IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DAVID PITTS, **Plaintiff,** **v.** **WJLA, 1100 Wilson Blvd., Arlington VA 22209; PATCH MEDIA, 134 W. 29th St., New York, NY 10001; NBC WASHINGTON, 4001 Nebraska Ave. NW, Washington, DC 20016; and NBCUNIVERSAL MEDIA, LLC, 30 Rockefeller Plaza, New York, NY 10112,** **Defendants.**	**Case No.: 2016 CA 002054 B** **Judge Brian F. Holeman**

MEMORANDUM IN SUPPORT OF DEFENDANTS WJLA, NBC WASHINGTON, AND NBC UNIVERSAL MEDIA, LLC'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

In support of their motion to dismiss pursuant to the District of Columbia anti-SLAPP Act, D.C. Code § 16-5501 *et seq.*, Defendants WJLA, NBC Washington, and NBC Universal Media, LLC (collectively, the "Broadcast Defendants"),[1] respectfully submit the following memorandum of points and authorities.

INTRODUCTION

Plaintiff David Pitts ("Pitts" or "Plaintiff") is a former professor at American University and a convicted felon. Last year, when he pleaded guilty to two felonies and admitted other related criminal conduct, he purported to accept responsibility for his actions and asked this Court for leniency as a result. Yet now, after being released from prison, he seeks to profit from his crimes by returning to this Court to sue multiple local news organizations for truthfully reporting on his conviction and sentencing.

Pitts admitted in his plea agreement that he set several small fires, one of which had to be extinguished by D.C. firefighters, and burglarized a commercial building to steal prescription drugs and doctors' prescription pads.[2] Despite these binding admissions, and despite the fact that this Court at his sentencing hearing pointed to his acknowledged fire-setting as an aggravating factor justifying his being sentenced to prison, Pitts now seeks to impose burdensome litigation costs and extract monetary damages from these news organizations simply because they accurately reported his admission that he endangered the lives and property of D.C. residents by lighting multiple fires.

However, District of Columbia law prohibits lawsuits such as this one that are aimed at suppressing speech the plaintiff dislikes rather than redressing any legitimate claim. The District

[1] The parties filed a stipulation dismissing American Broadcasting Company as a defendant on April 26, 2016.

[2] A copy of the plea agreement is attached to the Declaration of Matthew E. Kelley ("Kelley Decl."), filed herewith, as Ex. 1.

of Columbia enacted the Anti-SLAPP Act of 2010, D.C. Code § 16-5501, *et seq.*, to curb lawsuits exactly like this one: "Strategic Lawsuits Against Public Participation" that seek to punish those who speak or report about matters of interest to the community. The Act provides for a stay of discovery, prompt dismissal of a SLAPP such as this one with prejudice, and the defendant's recovery of its attorneys' fees and other litigation costs. Only if the plaintiff carries the heavy burden of demonstrating to the Court that his claims are "likely to succeed on the merits" may he be permitted to proceed.

Because Plaintiff is unable to meet this demanding burden with respect to any of his claims, the Anti-SLAPP Act requires dismissal of this action with prejudice. Indeed, under settled law, the challenged articles are not actionable under any theory of defamation, false light or intentional infliction of emotional distress because they are substantially true, and are also privileged reports of judicial proceedings. For these reasons, Plaintiff's lawsuit against these defendants must be dismissed.

FACTUAL BACKGROUND

A. Plaintiff's Criminal Conduct and Sentence

David Pitts was a professor and department chair at American University. Sadly, he also had a years-long addiction to prescription amphetamines that, according to the prosecution, Pitts likely obtained through pharmacy burglaries and/or forged prescriptions.

After midnight on Sept. 4, 2014, Pitts showed up outside Foxhall Square, a commercial building near AU with office space for doctors and other professionals on the top floors and retail stores such as a Starbucks coffee shop and a Rite Aid pharmacy on the ground floor. Kelley Decl., Ex. 1 at 7.[3] Unbeknownst to Pitts, he was being followed by a surveillance team of

[3] The facts set forth here are all taken from those Pitts admitted in his plea agreement.

Montgomery County, Maryland police, who suspected him of committing a pharmacy burglary in that jurisdiction. *Id.*[4] As the officers watched, Pitts set fire to a chair next to the guard booth at the building's parking garage, then walked to the front of the building and burned some newspapers in front of the Starbucks. *Id.* When the newspaper fire went out, he lit the papers on fire again. *Id.* Minutes later, Pitts walked to a wooded area near a residential condominium complex next door, and ignited a blaze there that grew so large the Montgomery County officers called the fire department, which extinguished the blaze. *Id.*

Nearly two hours later, at 2:45 a.m., Pitts returned to Foxhall Square and broke into the building through a rear door. *Id.* The Maryland officers, who were still watching Pitts, called Metropolitan Police, who cornered Pitts in the building's parking deck and arrested him as he tried to flee. *Id.* Pitts admitted that he broke into the building "with the intent to steal prescription medications, controlled substances, and prescription pads." *Id.* Pitts had matches and two lighters on his person when he was arrested. *Id.*

When officers searched Pitts' apartment pursuant to a warrant later that day, they found blank pages from prescription pads from at least nine doctors' offices, many of which are in Foxhall Square; two blank checks belonging to a person from Washington State who Pitts had never met; and more than 5,300 pills. *Id.* at 8-9.

