for Rural Development for the United States Department of Agriculture—brought an action against the defendants—Internet bloggers Andrew Breitbart and Larry O'Connor—asserting claims for defamation, false light, and intentional infliction of emotional distress, which the defendants moved to dismiss under the Anti-SLAPP Act. *Sherrod*, 843 F.Supp.2d at 83–84. The Honorable Judge Leon examined the legislative history of the Anti-SLAPP Act and found that the intent was "to create new substantive rights for defendants in SLAPP suits." *Id.* at 85. " 'Bill 18–893, the Anti-SLAPP of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.' " *Id.* (quoting [Council Report] at 1). In addition, since *3M Co.* three other D.C. District Court judges have found that the Anti– SLAPP Act applies to diversity actions in federal court. *See Boley v. Atl. Monthly Grp.*, 950 F.Supp.2d 249, 254 (D.D.C.2013) (Walton, J.) (finding the Courts of Appeals cases persuasive and adopting their

> reasoning); *Farah v. Esquire Magazine, Inc.*, 863 F.Supp.2d 29, 36 n. 10 (D.D.C.2012) (Collyer, J.) *aff'd sub nom. Farah v. Esquire Magazine*, 736 F.3d 528 (D.C. Cir.2013) ("it was certainly the intent of the D.C. Council and the effect of the law—dismissal on the merits—to have substantive consequences"); *Abbas v. Foreign Policy Grp., LLC*, CV 12–1565(EGS), [975 F.Supp.2d 1, 10], 2013 WL 5410410, *5 (D.D.C. Sept. 27, 2013) (Sullivan, J.) (same) [*appeal argued* No. 13-7171 (D.C. Cir. Oct. 20, 2014)].

(JA305-06).

The D.C. Council's purpose in adopting the Anti-SLAPP Act was to provide "substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. . . . by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." Council Report at 1. Although both Federal Rules of Civil Procedure 12 and 56 and their local analogues, D.C. Superior Court Civil Rules 12 and 56, provide for a prompt and summary determination of the merits of a claim, the D.C. Council nevertheless found it necessary to provide additional protections to defendants in cases involving free expression. The Council allowed enforcement of those protections through a special motion to dismiss under D.C. Code § 16-5502, allowing defendants to promptly test claims against the substantive immunity provided by the Anti-SLAPP Act. These

protections add to, and do not displace, both Federal and D.C. Rules 12 and 56, or "at worst, . . . function[] merely as a mechanism for considering summary judgment at the pleading stage as is permitted under Rule 12(d)." *Makaeff*, 736 F.3d at 1183.

Accordingly, the Opinion Below properly held that the Anti-SLAPP Act could be enforced in this federal diversity action.[9]

**B. The Anti-SLAPP Act is Consistent With the Seventh Amendment**

Although Plaintiffs now claim that the Anti-SLAPP Act violates their right to trial by jury under the Seventh Amendment, they failed to raise this argument before the District Court, and have provided no explanation or excuse for their failure to do so. Accordingly, this Court should "not consider arguments raised for the first time on appeal, [as] appellants present no extraordinary circumstances to explain their failure to raise these arguments in district court." *Figueroa v. D.C. Metropolitan Police*

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[9] Even though Plaintiffs' failure to allege the diverse citizenship of the deprives the federal courts of subject matter jurisdiction, see Point II.A, at pages 40-41, below, federal courts may nevertheless award attorneys' fees to a defendant pursuant to a fee-shifting statute despite the absence of jurisdiction. *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923 (7th Cir.2000) ("motion seeking an award under [fee-shifting] statutes is a case or controversy that may be adjudicated to the extent the movant has suffered at its adversary's hands an injury that may be redressed by a decision in its favor"); *Grynberg v. Praxair*, 389 F.3d 1038, 1057-58 (10th Cir.2004); *Animal Welfare Institute v. Feld Entertainment, Inc.*, 944 F.Supp.2d 1, 12-13 (D.D.C. 2013).

*Department*, 633 F.3d 1129, 1133 n.3 (D.C. Cir. 2011). However, even if this Court were to consider the Plaintiff's Seventh Amendment argument, it must be rejected.

Plaintiffs claim that the Anti-SLAPP Act abridges their Seventh Amendment rights because under D.C. Code § 16-5502(b), a special motion to dismiss could be decided by a judge despite disputed factual issues that would otherwise be within the province of a jury. However, as Point II, below, sets forth in detail, there is "a mélange of reasons" (JA304) for the Plaintiffs' Complaint to be dismissed as a matter of law, none of which involves any disputed issues of fact. Accordingly, Plaintiffs claims inthis case could never reach a jury, and therefore their Seventh Amendment rights cannot have been violated.

More generally, though the Anti-SLAPP Act provides that a special motion to dismiss "shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied," D.C. Code § 16-5502(b), this does not mean that a court considering the motion must engage in a probability determination of disputed factual issues. Neither the text of the Act nor the D.C. courts have specified what standard of decision-making should be applied where there are disputed factual issues.

Were the issue of a disputed factual issue to arise – and it does not arise here – the D.C. Courts would likely decide it in the same manner as the California Supreme Court, when it interpreted a similar Anti-SLAPP statutory provision to mean:

> In order to establish a probability of prevailing on the claim, a plaintiff responding to an anti-SLAPP motion must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.

*Walker v. Parker, Covert & Chidester*, 28 Cal.4th 811, 821, 50 P.3d 733, 739, 123 Cal. Rptr.2d 19, 26 (2002) (citations and internal quotations omitted). If this standard were to be adopted, the Anti-SLAPP Act would have no Seventh Amendment infirmities because disputed material factual issues would still be subject to resolution by jury trial. Indeed, as the First Circuit noted in *Godin*, the Anti-SLAPP Act "is a relatively young statute, not much construed by the state courts, and there is no reason to think the state courts would construe [it] so as to be incompatible with the Seventh Amendment." 629 F.3d at 90 n.18.

