SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TS MEDIA, INC., TAVIS SMILEY PRESENTS, INC., and THE SMILEY GROUP, INC., Plaintiffs, v. PUBLIC BROADCASTING SERVICE, a District of Columbia nonprofit corporation, Defendant.	Case No. 2018 CA 001247 B Hon. Anthony Epstein Next Court Date: May 25, 2018 Initial Conference Oral Hearing Requested

DEFENDANT AND COUNTER-PLAINTIFF PUBLIC BROADCASTING SERVICE'S MEMORANDUM OF LAW IN SUPPORT OF ITS SPECIAL MOTION TO DISMISS

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I. INTRODUCTION

A national dialogue emerged in October 2017 regarding the widespread and wholly unacceptable prevalence of sexual assault and harassment in the workplace, particularly in the entertainment and media industries. This movement, which initially spread on social media, raises issues of critical public interest by encouraging both women and men to speak out about their experiences with workplace misconduct, often at the hands of well-respected and powerful men. By letting them know that they are not alone, the movement empowers vulnerable individuals to come forward to share their stories – "Me Too."

The lawsuit filed by TS Media, Inc., Tavis Smiley Presents, Inc., and The Smiley Group, Inc. against PBS strikes at the heart of the #MeToo movement – public dialogue regarding accusations of misconduct. Plaintiffs seek to hold PBS liable in tort for informing the public on December 13, 2017, in the midst of the #MeToo movement, that it had received multiple, credible allegations of misconduct regarding its national daily talk show host Tavis Smiley, that it had hired an outside law firm to conduct an investigation into those allegations, and that during the pendency of its investigation, it had decided to indefinitely suspend distribution of *Tavis Smiley* to PBS member stations.

Plaintiffs' tort claims present a textbook "strategic lawsuit against public participation" or SLAPP and should be dismissed with prejudice under the District of Columbia Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.* The D.C. Anti-SLAPP Act was adopted in 2010 and "incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed . . . to punish the opponent or prevent the expression of opposing points of view." *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012). Because Plaintiffs' claims arise from speech related to a public figure concerning an issue of important public interest, as explained in greater detail below, Plaintiffs' tort claims should be dismissed with prejudice. *See* D.C. Code 16-5502(a)-(b).

II. FACTUAL BACKGROUND

The material facts relevant to this Motion are not in dispute and are a matter of public record, as demonstrated by the facts alleged in Plaintiffs' Complaint, as follows:

PBS launched *Tavis Smiley*, a late night weekday half-hour television program hosted by Tavis Smiley in 2004. For fourteen consecutive years, and over a period of changing PBS programming executives, PBS renewed *Tavis Smiley*, typically annually, in the fall. In November 2017, PBS and TSM renewed the agreement for a 15th season. Compl. ¶ 31.

In October 2017, "sexual harassment in the workplace became a major topic of conversation throughout the United States" as the Me Too movement (#MeToo) went viral. *See* Compl. ¶ 28. As the Plaintiffs' Complaint explains:

> Many famous and successful men have ***rightfully been outed*** for their improper, and in many cases criminal behavior. ***Hosts on network television***, including Fox, NBC and CBS voluntarily left their jobs in scandal as a result of ***allegations*** against them concerning ***sexual harassment***. According to news reports, in some cases, the alleged harassment happened years ago while in other cases it appears to be ongoing.

Id. (emphasis added).

On October 5, 2017, the New York Times published its initial report about Harvey Weinstein's pattern of sexual harassment; on October 25, it was reported that journalist Mark Halperin was accused of sexual harassment; on November 21, 2017, it was reported that CBS fired Charlie Rose and that PBS suspended distribution of *The Charlie Rose Show* based on allegations of his sexual misconduct; on November 29, 2017, it was reported that NBC fired host Matt Lauer over allegations of inappropriate sexual behavior with subordinates, and that Minnesota Public Radio fired Garrison Keillor over allegations of inappropriate behavior. *See* Declaration of W. Brad Nes ("Nes Decl.") ¶¶ 2 to 6 and Exs. A-E.[1]

[1] During the fall of 2017, allegations of misconduct were also reported regarding many other public figures as well. *See, e.g.,* Nes Decl. ¶ 6, Ex. E.