Pitts was charged with second-degree burglary and ordered held without bond. Kelley Decl., Ex. 3 at 3-4. Among the reasons for the magistrate's finding that Pitts "poses both a substantial danger to the community as well as a significant risk of flight if released from custody" were that Pitts "was observed setting fires to a building (which is located in a residential neighborhood near a college) in the middle of the night in D.C. and then burglarizing

[4] Pitts pleaded guilty to second-degree burglary in Montgomery County in December 2015. *See State v. Pitts*, No. 128073C (Md. Cir. Ct. Montgomery Cnty.).

that building" and was the subject of "an active arrest warrant for Burglary from Montgomery County, Maryland." *Id.* at 2-4.

Pitts eventually agreed to plead guilty to two felonies: second-degree burglary and first-degree identity theft. Kelley Decl., Ex. 1 at 1. In exchange, prosecutors agreed not to charge Pitts with nine additional crimes, including additional identity theft and drug counts as well as "Malicious Destruction of Property and/or Arson for the fires set near 3301 New Mexico Ave, NW and the Embassy Park complex on September 4, 2014." *Id.* at 1-2. However, the plea agreement specifically reserved to the government the right to charge Pitts in connection with "[t]he fires at the Woodley Park Marriott on August 28, 29 and 30, 2014." *Id.* at 2. As is standard for such plea bargains, Pitts certified he entered into the agreement voluntarily and "intending to be legally bound," admitting with his signature that "I am pleading guilty because I am in fact guilty of the offenses set forth herein." *Id.* at 5. He also agreed that the factual proffer included in the agreement was true and correct. *Id.* at 9. That proffer included his admissions that he had engaged in the fire-setting spree.

At his sentencing hearing on March 20, 2015, Pitts' attorney asked for a sentence of six months, or approximately the time Pitts already spent in pre-trial detention. Kelley Decl., Ex. 4 at 10:16-11:8. Pitts also spoke, addressing his family, friends, and former students and colleagues at American University: "I sincerely ask for your forgiveness and a second chance at earning your trust." *Id.* at 14:16-17. Assistant U.S. Attorney Christopher Bruckmann recommended a one-year sentence. *Id.* at 8:2-17. The prosecutor told the court that Pitts' admitted fire-setting was a significant aggravating factor:

> [I]t was not only a break-in forcefully; it was not only done at night, but the series of fires that the defendant set before he committed the burglary, whether that was to distract first responders or for some other reason, presented a significant danger to the community. The fires, one of them grew to the point where the

> Metropolitan – where Montgomery County Police Department that were surveilling the defendant felt they needed to call the DC Fire Department who came and had to extinguish the fire in the woods.

Id. at 5:11-21. In addition, the court records indicate that Pitts was suspected of committing many more similar crimes. Kelley Decl., Ex. 2 at 7 ("Since there is no legal means by which the defendant could have obtained that quantity of amphetamines, he has almost certainly been committing burglaries, prescription fraud, identity theft, and/or other crimes for years.").

Judge Zoe Bush sentenced Pitts to two years in prison with all but one year and one day suspended, plus three years of supervised release, admonishing Pitts that his "long-standing issues with mental illness and substance abuse" did not excuse his crimes. Kelley Decl., Ex. 4 at 15:3-9. "It's not unusual for people who commit crimes to suffer from mental illness and to suffer from drug addiction, but many, if not most, on their own couldn't afford to – to get treatment, but you could." *Id.* at 15:9-13. Notably, Judge Bush specifically pointed to Pitts' admitted fire-setting as a significant factor in her sentencing decision, telling Pitts that "the activities that you undertook to support your habit did pose a substantial danger to the community," because "those fires could have resulted in the loss of life." *Id.* at 15:13-16.

B. Defendants' News Reports About Pitts' Crimes

The criminal case against Pitts garnered widespread news media coverage in the Washington metropolitan area and beyond, including by Defendants WJLA, the ABC-affiliated television station owned by Sinclair Broadcasting Group, Inc., and NBC Washington (WRC), which is owned and operated by the network with which it is affiliated, NBC Universal. Both stations posted articles (collectively, the "Articles") regarding Pitts' sentencing hearing to their respective websites on the day of the hearing, March 20, 2015. Kelley Decl., Exs. 5 ("WJLA Article") & 6 ("March 20 NBC Article").