In any event, because the Plaintiffs failed to raise the Seventh Amendment before the District Court, because the Plaintiffs have not demonstrated that they are aggrieved by any Seventh Amendment violation, and because the Anti-SLAPP Act is not inconsistent with the Seventh Amendment, this Court must reject Plaintiff's Seventh Amendment argument.

### C. Defendants' Anti-SLAPP Act Motion Was Timely

When Plaintiffs filed their District Court Complaint on February 21, 2012 (JA7-13), the "identical in substance" (JA304) Superior Court Action remained pending, despite Plaintiffs' procedurally improper attempt to dismiss it without prejudice by notice. (JA253). Because "Plaintiffs do not have a right actively to pursue parallel state and federal actions simultaneously," *Maheffy*, 699 F.2d at 546, 30 days after the filing of the Complaint Defendant Bailey promptly (30 days after the filing of the Complaint (JA14)) moved for a mandatory stay of proceedings in the District Court. (JA14-23). The stay motion was based on *Colorado River* abstention and this Court's precedent requiring a District Court to stay its action "during the pendency of the parallel action in the District of Columbia courts." *Maheffy*, 699 F.2d at 547.

After the District Court granted the stay (and, technically, before the stay was lifted), Defendant Bailey filed his Motion to Dismiss and for Attorneys' Fees that is the subject of this appeal. (JA2-3, 46-47). With respect to the Anti-SLAPP Act portion of the motion, the Opinion Below held: "Defendants moved promptly to stay this action because of the pendency of the Superior Court Action. As such, considering the circumstances under which the action was brought, the time to file the special motion to dismiss is equitably tolled and this motion is considered timely." (JA304).

D.C. Code § 16-5502(a) provides that: "A party may file a special motion to dismiss . . . within 45 days after service of the claim." In *Sherrod v. Breitbart*, 720 F.3d 932, 937-38 (D.C. Cir. 2013), this Court held that a motion filed by consent pursuant to Federal Rule of Civil Procedure 6(b) to extend the time to answer or move with respect to a complaint cannot extend the 45 day statutory time limit to file an Anti-SLAPP Act motion.

Unlike the situation in *Sherrod*, in which the parties sought to voluntarily extend the time to file a motion under the Federal Rules of Civil Procedure, in this case the pendency of the identical, prior-filed Superior Court Action required that the District Court impose a stay of proceedings under *Colorado River* and *Maheffy*. Because a stay under *Colorado River*

abstention was mandatory, and the District Court would have therefore been unable to act on an Anti-SLAPP Act motion filed by Defendant Bailey, it was proper for the District Court to equitably toll the time to file such a motion.

Indeed, it was particularly important for the District Court to abstain here because pending in the Superior Court Action was Defendant Bailey's Superior Court Dismissal Motion, seeking Anti-SLAPP Act dismissal and attorneys' fees. (JA33-44). Although Plaintiffs claim in their Brief (at 20) that their notice of dismissal was a signal that they would not pursue the Superior Court Action, Defendant Bailey disputed their right to unilaterally dismiss their claims without prejudice, and argued in opposition to Plaintiffs' motion for voluntarily dismissal that, instead, Bailey's Superior Court Dismissal Motion should be granted on the merits and the Superior Court Action should be dismissed with prejudice.

Although the Superior Court found, with obvious reluctance, that dismissal without prejudice was permissible (JA251-57), had the dismissal been with prejudice, the District Court case would have been precluded. *See Attwood v. Mendocino Coast District Hospital*, 886 F.2d 241, 244 (9th Cir. 1989) (a *Colorado River* stay "avoids the waste of judicial resources from duplicative litigation in two courts," particularly where "all issues are in fact

are resolved by the state proceeding"). Moreover, the reason why the *Colorado River* stay was required here was Plaintiffs' admitted efforts at forum shopping and the procedurally improper manner in which they did so. *See American International Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253, 1255 & 1259-59 (9th Cir. 1998) (affirming *Colorado River* dismissal of federal action for "the prevention of forum shopping and the avoidance of duplicative litigation" where plaintiff "is trying to avoid adverse rulings" and "abandoning its state court case solely because it believes that the Federal Rules of Evidence are more favorable to it than the state evidentiary rules.")

Because a stay of the District Court action was required under *Colorado River* abstention, and any delay was caused by the Plaintiffs' procedural missteps, the District Court properly found that the Anti-SLAPP Act's 45 day time to make a special motion to dismiss was equitably tolled such that Defendant Bailey's motion was timely. (JA304).

**D. Dismissal and Fees under the Anti-SLAPP Act Were Proper**

The allegedly defamatory statements at issue herein were made in litigation papers submitted in a court proceeding concerning a public controversy that was then the subject of pervasive discussion and debate in the local and national media. Despite this, Plaintiffs suggest in their brief (at

27-32) that the Anti-SLAPP Act is inapplicable because the challenged statements were not made "in connection with an issue of public interest." On the contrary, because the statements were made in a judicial proceeding and concerned an issue of safety and community well-being being advocated by Plaintiffs, who qualified as public figures, the Anti-SLAPP Act was properly enforced to grant dismissal and attorneys' fees.

The Anti-SLAPP Act provides protection for an "act in furtherance of the right of advocacy on issues of public interest," which is defined in D.C. Code § 16-5501(1) to encompass three categories of expressive acts:

> (A) Any written or oral statement made:
>
> (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or
>
> (ii) In a place open to the public or a public forum in connection with an issue of public interest; or
>
> (B) Any 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.

Under this definition, subsections (A)(ii) and (B) require the statement or expressive act to be "in connection with an issue of public interest" (a term defined in § 16-5501(3)). In contrast, however, subsection (A)(i) does not contain a specific requirement that the statement "[i]n connection with" a

legislative, executive, judicial or other official proceeding also be "in connection with an issue of public interest."