In the middle of the intense and nationally significant dialogue that began in October 2017 regarding the widespread prevalence of sexual assault, harassment and inappropriate behavior, especially in the workplace, on November 21, 2017, just a few days after the 2017 PBS-TSM agreement was signed (and the day after the Charlie Rose story broke), PBS received "an allegation that Mr. Smiley had engaged in . . . misconduct" and immediately hired a law firm to initiate an "investigation" of the allegations. *See* Compl. ¶¶ 6, 31. In particular, "PBS received an anonymous phone call by a person who claimed to have previously worked for TSM." *Id.* ¶ 33. "That person made claims that Mr. Smiley engaged in some sort of misconduct." PBS hired a law firm to "perform" this 'investigation" into Mr. Smiley's alleged misconduct. *Id.* ¶ 6. As part of its investigation, the investigator interviewed Tavis Smiley, among other witnesses. Compl. ¶ 8. "During the approximately three hours of questioning . . . Mr. Smiley informed PBS's counsel that, during the course of a 30-year career, he had consensual relationships with workplace colleagues." *See* Compl. ¶ 40.

Following Mr. Smiley's interview, PBS *suspended* distribution of *Tavis Smiley* pursuant to paragraph 9.1 of the November 2017 Agreement, which allows PBS to suspend distribution "for any reason." *Id.* ¶ 43; PBS Answer ¶ 9. Shortly after it suspended distribution of *Tavis Smiley* on December 13, 2017, PBS issued a press release to the media that stated, in full:

> Effective today, PBS has indefinitely suspended distribution of "Tavis Smiley," produced by TS Media, an independent production company. PBS engaged an outside law firm to conduct an investigation immediately after learning of troubling allegations regarding Mr. Smiley. This investigation included interviews with witnesses as well as with Mr. Smiley. The inquiry uncovered multiple, credible allegations of conduct that is inconsistent with the values and standards of PBS, and the totality of this information led to today's decision.

Nes Decl. ¶ 7 & Ex. F.

That same day, *Variety* published an article titled "PBS Suspends 'Tavis Smiley' Following Sexual Misconduct Investigation (EXCLUSIVE)."[2] The *Variety* article quoted PBS's press release, cited sources close to "the production," and quoted from a statement that Mr. Smiley released on Facebook. Nes Decl. Ex. G. Subsequently, Mr. Smiley publicly admitted, on Facebook and on national television, that he has had multiple relationships with subordinates. *See* Nes Decl. ¶¶ 9-10. Mr. Smiley also acknowledged on national television that "there are some people who believe there is no such thing as a consensual relationship in the workplace. I hear that point of view and I respect it." *See* Nes Decl. ¶ 10.

On February 20, 2018, TS Media, Inc., Tavis Smiley Presents, Inc., and The Smiley Group, Inc. (but not Tavis Smiley in his personal capacity) filed this action against PBS. *See generally* Compl. Relevant here, Plaintiffs' tort claims seek to hold PBS liable in tort for PBS informing the press that it had received "multiple, credible allegations" of misconduct regarding its national daily talk show host and that it had hired an outside law firm to conduct an "investigation" into those allegations. *See, e.g.*, Compl. ¶¶ 60, 69 (emphasis added). As demonstrated below, the District of Columbia's Anti-SLAPP Act prevents such lawsuits.

III. LEGAL STANDARDS

Under the District of Columbia's Anti-SLAPP Act (the "Act"), "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." D.C. Code § 16-5502(a). An "act in furtherance of the right of advocacy on issues of public interest" includes "any written or oral statement made . . . in a place open to the public or a public forum in connection with an issue of public interest; or any other expression or expressive conduct that involves . . . communicating views to members of the public in

[2] *See* Nes Decl. ¶ 8, Ex. G.

connection with an issue of public interest." D.C. Code § 16-5501(1). An "issue of public interest" includes "an issue related to . . . a public figure." *Id.* § 16-5501(3).

The Act establishes a two-stage, burden shifting framework applicable to special motions to dismiss. At the first stage, the party filing a special motion to dismiss must make "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." *Id.* § 16-5502(b). If that showing is made, the burden shifts to the responding party to demonstrate "that the claim is likely to succeed on the merits." *Id.* The responding party ***must present evidence***—not simply allegations—legally sufficient to permit a jury properly instructed on the law, including applicable defenses and privileges, to reasonably find in plaintiff's favor. *See Competitive Enter. Institute v. Mann*, 150 A.3d 1213, 1220-21, 1236, 1238 & n.32 (D.C. 2016). If the responding party cannot make this showing, the special motion to dismiss shall be granted. D.C. Code § 16-5502(b).[3]