The WJLA Article states, in its entirety:

> WASHINGTON (WJLA) – An American University professor was sentenced Friday to two years in jail for setting fires and breaking into a pharmacy last September.
>
> But David Pitts, 38, had Judge Zoe Bird suspend all but one year and a day of the sentence for burglary and identity theft.
>
> He pleaded guilty in January to the charges, admitting that he set fires near campus to distract authorities and then broke into a New Mexico Avenue pharmacy to seal prescription drugs.
>
> 'I owe my people an apology,' Pitts said of the university, its students and his partner of six years. 'I ask for their forgiveness and the opportunity to earn their trust.'
>
> The judge noted that Pitts had longstanding mental health and substance abuse issues, but said he needed to serve some prison time because setting the fires could have led to a loss of life.

Id. Ex. 5.

WJLA's accompanying television report, which also remains posted on its website, likewise reported that "An American University professor was sentenced today to two years in jail for setting fires and breaking into a pharmacy." *See id.* Ex. 9; available at: http://wjla.com/news/local/american-univ-professor-sentenced-to-year-and-a-day-in-prison-for-fires-break-in-112483 (embedded video). WJLA reporter Sam Ford specifically, and accurately, reported the legal charges to which Pitts pleaded: he "pleaded guilty in January to burglary and identity theft." *Id.* Ford also reported, again accurately, that Judge Bush stated that "one reason she gave him prison time was his setting of fires could have led to loss of life." *Id.*

The March 20 NBC Article likewise accurately reported the specific legal charges to which Pitts pleaded, as well as his admissions regarding the fires and the role those admissions played in Judge Bush's sentencing decision:

> A former American University professor [was] sentenced Friday for breaking into an office building and setting multiple fires in Northwest D.C.
>
> David Pitts, 38, was sentenced to two years in prison, with all but a year and a day suspended.
>
> Prosecutors say that on Sept. 4, 2014, Pitts broke into a building in the 3300 block of New Mexico Avenue NW with the intent to steal prescription pads, medicine and controlled substances from the pharmacy and multiple doctors' offices that the building houses.
>
> According to records from Pitts' plea hearing in January, Pitts set a series of small fires before breaking into the building. He first set a chair and bottles on fire near the building's parking attendant booth, and then lit newspapers on fire in another area outside the office complex. The fires destroyed the chair and damaged the attendant's booth. The newspaper fires caused no damage.
>
> According to records, Pitts then walked to a wooded area near the complex and started another fire. This blaze grew so large that the D.C. Fire Department had to be called to extinguish it.
>
> The records say Pitts then broke into the building and was arrested shortly after. When police searched his apartment later, they found blank prescription pads from at least nine different doctors' offices and more than 5,300 pills.
>
> Pitts holds a doctorate degree from the University of Georgia, and previously served as the chair of AU's Department of Public Administration and Policy.
>
> In January, he pleaded guilty to charges of second-degree burglary and first-degree identity theft. He also faces charges of burglary, theft and destruction of property in Montgomery County.
>
> Pitts will be placed on three years of supervised release after serving his prison sentence.

Id., Ex. 6.

C. The Complaint

Just short of one year after his sentencing, Pitts filed the Complaint in this action, which purports to allege claims for defamation, "false light & invasion of privacy," and intentional infliction of emotional distress under D.C. law. *See* Compl. ¶¶ 20-30. The Complaint is replete

with allegations that plainly contradict the court record, and even appear to reflect an attempt by Pitts to backtrack on his plea agreement.

For example, the Complaint asserts that "David was [not] sentenced to jail for setting fires," even though Judge Bush specifically pointed to that conduct as a reason for requiring jail time. *Id.* at 1. The Complaint further asserts that Pitts "broke into a commercial building to *retrieve* prescription drugs from his doctor's office," even though by his own binding admission Pitts broke into the building to *steal* drugs and prescription pads, not to "retrieve" anything of his. Compl. ¶ 8; Kelley Decl., Ex. 1 at 7. And though Judge Bush specifically noted that Pitts' fire-setting could have led to the loss of life, the Complaint attempts to minimize Pitts' conduct by asserting that "no individuals were harmed by his actions." Compl. ¶ 8.

The Complaint also pleads words that never appear in Defendants' news reports in a purported effort to state a cause of action. Thus, the Complaint alleges that WJLA and NBC4 falsely reported that Pitts "was sentenced to 'two years in jail for setting fires' or *arson*." *Id.* ¶ 12 (emphasis added). The Complaint further alleges that none of these statements are true because "no where [sic] in David's court records or filings was David ever charged with *arson*, nor did David admit to committing *arson*." *Id.* ¶ 13 (emphasis added). *See also id.* ¶ 22 ("the misrepresentation by the Defendants of David being convicted as an arsonist has no basis in fact."); ¶ 26 (Defendants . . . accused him of being an arsonist"); ¶ 29 ("Defendants knowingly, recklessly, and intentionally published the false and defamatory statements and accusations of Plaintiff being an arsonist."). Based on these allegations, the essence of Plaintiff's claims is that the Defendants allegedly portrayed him as "being convicted as an arsonist," *id.* ¶ 22, or "accused him of being an arsonist," *id.* ¶ 26. Strikingly, the word "arson" appears half a dozen times in the Complaint, but it appears nowhere in any of these Defendants' news reports.