In drafting the Act this way, the D.C. Council established that *all* statements made in connection with a public proceeding are, by definition, statements "in connection with an issue of public interest," and no separate finding of public interest need be made. Indeed, protecting the ability of citizens to participate in governmental proceedings without being subject to meritless litigation is precisely the right that the Anti-SLAPP Act is designed to protect.

Because the allegedly defamatory statements were submitted as part of a Motion to Dismiss the New York Action (JA67-74 & 104-134), they qualify for Anti-SLAPP Act protection under § 16-5501(1)(A)(i) as having been made "[i]n connection with an issue under consideration or review by a . . .judicial body." Although Plaintiffs contend that the statements were unrelated to the New York proceedings, the New York Action court found otherwise, concluding that the "controversial statements related to their litigation." (JA63).

However, even if the challenged statements were not made in connection with litigation, they would nevertheless be protected by the Anti-SLAPP Act under a recent D.C. Court of Appeals decision, *Doe No. 1 v.*

*Burke*, 91 A.3d 1031, 1040-44 (D.C. 2014), which holds that the Anti-SLAPP Act applies where Plaintiffs are "public figures" with respect to the matters at issue and thus within the definition of "issue of public interest" in D.C. Code § 16-5501(3). In *Burke*, the court found that term "public figure" under the Anti-SLAPP Act "imports the definition of 'public figure' used throughout defamation law," *id.* at 1041, and adopted this Court's test in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1294-98 (D.C. Cir. 1980) to determine who may qualify as a public figure. *Id.* at 1042.

In *Waldbaum*, this Court established a three element test to determine whether someone is a limited purpose public figure with respect to a particular matter of public controversy:

> (1) The court must isolate the public controversy, that is, "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." [*Waldbaum*, 627 F.2d] at 1296. (2) The court must analyze the plaintiff's role in it. "Trivial or tangential participation is not enough . . . . [To be a limited-purpose public figure, a plaintiff] must have achieved a 'special prominence' in the debate." *Id.* at 1297 (citation omitted). The court can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct or statements. *Id.* . . . (3) Finally, the court must determine whether the alleged defamation was germane to the plaintiff's participation in the controversy. *Id.* at 1298.

*Lohrenz v. Donnelly*, 350 F.3d 1272, 1279 (D.C. Cir. 2003) (applying *Waldbaum* to find female fighter pilot to be a limited purpose public figure

with respect to debate over role of women in combat). Because all three elements of the *Waldbaum* test are met, Plaintiffs herein must be considered, at the very least, limited purpose public figures with respect to the statements at issue. Therefore, under *Burke*, the Anti-SLAPP Act applies to bar prosecution of claims based on those statements.

As to the first *Waldbaum* element, the public controversy over the proposed Islamic cultural center in lower Manhattan was the subject of intense local and national scrutiny and public debate in the Summer of 2010, centering on issues of freedom of religion and speech, national security, appropriate commemoration of a national tragedy, and religious and ethnic tolerance.[10] The public debate over these issues was in full flower well before Plaintiffs filed the New York Action, which purported to be a class action on behalf of all persons who are "residents, renters, do business and frequent or visit the area around Ground Zero, and on behalf of all persons who directly or indirectly participated in heroic and selfless acts of patriotism during September 11, 2011 and its aftermath," and alleged that those class members had suffered "emotional, mental and physical pain" due to the cultural center having been proposed. (JA82-85, ¶¶ 19 & 22) If successful, the New York Action would have prevented the construction of a

[10] Citations to a small sampling of the major media coverage of the controversy are set forth in footnote 4 on page 7, above.

proposed major cultural institution to be used by thousands of New Yorkers and visitors of all religious backgrounds. Accordingly, the first element of the *Waldbaum* test, "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants," is plainly present. 627 F.2d at 1296.

As to the second *Waldbaum* element, Plaintiffs expressly set forth in their Complaint that they and the organizations they lead act as public advocates for issues connected with the Islamic cultural center controversy. (JA7-8, ¶¶ 2 & 7).[11] Beyond their general advocacy, Plaintiffs deliberately inserted themselves into this controversy by filing the New York Action and actively courting publicity about it, including filing a press release, holding a press conference, and appearing on Fox News to discuss the Action. Their efforts were successful in obtaining local and national coverage of the filing of the Action.[12] In filing the New York Action, the Plaintiffs were expressly

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[11] For fuller description of the Plaintiffs' public advocacy, see pages 7-8, above. Indeed, Plaintiff Forras should be considered a general purpose figure because he was a candidate for U.S. Senator for the November 2010 election. (JA207-09 & 213-16)); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

[12] See footnote 6 on page 9, above. In *Burke*, 91 A.3d at 1042-43, the D.C. Court of Appeals applied *Waldbaum* to determine whether it was appropriate to find an attorney a public figure simply because of his or her representation of a client and held that where a lawyer seeks publicity, including by "putting out press releases and giving interviews," that lawyer becomes a public figure. More generally, in *Klayman v. Segal*, 783 A.2d

and publicly trying to stop construction of the controversial Islamic cultural center. They were "purposely trying to influence the outcome or could realistically have been expected, because of [their] position in the controversy, to have an impact on its resolution," thus satisfying the second element of the *Waldbaum* test. 627 F.3d at 1297.

As to the third *Waldbaum* element, a substantial point of discussion within the controversy was the role of religious intolerance in the opposition to the proposed cultural center.[13] Indeed, in the period prior to the Plaintiffs' filing the New York Action, many mainstream news sources had directly explored whether opposing the cultural center constituted "bigotry."[14]

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607 (D.C. 2001), Plaintiff Klayman obtained judicial recognition of his status as a public figure in a defamation action against the Washington Post and its reporter, where the D.C. Court of Appeals noted that "Mr. Klayman does not dispute that he considers his activities to warrant significant media attention. He makes much in his pleadings and other submissions in this case of his dedication to investigating and exposing corruption in government and he does not deny that he has made a concerted effort to obtain media coverage for his positions and for the activities of Judicial Watch." *Id.* at 612.