IV. THIS COURT SHOULD DISMISS PLAINTIFFS' TORT CLAIMS UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT

A. Plaintiffs' Tort Claims Are Predicated on Speech Protected by the D.C. Anti-SLAPP Act

Plaintiffs' claims for intentional interference with contract and tortious interference with business expectancy are expressly predicated on PBS's alleged statements to the press—in the midst of the #MeToo movement—that it engaged an outside law firm to conduct an "investigation" after receiving "troubling allegations" regarding Mr. Smiley and that the investigation uncovered multiple, credible allegations of sexual misconduct and other inappropriate behavior. *See* Compl. ¶¶ 60-63, 69-70. This speech falls squarely within the Act's protections, and Plaintiffs' attempt to impose tort liability for PBS informing the public about an

[3] The Act also provides for a stay of discovery, an expedited hearing on the special motion to dismiss, for issuance of the ruling as soon as practicable after the hearing, and for an award of attorneys' fees in the court's discretion to a prevailing defendant. *Id.* § 16-5502 (c), (d).

investigation into Mr. Smiley's alleged misconduct and other inappropriate behavior is a classic example of a SLAPP case.

There is no dispute that Mr. Smiley is a public figure. Indeed, Plaintiffs' Complaint alleges that "Mr. Smiley is now one of America's most well-known and respected media personalities" and that "Mr. Smiley is also an accomplished author." Compl. ¶¶ 19, 21. *See, e.g.*, *Braden v. News World Communications, Inc.*, No. CA-10689'89, 1993 WL 625508, at *6 (D.C. Super. Ct. Sept. 3, 1993); *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000). As PBS's statements at issue here relate to a public figure, they are protected by the Act for that reason alone.

The speech that Plaintiffs seek to chill through their tort claims is also protected by the Act because it relates to the #MeToo movement, an issue at the forefront of public discourse. As the Complaint acknowledges, "beginning in approximately October 2017, sexual harassment in the workplace became a major topic of conversation throughout the United States." *See* Compl. ¶ 28. In the fall of 2017 (and during the very timeframe the investigation of Mr. Smiley's conduct was occurring), many prominent public figures, including Mark Halperin, Charlie Rose, Matt Lauer, and Garrison Keillor, were implicated by allegations of misconduct and inappropriate behavior. *See supra* at 2. Against this national backdrop, Plaintiffs allege PBS informed the press that an investigation uncovered "allegations" of Mr. Smiley's misconduct and other inappropriate behavior and that PBS was suspending distribution of *Tavis Smiley* to PBS member stations. Accordingly, PBS's statements fit squarely into the national debate on sexual misconduct, harassment and other inappropriate behavior in the workplace, and the Anti-SLAPP Act protects PBS from Plaintiffs' attempts to punish PBS for informing the public that credible

allegations of misconduct and inappropriate behavior came to light as the investigation proceeded.

Finally, the statements on which Plaintiffs base their tort claims were made in a place open to the public or a public forum because they were made to the press. *See, e.g., McGarry v. Univ. of San Diego*, 154 Cal. App. 4th 97, 105 (2007) (university's alleged defamatory statements to San Diego Union Tribune reporter that it terminated its head football coach based on a "culmination of events" were protected under California Anti-SLAPP Act);[4] *Maranatha Corrections, LLC v. Dep't of Corr. And Rehab.*, 158 Cal. App. 4th 1075, 1086 (2008) (state agency made statements open to the public when it provided copies to local newspapers of its letter terminating its contract with private entity operating a prison because local newspapers constituted public fora).[5] In sum, PBS's statements constitute speech protected by the Act.

B. Plaintiffs Tort Claims Are Not Likely to Succeed on the Merits

As Plaintiffs' tort claims arise from, and seek to chill, speech protected by the Act, the *burden shifts* to them to demonstrate that their claims are likely to succeed on the merits. Plaintiffs cannot make this showing because they cannot overcome the First Amendment protections that apply to PBS's protected speech. Nor can Plaintiffs present sufficient evidence on which a jury could reasonably find in their favor on the tortious interference claims.

1. The First Amendment Prohibits Plaintiffs' Tort Claims Because Plaintiffs Cannot Demonstrate PBS Acted with "Actual Malice"

In the context of tort claims, First Amendment protections are most commonly applied to defamation claims, but "their applicability to other torts has repeatedly been recognized."

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[4] In construing the D.C. Anti-SLAPP Act, courts look to authority under the California Anti-SLAPP law, on which the D.C. Act was modeled. *See Abbas v. Foreign Policy Grp., LLC*, 975 F. Supp. 2d 1, 9 (D.D.C. 2013) (noting that D.C. Act was modeled on Anti-SLAPP Acts in other jurisdictions and finding California precedent particularly instructive); *Boley v. Atl. Monthly Grp.*, 950 F. Supp. 2d 249, 255-57 (D.D.C. 2013) (same).