Notably, the Complaint does not set forth the text of any of the challenged articles or attach any of them as exhibits. In fact, the only reference the Complaint makes to any specific article is a footnote which provides the address of an online article regarding Plaintiff's guilty plea that NBC Washington published on January 23, 2015. *See* http://www.nbcwashington.com/news/local/Former-American-University-Professor-David-Piits-Pleads-Guilty-for-Setting-Several-Small-Fires-Near-Campus-289621081.html (cited at Compl. 1 n.1). That article (the "January 23 NBC Article") states, in its entirety:

> A former American University professor and department chair pleaded guilty this week to setting several small fires in a neighborhood near campus last year.
>
> Pitts was accused of setting a chair and bottles on fire during the early morning hours of Sept. 4 in an office complex garage in the 3300 block of New Mexico Avenue NW. Police say Pitts then walked to another part of the complex and set some newspapers on fire.
>
> He then walked to a wooded area and set another fire, police said. Documents say Pitts then made his way to an office building on New Mexico Avenue where he had intended to steal prescription medication, controlled substances and prescription pads.
>
> When officers searched Pitts' home they found more than 5,300 prescription pills, blank prescription pads from at least nine different doctors and other items.
>
> Pitts could face up to 15 years in prison for burglary charges and up to 10 years for identity theft charges.
>
> Pitts holds a doctorate degree from the University of Georgia, and had served as the chair of AU's Department of Public Administration and Policy.

Kelley Decl., Ex. 7 (January 23 NBC Article).

ARGUMENT

I. THE BROADCAST DEFENDANTS ARE ENTITLED TO THE IMMUNITY AFFORDED BY THE ANTI-SLAPP ACT

The District of Columbia's Anti-SLAPP statute, D.C. Code § 16-5501 *et seq.* ("the Act"), provides immunity from meritless lawsuits such as this one that arise out of "act[s] in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). Plaintiff can overcome this protection only by satisfying the heavy burden of demonstrating to this Court that he is "*likely* to succeed on the merits" of his claims. *Id.* (emphasis added). Although it is not their burden to do so, the Broadcast Defendants explain in the following section several reasons why Plaintiff cannot meet his burden – indeed, why the Complaint fails to state a claim even under ordinary pleading rules – such that the Complaint should be dismissed, promptly and with prejudice.

A. The Anti-SLAPP Act Protects the Broadcast Defendants' Articles Regarding Plaintiff's Criminal Case

As the Court of Appeals has explained, the District of Columbia enacted the Anti-SLAPP Act in 2010 to "protect the targets" of SLAPPs, which are actions that "masquerade as ordinary lawsuits" but whose "true objective is to use litigation as a weapon to chill or silence speech." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1033 (D.C. 2014) (internal quotations and citation omitted). The purpose of the Act, as with similar legislation in other states, is to further the First Amendment's goal of encouraging debate and discussion of public issues. *Id.* at 1036. Thus, the statute provides for a special motion to dismiss, "a procedural mechanism that allows a named defendant to quickly and equitably end a meritless suit." *Id.*

That procedural mechanism is contained in Section 16-5502, which provides:

> (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.

D.C. Code § 16-5502 (emphasis added). The Act further provides that "[t]he 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." *Id.* § 16-5502(d). In other words, the Broadcast Defendants bear the burden on this motion only of showing that Plaintiff's claims arise out of the type of advocacy protected by the Anti-SLAPP Act. If so, then the Anti-SLAPP Act *requires* that the claims be dismissed *with prejudice*, unless Plaintiff meets the heavy burden of proving that he is *likely* to succeed on the merits of his claims. *Id.*

Although the burden of proof on Defendants in making this *prima facie* showing is "not onerous," *Doe No. 1*, 91 A.3d at 1043 (internal marks and citations omitted), in this case there can be no question that D.C.'s Anti-SLAPP Act applies to Plaintiff's claims. The statutory definition of a protected act includes three prongs, all of which apply to the Articles:

First, the statute defines a protected act as making "any written or oral statement . . . [i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." D.C. Code § 16-5501(1)(A)(i). The Articles indisputably qualify because each is a news report regarding a judicial proceeding – namely, Pitts' guilty plea or sentencing hearing.