[13] *See* Laurie Goodstein, *Concern is Voiced Over Religious Intolerance*, N.Y. Times, Sept. 7, 2010; Lawrence Wright, *Intolerance: Ground Zero Mosque*, The New Yorker, September 20, 2010; Ron Scherer, *US Muslim Groups Unite, See Mosque near Ground Zero as Test of Rights*, Christian Science Monitor, Sept. 20, 2010.

[14] Bill O'Reilly, "You're a Bigot if You Think Proposed Mosque Near Ground Zero is Inappropriate," Fox News (Aug. 17, 2010), available at http://www.foxnews.com/transcript/2010/08/17/you039re-bigot-if-you-think-proposed-mosque-near-ground-zero-inappropriate/ (visited Feb. 17,

Accordingly, Plaintiffs cannot have been surprised that their public and publicized filing of the New York Action seeking to enjoin construction of the proposed cultural center was challenged as religious intolerance and bigotry, issues at the center of the controversy. Thus, the "alleged defamation fell within the relevant range of issues," and therefore satisfied the third element of the *Waldbaum* test. 627 F.2d 1298.

Because Plaintiffs are considered public figures with respect to the allegedly defamatory statements under the *Waldbaum* test, *Burke* holds that their statements concern an "issue of public interest" under D.C. Code § 16-5501(d), and are therefore "speech [that] was worthy of protection under the statute." *Burke*, 91 A.3d 1041-44. Accordingly, the District Court properly granted Defendant Bailey's Anti-SLAPP Act special motion to dismiss under § 16-5502 and ordered that attorneys' fees be awarded under § 16-5504(a). (JA307-17)[15]

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2015); Greg Sargent, *ADL: Some Opponents of Ground Zero Mosque Are Bigots, But We Should Let Them Win Anyway*, The Plum Line, Washington Post, July 30, 2010, available at http://voices.washingtonpost.com/plum-line/2010/07/anti-defamation_league_opponen.html (visited Feb. 17, 2015); M.S., *Ground-Zero Mosque: Mainstreaming Bigotry*, The Economist, Jul. 19, 2010; *see also* Lore Croghan, *Muslim Leaders Meet in NY to Push for 'Ground Zero' Mosque, Beat Back Anti-Islam Bigotry*, N.Y. Daily News, Sept. 20, 2010.

[15] Although the Opinion Below (JA317) and Judgment Below (JA298) determined that Defendant Bailey was entitled to an award of attorneys'

## II

## THE PLAINTIFF'S CLAIMS ARE PATENTLY MERITLESS

In the Opinion Below, Judge Rothstein recognized that: "Defendants present a mélange of reasons why this case should be dismissed," and that the "mélange" was diverse enough that the judge felt it necessary to "resist the temptation to deal with" them all. (JA304). Although the Opinion Below found it unnecessary to analyze all of the reasons for dismissal raised by Defendant Bailey in his motion to dismiss, Federal Rule of Civil Procedure Rule 12(g)(2) required him to raise all applicable Rule 12 grounds for dismissal in his motion or risk their waiver. Similarly, he presents the entire mélange of reasons for dismissal herein, both because they provide alternate grounds for this Court to affirm the Judgment Below and because they demonstrate that the claims raised by Plaintiffs were patently meritless and abusive. Indeed, the federal refiling of the Superior Court Action was particularly vexatious because a motion for dismissal on all of the grounds set forth herein (except for lack of diversity jurisdiction) was pending in the

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fees, they did not determine the amount of the fee award, but rather set such award down for future determination. Later, the District Court ordered that the determination of the amount of the fee award be held in abeyance pending this appeal. (JA341-42). Thus, the amount of the fee is not under consideration in this appeal.

Superior Court Action when Plaintiffs sought to dismiss that Action without prejudice and refile it in the District Court. (JA33-44).

**A. Plaintiffs Have Failed To Allege Diversity of Citizenship**

Plaintiffs have brought this action pursuant to 28 U.S.C. § 1332, claiming diversity jurisdiction (JA7), and there is no other asserted basis for federal court jurisdiction over Plaintiffs' claims. As this Court has recognized, however: "Because federal courts are of limited jurisdiction, there is a presumption against the existence of diversity jurisdiction. Accordingly, the party seeking the exercise of diversity jurisdiction bears the burden of pleading the citizenship of each and every party to the action." *Loughlin v. U.S.*, 393 F.3d 155, 172 (D.C. Cir. 2004) (*quoting Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 792 (D.C. Cir.1983)). Here, Plaintiffs have not alleged the citizenship of *any* of the parties to this Action, much less *every* party. As such, they have not properly invoked this Court's diversity jurisdiction, and this Action must be dismissed for lack of subject matter jurisdiction.

This objection appears not to have been a mere innocuous pleading omission, because there is evidence indicating that Plaintiff Forras is a citizen of New York, making him non-diverse from Defendants Bailey and Rauf, both of whom are New Yorkers. Indeed, the very premise of the New

York Action was that construction of the proposed community center would injure Forras based on his residence at 257 Church Street, New York, New York (JA54-55), the address listed for Forras in the Superior Court Action complaint. (JA240). Although Forras has a Connecticut address listed in the caption of the Complaint herein (JA7), that address is that of a UPS Store apparently used by Forras as a mail drop. (JA220-24). The address of Forras' foundation is in South Salem, New York (JA204) the town in which Forras had formerly served as a volunteer firefighter (JA200).[16] In any event, because Plaintiffs have not even alleged the parties' citizenship, they have not established that the federal courts have subject matter jurisdiction.

**B. <u>There is No Long-Arm Jurisdiction Over Defendant Bailey</u>**

The District of Columbia's long-arm statute, D.C. Code § 13-423, is coextensive with the reach of personal jurisdiction permitted under the Due

[16] Indeed, none of the addresses listed by Plaintiffs in the caption are residence addresses, but rather business addresses which are not probative of citizenship. Plaintiff Klayman used his office address in the caption (JA7, caption & ¶ 2), in contravention of District Court Local Civil Rules 5.1(e)(1) & 11.1, which requires the use of an individual's residence address, and as Klayman acknowledged in the Complaint, he is not a District of Columbia citizen, but rather a former resident. (JA7-8). The address given for Defendant Bailey is, as Plaintiffs were aware from the New York Action, his office address, not his residence, and the address given for Defendant Rauf, 51/45 Park Place, New York, New York, is the address of the proposed community center at issue in this action, involving an organization with which he had publicly cut ties prior to the filing of the Complaint herein.

Process Clause of the United States Constitution. *Harris v. Omelon*, 985 A.2d 1103, 1105-1106 (D.C. 2009). It is well settled law that the Due Process Clause requires, in order to subject a defendant to personal jurisdiction if he is not present within the forum, that he must have minimum contacts with the forum locality such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington, Office of Unemployment Compensation Placement*, 326 U.S. 310, 316 (1945). The requirement of minimum contacts "protects the defendant against the burdens of litigating in a distant or inconvenient forum." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

The Complaint herein alleges absolutely no connection between Bailey and the District of Columbia, and indeed there is none. The only way in which the occurrences herein touch on the District of Columbia at all is that an article was published in a New York newspaper that has some limited circulation within the District. In fact, Defendant Bailey has virtually no contacts with the District of Columbia. He owns no property in the District, he conducts no business in the District, and he is not licensed to practice law in the district. Prior to the commencement of this action Defendant Bailey had not visited the District of Columbia for more than two decades, and

otherwise has no personal or professional contacts with the District of Columbia. (JA48-49, ¶¶ 5-11). Accordingly, there is no allegation, and there can be no showing that Defendant Bailey has had any contacts, much less "minimum contacts" with the District of Columbia, such that it is proper for this Court to exercise personal jurisdiction over him.

Although Plaintiffs claim that they suffered reputational injury in the District of Columbia because the New York Post article was distributed in there, this Court has held that the author of a nationally-distributed publication is not subject to personal jurisdiction in the District of Columbia for defamation-based claims, absent specific contacts with the District, because "*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); *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).

Under these precedents, if the author of a nationally-distributed article is not subject to *in personam* jurisdiction in the District, it follows that a source who is merely quoted by the article's author would likewise not subject the source to such jurisdiction. Accordingly, there is no basis to find that Defendant Bailey is subject to personal jurisdiction.

**C. Plaintiffs' Claims Are Time-Barred**

The Complaint herein, filed on February 21, 2012, alleges four counts: (1) defamation, (2) false light, (3) assault, and (4) intentional infliction of emotional distress. Under both New York and D.C. law,[17] these claims have a one year statute of limitations running from the first

[17] Under *Erie*, federal courts apply D.C. choice of law rules in this diversity action. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 626 (D.C. Cir. 2001). D.C. courts, in turn, apply a "governmental interests" test, comparing the respective interests of jurisdictions with contacts to the case. *Atkins v. Industrial Telecommunications Association, Inc.*, 660 A.2d 885, 887-88 (D.C. 1995). Although all of the occurrences at issue herein took place in New York, with the only contact to D.C. being the alleged reputational injury suffered by the one of the two Plaintiffs who has a business address (though not his residence) in D.C., it is unnecessary to resolve which jurisdiction's law should apply because, as demonstrated by the citations herein to the law of both jurisdictions, the choice of law question "should not affect the result, however, because . . . there are few discernible differences between" the law of the two jurisdictions. *Id.* (internal quotation omitted).

publication of the allegedly defamatory statements, which occurred on or before October 11, 2010.[18] Thus, all of Plaintiffs' claims are time-barred.

Under D.C. Code §12-301(4), the statute of limitations for both defamation and assault claims is expressly set at one year, and under the "single publication" rule, defamation-based claims accrue on the date the allegedly defamatory statements were first published. *Mullin v. Washington Free Weekly, Inc.*, 785 A.2d 296, 298 (D.C. 2001). Although claims of false light and intentional infliction of emotional distress are not expressly mentioned in D.C. Code §12-301(4), D.C. courts have held that when such claims are "intertwined" with defamation claims, they share the one year statute of limitations. *Id.* (affirming finding that false light and intentional infliction of emotional distress claims were time-barred as intertwined with defamation claims); *Saunders v. Nemati*, 580 A.2d 660, 662 (D.C. 1990) (intentional infliction of emotional distress has one year limitations period when claim is intertwined with claims having limitation period set by statute); *Bond v. U.S. Department of Justice*, 828 F.Supp.2d 60, 78 (D.D.C. 2011) (intentional infliction of emotional distress claim and false light

[18] The Affirmation and Memorandum of Law which Plaintiffs allege contain the defamatory statements are dated October 7, 2010 (JA74, 133) and were served and filed in the New York Action, and therefore published, on October 8, 2010. The New York Post article was posted on the internet and published in the print edition of the newspaper on October 11, 2010. (JA136).

claims held to be intertwined with defamation allegations and thus time-barred under one year statute of limitations).

Under New York Civil Practice Law and Rules ("CPLR") 215(3), the limitations period for intentional torts is one year. Although "assault, . . . libel, slander, [and] false words causing special damages" are expressly mentioned in CPLR 215(3), New York courts hold that intentional infliction of emotional distress claims also fall within its ambit. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 491, 868 N.E.2d 189, 197, 836 N.Y.S.2d 509, 517 (2007) (dismissing intentional infliction of emotional distress claim based on CPLR 215 one year statute of limitations); *Wilson v. Erra*, 94 A.D.3d 756, 756, 942 N.Y.S.2d 127, 129 (App. Div. 2d Dept. 2012) ("causes of action sounding in defamation and intentional infliction of emotional distress are governed by a one-year statute of limitations").