Second, the statute also protects written or oral statements made "[i]n a place open to the public or a public forum in connection with an issue of public interest." *Id.* Code § 16-5501(1)(A)(ii). A news website available to anyone with an Internet connection is both a public forum and a place open to the public. The statute defines an "[i]ssue of public interest" as "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." *Id.* § 16-5501(3). Both the specific topic of the Articles – the guilty plea and sentencing of a man responsible for crimes that endangered the safety and well-being of the community – and their general topics – crime, drug addiction and mental illness – are issues of public interest. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, . . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.") (internal marks and citations omitted); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1290 (D.D.C. 1981) ("The public has a legitimate interest in the facts about past crimes and their investigation and prosecution, as well as the possible motivating forces in the background of the criminal."). Indeed, both the prosecution and Judge Bush said in Pitts' sentencing hearing that he deserved his prison term precisely because of the threat to community health and safety his fire-setting posed. Kelley Decl., Ex. 4 at 5:11-16 (prosecutor stated that Pitts' admitted fire-starting "presented a significant danger to the community"); *id.* at 15:13-16 (Judge Bush told Pitts that "the activities that you undertook to support your habit did pose a substantial danger to the community" because "those fires could have resulted in the loss of life").

Third, the final category protected by the statute is "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." D.C. Code § 16-5501(1)(B). As previously explained, the Articles concern issues of public interest. And communicating news to members of the public regarding issues of public interest is the fundamental reason the Broadcast Defendants posted the Articles on their websites. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) ("The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.").

B. Plaintiff Must Show He Is Likely to Succeed on the Merits

Having shown that this lawsuit arises from "act[s] in furtherance of the right of advocacy on issues of public interest," the Broadcast Defendants are entitled to a mandatory dismissal, with prejudice, of Plaintiff's claims. D.C. Code §§ 16-5501-02; see also *Doe No. 1*, 91 A.3d at 1036. To avoid this result, Pitts now must shoulder the heavy burden of showing that he is likely to prevail on the merits. D.C. Code § 16-5502(b).

Because the Act confers immunity from suit, the D.C. Court of Appeals has instructed that the inquiry regarding likelihood of success on the merits is meant "to determine whether the defendant is being forced to defend against a meritless claim, not to determine whether the defendant actually committed the relevant tort." *Doe No. 1*, 91 A.3d at 1038 (internal marks and citation omitted). The Court of Appeals has not yet determined the precise standard that governs a showing of likelihood of success on the merits. Some District of Columbia trial courts have concluded that the standard to be applied is the same one that governs a motion for summary

judgment, *i.e.*, that the plaintiff has made a *prima facie* showing of facts that, if proved, would entitle him to judgment in his favor. *Mann v. Nat'l Rev., Inc.*, No. 2012 CA 008263 B, 2013 WL 4494942, at *5 (D.C. Super. Ct. July 19, 2013); *see also* Omnibus Order at 8-9, *The Wash. Travel Clinic, PLLC v. Kandrac*, No. 2013 CA 003233 B (D.C. Super. Ct. Dec. 16, 2013) (same). At least one trial court has held that the standard is even higher – a requirement for the plaintiff to make an evidentiary showing similar to that required for the entry of a preliminary injunction under Rule 65. *Ctr. for Advanced Def. Studies v. Kaalbye Shipping Int'l*, No. 2014 CA 002273 B, 2015 WL 4477660, at *3-4 (D.C. Super. Ct. April 7, 2015) (noting the "fact-intensive analysis" performed by the Court of Appeals in *Doe No. 1*). The D.C. Circuit recently predicted that the standard is "even more difficult for plaintiffs to meet" than the standards imposed by Rules 12 or 56. *Abbas v. Foreign Policy Grp., LLC*, 414 U.S. App. D.C. 465, 472, 783 F.3d 1328, 1335 (D.C. Cir. 2015). In this case, however, those differences in construing the "likely to succeed on the merits" requirement do not matter, because Pitts cannot show a likelihood of success under any standard, including those that govern a conventional motion to dismiss under Rule 12(b)(6).

II. PLAINTIFF FAILS TO STATE CLAIMS FOR DEFAMATION, FALSE LIGHT AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND THEREFORE CANNOT MEET HIS BURDEN TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS

This lawsuit is meritless on its face, and therefore could not survive a motion to dismiss pursuant to Rule 12(b)(6), let alone meet the more exacting standard set by the Anti-SLAPP Act. Plaintiff's claims fail for three main reasons: (1) the Articles are not actionable as a matter of law because they are not reasonably capable of the defamatory meaning alleged; (2) the Articles are substantially true ; and (3) the Articles are protected by the privilege District of Columbia law affords to accurate reports of government proceedings. In addition, any claims regarding the

January 23 NBC Article are also barred by the one-year statute of limitations for defamation, which governs all claims pleaded by the Complaint. This Court should, therefore, dismiss this case with prejudice.

A. The Articles Do Not Reasonably Imply Pitts Was Convicted of Arson

Pitts' claims are based on the false premise that the Articles "accused him of being an arsonist." Compl. ¶ 26. That is not a reasonable interpretation of the Articles, however, which dooms Plaintiff's claims to failure.