Although they have apparently abandoned this argument on appeal, Plaintiffs have previously contended that their complaint herein should relate back to the date of filing of the dismissed Superior Court Action. However, as this Court has recognized:

> once a suit is dismissed, even if without prejudice, the tolling effect of the filing of the suit is wiped out and the statute of limitations is deemed to have continued running from whenever the cause of action accrued, without interruption by that filing. In short, when a suit is dismissed without prejudice, the statute of limitations is deemed unaffected by the filing of the suit, so

> that if the statute of limitations has run the dismissal is effectively with prejudice.

*Chiralsky v. Central Intelligence Agency*, 355 F.3d 661, 672 (D.C. Cir. 2004) (citations, internal quotations and footnotes omitted). Therefore, the claims brought by Plaintiffs in their February 21, 2012 Complaint, each of which accrued no later than October 11, 2010,[19] are all barred by the applicable one year statute of limitations.

**D. The Judicial Proceedings Privilege Bars Plaintiffs' Claims**

It is well-settled District of Columbia law that an allegedly defamatory statement made during the course of a judicial proceeding cannot be the basis of a defamation action so long as the statement has some relation to the proceeding. *Mazanderan v. McGranery*, 490 A.2d 180 (D.C. 1984); *Sturtevant v. Seaboard Service System, Ltd.*, 459 A.2d 1058, 1059 (D.C. 1983). Such statements are absolutely privileged. *Id*. The law is the same in New York, the original forum jurisdiction where the statements were made. *See Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365, 866 N.E.2d 439, 442, 834 N.Y.S.2d 494, 497 (2007); *Panghat v. New York Downtown Hospital*, 85 A.D.3d 473, 474, 925 N.Y.S.2d 445, 446 (App. Div. 1st Dept. 2011).

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[19] Indeed, even if this action related back to the October 12, 2011 filing of the Superior Court Action (JA24), it nevertheless would be untimely as the challenged statements were all made more than one year prior to filing.

The allegedly defamatory statements cited by Plaintiffs in their Complaint are taken directly from the Memorandum of Law and Affirmation in support of the Defendants' successful motion to dismiss in the New York Action. Indeed, the Complaint expressly acknowledges this, repeatedly noting that the allegedly injurious statements were made by publication of "court pleadings" and by allegedly providing those "court pleadings" to a newspaper. (JA8-10, ¶¶ 4, 5, 8, 9, 10 & 11). The New York Action motion to dismiss centered on the fact that the Plaintiff there had failed to plead any cognizable cause of action in his complaint, and that the Action was brought exclusively because Plaintiff Forras had or has an aversion toward Islam. (JA67-134). Although Plaintiffs herein make a conclusory allegation that Defendant Bailey's statements made in the New York Action were unrelated to that proceeding, such a claim was expressly rejected by Justice Billings, who denied Plaintiffs' sanctions motion based on the same statements in the New York Action, noting that "it's not that the statements were so far removed from the subject matter of this action" (JA161 at 4:13-15), and finding that the parties' "controversial statements" were "related to their litigation" and thus not a basis for sanctions. (JA63 at 10). Thus, the

statements are absolutely privileged and cannot be used as a basis for Plaintiffs' claims.[20]

**E. Defendant's Statements Are Protected By the First Amendment**

In *New York Times v. Sullivan*, 376 U.S. 254, the Supreme Court held that the First Amendment prohibited libel claims brought by public officials without the plaintiff proving actual malice – i.e. that the statement was made with knowledge that it was false or with reckless disregard of the truth. The purpose behind this standard is to prevent the chilling of robust debate and discussion over matters of public significance, which form an essential part of our constitutional tradition. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). The Supreme Court subsequently held that the actual malice standard also applies to public figures, including situations where an "individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues". *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323, 351 (1974).

As discussed in Point I.D at pages 34-38, above, under this Court's *Waldbaum* test, 627 F.2d 1287, 1294-98, Plaintiffs are, at the very least,

[20] In addition to finding the statements to be absolutely privileged, the Opinion Below properly found that Plaintiffs' claims for assault and intentional infliction of emotional distress based on these statements failed to state a claim because they were too attenuated to constitute an assault and not so extreme and outrageous as to allow emotional distress liability. (JA312-14).

limited purpose public figures with respect to the controversy over the proposed Islamic cultural center. As such, the allegedly defamatory statements were protected by the *New York Times v. Sullivan* privilege. Because the Complaint makes no allegation that Defendant Bailey knew of or disregarded the alleged falsity of any of the challenged statements,[21] much less that he acted with actual malice in making such statements, prosecution of the Plaintiffs' claims is barred by the First Amendment to the U.S. Constitution.

**F. *Res Judicata* and Collateral Estoppel Bar Plaintiffs' Claims**

The doctrines of *res judicata* and collateral estoppel preclude the relitigation of the same claim or issue between the same parties. Both District of Columbia and New York courts hold that for collateral estoppel to apply: "(1) the issue must be actually litigated and (2) determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the parties or their privies; (4) under circumstances where the determination was essential to the judgment, and not merely dictum." *Elwell v. Elwell*, 947 A.2d 1136, 1140 (D.C. 2008) (quoting *Patton v. Klein*, 746 A.2d 866, 871 (D.C. 1999)); *D'Arata v. New York Central Mutual Fire*

[21] Indeed, the statements which Plaintiffs challenge as defamatory appear to be statements of opinion as opposed to factual statements which may be made with knowing or reckless falsity.

*Insurance Co.*, 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24, 26-27, 564 N.E.2d 634, 636-37 (1990).[22]

In the New York Action, on or about January 5, 2011, Plaintiffs filed a cross-motion for sanctions against Defendant Bailey, seeking monetary sanctions for the exact same statements complained of in this action. (JA139-156). On April 5, 2011, Justice Billings considered and denied Plaintiffs' cross-motion in a ruling from the bench in which she stated: "I don't believe that the allegations by defendants have risen to the level of threatening a party or counsel with violence. ¶ And I don't see any evidence through affidavits or otherwise that defendants or defendants' counsel's conduct has caused plaintiffs or witnesses on behalf of plaintiffs or on behalf of any party not to step forward for fear of being harmed." (JA161, 4:2-9). Justice Billings confirmed this ruling in her September 26, 2012 Decision and Order, noting "the parties' and their attorneys' controversial statements related to their litigation do not amount to frivolous conduct." (JA63). This

[22] Similarly, in determining whether *res judicata* applies, the courts consider "(1) whether the claim was adjudicated finally in the first action; (2) whether the present claim is the same as the claim which was raised or which might have been raised in the prior proceeding; and (3) whether the party against whom the plea is asserted was a party or in privity with a party in the prior case" *Calomoris v. Calomoris*, 3 A.3d 1186, 1190 (D.C. 2010) (quoting *Elwell*, 947 A.2d at 1140).

Decision and Order was a final determination of the New York Action that was not appealed by the Plaintiffs. (JA50, ¶ 16).[23]

Thus, Plaintiffs' claims were finally adjudicated by Justice Billings. Their claims for assault and intentional infliction of emotional distress were raised in their New York cross-motion for sanctions and their claims for defamation and false light could have been raised in that motion, since they arise out of the same statements, and parties herein are the same as or in privity with those in the New York Action. Accordingly, Plaintiffs' claims are barred by the doctrines of *res judicata* and collateral estoppel.

The law is well-established that *res judicata* and collateral estoppel are predicated upon the underlying operative facts, and the fact that a plaintiff pursues a new or different theory of recovery on those already adjudicated facts does not allow the second action to survive. The newness of the theory does not rescue the second action from the preclusive effect of the earlier judgment or order. *See McManus v. MCI Communications Corp*., 748 A.2d 949, 959 (D.C. 2000) (collateral estoppel); *Parker v. Martin*, 905 A.2d 756, 763 (D.C. 2006) (*res judicata*); *Reilly v. Reid*, 45 N.Y.2d 24, 379

[23] Although Plaintiffs filed a Notice of Appeal of the New York Dismissal Order (JA296), they abandoned their appeal by not timely filing their brief and other required appeal papers within the nine months permitted by court rules. N.Y. Appellate Division, First Department Rules § 600.11(a)(3), 22 NYCRR § 600.11(a)(3).

N.E.2d 172, 407 N.Y.S.2d 645 (1978) (collateral estoppel); *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357-58, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981) (*res judicata*). Accordingly, Plaintiffs are precluded from bringing the claims they assert herein by the doctrines of *res judicata* and collateral estoppel.

## III

## ATTORNEYS' FEES SHOULD ALSO BE AWARDED UNDER 28 U.S.C. § 1927 AND THE COURT'S INHERENT POWER TO CONTROL ABUSIVE LITIGATION PRACTICES

In his dismissal motion before the District Court, Defendant Bailey argued he was entitled to attorneys' fees based not only on the Anti-SLAPP Act, but also under 28 U.S.C. § 1927 and the inherent power of the courts to prevent abuse of the judicial process. (JA46). In the Opinion Below, Judge Rothstein ordered that Defendant Bailey be awarded attorneys' fees under the Anti-SLAPP Act, and did not reach any other ground for the award of such fees. Accordingly, even if this Court finds that an award of attorneys' fees is unwarranted under the Anti-SLAPP Act, it should nevertheless award attorneys' fees under 28 U.S.C. § 1927 and the inherent power of the courts to prevent abusive litigation.[24]

[24] In the alternative, should this Court find fees under 28 U.S.C. § 1927 and the inherent power not fully warranted on the record before it, it should remand to the District Court for a finding that such fees are warranted.

28 U.S.C § 1927 provides that an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This Court may award such sanctions when it finds that "the offending attorney's multiplication of the proceedings was both 'unreasonable' and 'vexatious' . . . [and] evidence of recklessness, bad faith, or improper motive must be present." *LaPrade v. Kidder Peabody & Co., Inc.*, 146 F.3d 899, 906 (D.C. Cir. 1998) (citations and internal quotations omitted); *see also Wallace v. Skadden, Arps, Slate Meagher & Flom, LLP*, 362 F.3d 810, 813 (D.C. Cir. 2004).

In addition, federal courts have the inherent power to issue sanctions and award attorneys' fees for bad faith litigation conduct, a power that:

> transcends a court's equitable power concerning relations between the parties and reaches a court's inherent power to police itself, thus serving the dual purpose of vindicating judicial authority without resort to the more drastic sanctions available for contempt of court and making the prevailing party whole for expenses caused by his opponent's obstinacy.

*Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-51 (1991) (internal quotation omitted). Such power should be exercised when a "party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975) (quoting *F.D. Rich Co. v. U.S. ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129

(1974)). This inherent power "enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments." *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995).

As discussed above, both this Action and the Superior Court Action were brought not to vindicate legitimate legal rights, but rather to stifle Defendants' advocacy in court on what was then a matter of intense local and national public debate and controversy. More than just being SLAPP suits, both Actions in the District of Columbia were brought with claims that were patently meritless on both a legal and factual basis, and for the vexatious purpose of adding to the Defendants' litigation burden after receiving an adverse ruling on the same claims in the New York Action. Most perniciously, when the Defendants realized that they were in an untenable position in the Superior Court Action, with their Complaint inevitably to be dismissed with prejudice under the Anti-SLAPP Act with a concomitant assessment of attorneys' fees against them, they sought to dismiss that action without prejudice and refile the same patently deficient Complaint in this Court.