A plaintiff may proceed with his defamation claim only if the statements about which he complains are "reasonably susceptible of a defamatory meaning." *Klayman v. Segal*, 783 A.2d 607, 612-13 (D.C. 2001) (internal marks and citation omitted). Further, "[t]he plaintiff has the burden of proving the defamatory nature of the publication, and the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it is addressed." *Clawson v. St. Louis Post-Dispatch, L.L.C.*, 906 A.2d 308, 313 (D.C. 2006) (internal marks and citation omitted). Whether the challenged publications reasonably convey the defamatory meaning alleged is a threshold question of law for the Court. *Klayman*, 783 A.2d at 612-13. Context is key in this analysis, because "a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire article." *Id.* at 614.

Further, the Court of Appeals has cautioned that a case such as this where the plaintiff alleges a defamatory implication "requires careful exegesis to ensure that imagined slights do not become the basis for costly litigation." *Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Thus, not only must the challenged article be reasonably capable of carrying a

defamatory implication, but the language of the article must, on its face, show that the author intended or endorsed that defamatory implication. *Id.* And even if a defamatory inference may be drawn from an article, if the reported facts that lead to that inference are true, the article is not actionable. *Armstrong v. Thompson*, 80 A.3d 177, 183-84 (D.C. 2013).

Here, considering each of the articles in full and in context, none can be reasonably interpreted as reporting that Pitts was convicted of the crime of arson. None of the Articles uses the word "arson", and none states that Pitts intended to harm life or property. To the contrary, each makes clear that Pitts pleaded guilty to burglary and identity theft. Because the challenged publications are not reasonably capable of the defamatory meaning Plaintiff alleges, they are not actionable as a matter of law.

B. The Articles Are Substantially True

What the Articles do report is that Pitts admitted to deliberately setting fires, and that conduct was a reason he was sentenced to prison. But those facts are substantially true. Therefore, even if the Articles could give rise to an inference that Plaintiff was convicted of arson, they would not be actionable because that inference would be drawn from true facts. *Id.*

To succeed on his defamation and false light claims, Plaintiff has the burden of proving not only that the Articles were false but that they were *materially* false. *Weyrich v. New Republic, Inc.*, 344 U.S. App. D.C. 245, 255, 235 F.3d 617, 627 (D.C. Cir. 2001) ("[T]o be actionable, the story must be materially false."). In other words, the statements Pitts challenges need not be precisely accurate in every minute detail; substantial truth is all that is required. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) ("The common law of libel takes but one approach to the question of falsity . . . It overlooks minor inaccuracies and concentrates upon substantial truth."). A report is substantially true as long as "the substance,

the gist, the sting" of what the article reports would have no meaningfully different impact on the reader than the literal truth. *Masson*, 501 U.S. at 517 (internal marks and citation omitted); *Armstrong*, 80 A.3d at 183-84 (same).

In this case, the challenged articles are not only substantially true, they are literally true. The Articles and accompanying video report state that Pitts pleaded guilty to burglary and identity theft. They report that Pitts admitted to setting fires in the course of committing those crimes. And they report that Pitts was sentenced "to two years in jail for setting fires and breaking into a pharmacy last September." Kelley Decl., Ex. 5 (WJLA article); *id.* Ex 6 (March 20 NBC Article) ("A former American University professor sentenced Friday for breaking into an office building and setting multiple fires in Northwest D.C.").

All of those statements are true. It is true that Pitts pleaded guilty to burglary and identity theft. It is true that he set fires as he admitted in his plea agreement. Kelley Decl., Ex. 1 at 1, 7. And finally, it is true that he was sentenced for setting fires and breaking into a pharmacy. The Government emphasized that fire-setting as its reason for seeking a one-year prison sentence. *Id.*, Ex. 2 at 6 (sentencing memorandum stated that "[t]he manner in which the defendant committed the burglary to which he pled guilty was both bizarre and dangerous – setting multiple fires before forcing entry into the building"); *id.*, Ex. 4 at 5:11-16 (prosecutor stated that Pitts' admitted fire-starting "presented a significant danger to the community"). And Judge Bush stated that she considered Pitts' admitted fire-setting as a factor in determining his sentence. *Id.* at 15:13-16 (Judge Bush told Pitts that "the activities that you undertook to support your

habit did pose a substantial danger to the community" because "those fires could have resulted in the loss of life").[5]

Moreover, even if somehow it were not literally or technically true that Pitts was sentenced for setting fires, or even if Defendants had actually reported that Pitts had committed arson (which they did not), it would make no difference. To hold otherwise would be to engage in the kind of hyper-technical hair-splitting that the First Amendment prohibits. *Foretich v. CBS*, 619 A.2d 48, 60 (D.C. 1993) ("Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 346, 838 F.2d 1287, 1296 (D.C. Cir. 1988))).