Because Plaintiffs, and in particular Plaintiff Klayman who acts as both plaintiff and attorney, have acted unreasonably, vexatiously, recklessly, in bad faith and for an improper motive in bringing both the Superior Court Action and this Federal Action, and particularly in refiling the Superior Court Action in this Court, an award of sanctions and attorneys' fees is warranted under 28 U.S.C. § 1927 and this Court's inherent power to prevent litigation abuse.[25]

An award of such fees is particularly warranted in light of the New York Action, in which Justice Billings generally (and with apparent reluctance) rejected sanctions against Plaintiffs (other than a $1,500 penalty for failure to appear for oral argument) by finding that their "conduct in filing the claims was not entirely frivolous", but nevertheless cautioned: "should plaintiff commence a further similar action, the history of this litigation may lead to a finding that he and his attorneys have engaged in vexatious, frivolous litigation." (JA63-65). Similarly, in his Order granting dismissal of the Superior Court Action without prejudice, Judge Edelman recognized:

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[25] Even though Plaintiffs' failure to alleged the diverse citizenship of the parties deprives the federal courts of subject matter jurisdiction, they may nevertheless award sanctions and attorneys' fees for improper litigation conduct. *Willys v. Coastal Corp.*, 503 U.S. 131 (1992) (Fed. R. Civ. P. 11 sanctions); *Red Carpet Studios Division of Source Advantage, Ltd.*, 465 F.3d 642 (6th Cir. 2006) (28 U.S.C. § 1927 and inherent power sanctions).

> The Court sympathizes with the Defendant's frustration: the lawsuit against him is likely based on litigation activity that is privileged, and Plaintiffs only moved to dismiss and re-filed their lawsuit in federal court after obtaining multiple extensions of time to respond to Defendant's Motion for Judgment on the Pleadings. . . . While Defendant did expend some effort in researching and writing a Motion for Judgment on the Pleadings, the dismissal of this action does not mean that that effort was wasted: Defendant can simply re-file that motion in federal court.

(JA254-44).[26] *See also Dean v. NBC Universal*, Case No. 2011 CA 006055 B, Memorandum and Order filed June 25, 2012 (D.C. Super Ct. 2012) (JA264-69) (when Klayman sought to dismiss similar action in Superior Court in favor of refiled action in federal court on same date, dismissal without prejudice was conditioned on payment of Superior Court attorneys' fees).

Furthermore, sanctions and attorneys' fees are particularly warranted in the proceedings herein given the long history of bad-faith and sanctionable conduct undertaken by Plaintiff Klayman. S*ee Klayman v. Judicial Watch, Inc.*, 802 F.Supp.2d 137,139-142 (D.D.C. 2011)

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[26] An award of attorneys' fees may include the fees incurred in the Superior Court Action under Fed. R. Civ. P. 41(d), which permits the ourt to award "costs of the that previous action," when previously dismissed action is refiled. *Esposito v. Piatrowski*, 223 F.3d 497, 500-502 (7th Cir. 2000) (finding attorneys' fees to be "costs" included in Fed. R. Civ. P. 41(d) when awarded under fee-shifting statute); *Robinson v. Bank of America, N.A.*, 553 Fed.. Appx. 648 (8th Cir. 2014) (affirming Fed. R. Civ. P. 41(d) award of prior-action attorneys' fees where plaintiff's dismissal of first action and refiling the same day was found to be in bad faith and vexatious).

(summarizing "Klayman's Past Litigation Misconduct" within case and awarding further sanctions); *Klayman v. Barmak*, 2009 WL 4722803 (D.D.C. 2009) (awarding summary judgment in favor of defendants for Klayman's unexcused failure to comply with court-ordered deadlines, and noting that Klayman had not paid prior discovery sanction award); *Klayman v. Luck*, 2012 Ohio 3354, 2012 WL 3040043, ¶¶ 39-43 (Ohio Ct. App. 2012) (affirming substantial attorneys' fees award against Klayman on finding, *inter alia*, that Klayman repeatedly interfered with legitimate discovery requests and "purposefully prolonged litigation"); *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 138 F.3d 33 (2d Cir. 1998) (affirming sanctions against Klayman for allegations of bias that were "prejudicial to the administration of justice"); *Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 560-562 (Fed. Cir. 1996) (affirming sanctions against Klayman).

Accordingly, because of Plaintiffs' abusive and vexatious conduct throughout the course of the two Actions they have brought in the District of Columbia, Defendant Bailey should be awarded the full attorneys' fees he has incurred in defending both this Action and the Superior Court Action, both in the trial courts and before this Court.

## CONCLUSION

For the foregoing reasons, Defendant-Appellee Adam Leitman Bailey respectfully requests that this Court affirm in all respects the April 18, 2014 Order and Judgment entered by the U.S. District Court for the District of Columbia.

Dated: Washington, D.C.
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**CERTIFICATE OF COMPLIANCE**
**WITH TYPE-VOLUME LIMITATION, TYPEFACE**
**REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,777 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1)

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 type face using Microsoft Word 2010 in a 14 point Times New Roman font.

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# ADDENDUM

## THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT OF 2010

### Title 16, Chapter 55

### Strategic Lawsuits Against Public Participation



**§ 16-5501. Definitions.**

For the purposes of this chapter, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any 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.

(2) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other civil judicial pleading or filing requesting relief.

(3) "Issue of public interest" means an issue 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. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(4) "Personal identifying information" shall have the same meaning as provided in § 22-3227.01(3).

**§ 16-5502. Special motion to dismiss.**

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If 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, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2) of this subsection, upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specified discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

**§ 16-5503. Special motion to quash.**

(a) A person whose personal identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personal identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

**§ 16-5504. Fees and costs.**

(a) The court may award a moving party who prevails, in whole or in part, on a motion brought under § 16-5502 or § 16-5503 the costs of litigation, including reasonable attorney fees.

(b) The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under § 16-

5502 or § 16-5503 is frivolous or is solely intended to cause unnecessary delay.

**§ 16-5505. Exemptions.**

This chapter shall not apply to any claim for relief brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is:

(1) A representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services; and

(2) The intended audience is an actual or potential buyer or customer.

CERTIFICATE OF FILING AND SERVICE

I, hereby certify that on February 18, 2015, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit and served electronically on the individual listed below by using the appellate CM/ECF system.

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