In particular, the case law has repeatedly recognized that legal proceedings are complex, and journalists are not expected to be attorneys or subject-matter experts. Thus, news reports that describe legal or technical matters in laypersons' terms are substantially true, even when they might contain technical legal inaccuracies. *See, e.g.*, *Armstrong*, 80 A.3d at 185 (defendant's "failure to use the precise term of art to describe the agency's reaction to Mr. Armstrong's wrongdoing does not make her statement false"); *Terry v. Journal Broad. Corp.*, 840 N.W.2d 255, 264 (Wis. Ct. App. 2013) (statement that plaintiff "was facing criminal charges" was substantially true because state employee testified plaintiff's conduct "could potentially constitute a violation of Wisconsin consumer and criminal laws" and that plaintiff was not referred for prosecution because she cooperated with authorities), *review denied*, 843 N.W.2d 707 (Wis. 2014); *Harrison*

[5] As the prosecution noted in its sentencing memorandum, Kelley Decl. Ex. 2 at 5, Judge Bush was fully within her discretion at sentencing to consider Pitts' "actual conduct," not just the conduct constituting the elements of the precise offenses to which he pleaded guilty. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 149 (1997).

v. Chi. Sun-Times, Inc., 793 N.E.2d 760, 767-68 (Ill. Ct. App. 2003) (headline stating plaintiff "kidnapped" daughter substantially true where court had found her civilly responsible for violating international child custody treaty). For example, courts have repeatedly found reports of criminal conduct to be substantially true even when the underlying case actually involved only civil violations, *id.*, and have found reports of serious criminal charges like rape to substantially true when the actual technical charges involved a lesser offense. *Alahverdian v. Grebinski*, No. 3:13-cv-00132, 2014 WL 2048190, at *10-11 (S.D. Ohio May 19, 2014) (statement that plaintiff had sexually assaulted another person substantially true because plaintiff was convicted of public indecency and sexual imposition). Notably, a federal court in Maryland held that an article was substantially true in reporting the plaintiff had been sentenced for luring a young African immigrant to the United States, "isolating her in their Maryland home, raping her, and forcing her to work as their servant for three years," where the plaintiff was actually convicted of involuntary servitude and the judge cited testimony regarding the sexual abuse as a factor at sentencing. *Nanji v. Nat'l Geographic Soc'y*, 403 F. Supp. 2d 425, 431-32 (D. Md. 2005) (internal marks and citation omitted).

Here, to the average layperson there would be no meaningful difference between learning that Pitts admitted to "arson" and learning that he admitted to deliberately "setting fires." Nor would there be any material difference between reading that he was "sentenced for setting fires and breaking into a pharmacy", or learning that he received a jail term for burglary in part because he admitted to setting fires in the course of breaking into a pharmacy.

In short, Pitts did not, and cannot, point to any materially false statement in any of the Articles. None is actionable because all are substantially true. Pitts, therefore, has not stated viable claims regarding the Articles and has no possibility of succeeding on the merits of any of his claims, let alone any likelihood of doing so. His claims should be dismissed with prejudice.

C. The Articles Are Privileged As Accurate Reports of Court Proceedings

Pitts cannot now try to repudiate through this defamation lawsuit the admitted facts for which he was criminally convicted and sentenced. In the District of Columbia as elsewhere in the United States, reports that accurately reflect what is said in court and in other governmental proceedings are shielded from liability by the common-law fair report privilege. *See, e.g.*, *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-90 (D.C. 1980); *Dameron v. Wash. Magazine, Inc.*, 250 U.S. App. D.C. 346, 349, 779 F.2d 736, 739 (D.C. Cir. 1985). This privilege safeguards our participatory democracy by protecting the public's right to "disseminate official records—whether verbatim or in fair summaries—without fear of liability for any false, defamatory material that they might contain." *Id.*; *see also Craig v. Harney,* 331 U.S. 367, 374 (1947) ("What transpires in a courtroom is public property. . . . Those who see and hear what transpired can report it with impunity.").

To qualify for the privilege's protection, the report at issue must be "(a) accurate and complete, or a fair abridgement of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern." *Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005) (quoting *Phillips*, 424 A.2d at 88). Federal courts interpreting District of Columbia law have identified an additional requirement: that "[i]t must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise

drawing upon official documents or proceedings." *Dameron*, 250 U.S. App. D.C. at 349, 779 F.2d at 739. Moreover, as with the element of falsity, accuracy for purposes of the fair report privilege is measured by whether a report is a substantially accurate account of judicial proceedings, not whether it is literally accurate in all respects. *White v. Fraternal Order of Police*, 285 U.S. App. D.C. 273, 288, 909 F.2d 512, 527 (D.C. Cir. 1990). And here too, journalists are accorded latitude to describe legal proceedings in layperson's terms, and are not held to the standards of technical precision to which a legal expert might be. *See, e.g.*, *Salzano v. N. Jersey Media Grp. Inc.*, 993 A.2d 778, 792-93 (N.J. 2010) ("Courts hearing defamation claims are to apply a common sense standard of expected lay interpretation of media reports of trials, rather than inquiring whether a report was strictly correct in defining legal charges and describing legal rulings." (internal marks and citation omitted)); *Williams v. New World Commc'ns of Detroit, Inc.*, No. 301154, 2012 WL 555776, at *5 (Mich. Ct. App. Feb. 21, 2012) ("journalists are not expected to be lawyers when reporting on legal matters").

The Articles at issue here easily meet all of these criteria. Each makes clear it is reporting on Pitts' guilty plea or sentencing hearing. Each is self-evidently published to inform the public regarding a matter of public concern – the criminal case against Pitts. Finally, for the reasons set forth above in addressing the issue of substantial truth, a comparison of the Articles with the transcript of the sentencing hearing and plea agreement on which they report shows that each is "a fair abridgement" of what occurred in Pitts' criminal case.

D. Claims Regarding the January 23 NBC Article Are Time-Barred

In addition to failing on all the grounds discussed above, any claims Pitts may be attempting to make regarding the January 23 NBC Article are barred by the District of Columbia's one-year statute of limitations for defamation actions. D.C. Code § 12-

301(4); *Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298-99 (D.C. 2001). Where, as here, the contested statement is a mass media publication, the limitations clock starts at the time of publication. *Id.* Pitts filed this lawsuit on March 19, 2016. Therefore, all of his claims are barred to the extent they are premised on the January 23 NBC Article.

E. Plaintiff's Tag-Along Claims Fail For the Same Reasons as His Defamation Claims

Finally, Pitts cannot prevail on his tag-along claims for false light invasion of privacy and intentional infliction of emotional distress for the same reasons that his defamation claim fails. It is well established under District of Columbia law that a plaintiff cannot avoid the constitutional protections afforded to defamation defendants by disguising his claim as one for another tort such as false light or IIED. *Blodgett v. Univ. Club*, 930 A.2d 210, 222-23 (D.C. 2007) (citing *Klayman*, 783 A.2d at 619). Thus, false light and IIED claims premised on the same allegations as a defamation claim will rise or fall with the defamation claim. *See, e.g., id.* at 223 ("where the plaintiff rests both his defamation and false light claims on the same allegations . . . the claims will be analyzed in the same manner"); *Clawson*, 906 A.2d at 317 (affirming dismissal of false light and IIED claims premised on same facts as dismissed defamation claim).

For example, in order to prove his false light claim, Pitts would have to prove that the Broadcast Defendants made statements about him that cast him in a false light. *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 859-60 (D.C. 1999). Pitts cannot recover on a false light theory because the Articles do not convey the alleged false light and, in any event, are substantially true. Similarly, because the Articles are privileged, Pitts cannot impose liability on the Broadcast Defendants on any theory of false light or intentional infliction of emotional distress. *See, e.g., Shipkovitz v. The Wash. Post Co.*, 571 F. Supp. 2d 178, 186 (D.D.C. 2008) (where defamation claim failed on grounds including fair report privilege, false light claim premised on same factual

allegations also failed), *aff'd sub nom. Shipkovitz v. Wash. Post Co.*, 408 F. App'x 376 (D.C. Cir. 2010). Likewise, because Pitts' false light and intentional infliction claims are premised on the same factual allegations as the defamation claim, they are also governed by the one-year limitations bar. *Mullin*, 785 A.2d at 300 (affirming dismissal of IIED and false light claims based on same allegations as time-barred defamation claim).

In addition, Pitts' IIED claim independently fails on the merits. That tort requires him to plead and prove "(1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff [to suffer] severe emotional distress." *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 163 (D.C. 2013) (brackets in original) (internal marks and citation omitted). Here, even ignoring the fact that Pitts did not bother to plead that he suffered severe emotional distress, he cannot show "extreme and outrageous" conduct by the Broadcast Defendants. To survive a motion to dismiss, Pitts must allege conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Williams v. D.C.*, 9 A.3d 484, 494 (D.C. 2010) (internal marks and citation omitted). Pitts' factual allegations fall far short of that standard, and if the Articles are not actionable as defamation, publishing them cannot clear the much higher threshold of conduct beyond all possible bounds of decency. *See, e.g., id.* (firing and defaming employee is not sufficiently extreme and outrageous conduct to make out an IIED claim).

CONCLUSION

Plaintiff's lawsuit, which is aimed at suppressing an uncomfortable truth about his criminal conduct, is a classic example of the kind of meritless litigation the Anti-SLAPP Act is meant to head off. For the reasons set forth above, the Broadcast Defendants are entitled to the

Act's protection, and Plaintiff cannot show any likelihood of success on the merits. The Broadcast Defendants respectfully request that this Court schedule a hearing promptly pursuant to the Act, and dismiss this case with prejudice.

Dated: April 29, 2016

Respectfully submitted,

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