[5] *See also Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050-51 (E.D. Cal. 2008) (holding that statements made to the press were made in public fora); *Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1161 (2004) (same).

Thompson v. Armstrong, 134 A.3d 305, 310 (D.C. 2016). "Unsurprisingly, therefore, courts have regularly held that First Amendment restrictions apply to suits for intentional interference with contractual relations." *Id.*[6] Simply put, "a plaintiff may not use related [tort] causes of action to avoid the constitutional requisites of a defamation claim." *Thompson*, 134 A.3d at 311.

Where First Amendment protections apply, as they do here, Plaintiffs must prove that PBS's allegedly tortious statements were made with "actual malice" by showing, through *clear and convincing evidence*, that PBS's statements were made with knowledge that they were false or with reckless disregard as to their falsity. *Thompson*, 134 A.3d at 311 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). Stated otherwise, Plaintiffs must prove, by clear and convincing evidence, that PBS, *in fact*, knew that its statements were false or subjectively entertained serious doubts as to the truth of its statements. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Beeton v. District of Columbia*, 779 A.2d 918, 924 (D.C. 2001).[7]

Here, the only "interference" that Plaintiffs allege is expressly predicated on PBS's alleged statements to the press that (1) it conducted an investigation after receiving allegations about Mr. Smiley's misconduct; and (2) the investigation uncovered "multiple, credible" allegations of his misconduct and other inappropriate behavior.[8] Plaintiffs *admit* that the first

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[6] *See also Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 273-74 (7th Cir. 1983) (applying constitutional limitations developed under the law of defamation to claim for tortious interference to avoid creating "an approach [that] would make every case of defamation of a corporation actionable as wrongful interference"); *Aequitron Med., Inc. v. CBS, Inc.*, 964 F. Supp. 704, 709-10 (S.D.N.Y. 1997) ("where the tortious interference claim is based on conduct that sounds in defamation, the special rules of defamation apply").

[7] Even in the Anti-SLAPP context, Plaintiffs must come forward with clear and convincing evidence of "actual malice" because "[t]he standards against which the court must assess the legal sufficiency of the evidence are the substantive evidentiary standards that apply to the underlying claim and related defenses and privileges." *Competitive Enter. Inst.*, 150 A.3d at 1236; 1252 ("the question for the court is whether the evidence suffices to permit a reasonable jury to find actual malice with convincing clarity.").

[8] *See* Compl. ¶¶ 60-61 ("PBS knew that the intentional announcement falsely claiming it had undertaken a reasonably proper workplace investigation would interfere with numerous contracts Plaintiffs had."); ¶ 69 ("PBS intentionally interfered with the Plaintiffs' economic relationships when it informed the press and the public that it had received 'multiple credible' allegations of misconduct by Mr. Smiley and that it had conducted an 'investigation' into those allegations.").

statement is true and cannot demonstrate by clear and convincing evidence or otherwise that the second is false, anything other than non-actionable opinion, or was made with "actual malice."

PBS's statements to the press that it conducted an investigation that included interviews with witnesses as well as with Mr. Smiley is indisputably true. Indeed, Plaintiffs admit that the investigator interviewed Mr. Smiley and other witnesses. *See* Compl. ¶¶ 38, 40. Likewise, Plaintiffs' Complaint admits there was "an investigation;" they just allege it was done poorly or for pretextual motives. *See id.* ¶ 6. Despite these admissions, Plaintiffs attempt to manufacture a tort claim by alleging that PBS made an "intentional announcement falsely claiming it had undertaken a *reasonably proper workplace* investigation." *Id.* ¶ 61 (emphasis added). A simple reading of the press release and the *Variety* article, however, reveal that PBS said only that it conducted "an investigation"; there are no statements characterizing the investigation. *See* Nes Decl. Exs. F-G. Plaintiffs cannot fabricate a PBS statement and then attack its validity.

As to PBS's statement that the investigation "uncovered multiple, credible allegations of conduct that is inconsistent with the values and standards of PBS," Plaintiffs cannot prove that the claims are untrue, that they are anything but non-actionable opinion, and that they were made with malice. Any ***one*** of these grounds is independently sufficient to bar this claim.

First, the statements are true, if not wholly non-actionable opinion. Plaintiffs have admitted the statement in the *Variety* article that "Smiley had engaged in sexual relationships with multiple subordinates . . . ." *See* Compl. ¶ 40 (admitting that Mr. Smiley had "consensual relationships with workplace colleagues"); Nes Decl. Ex. G. Also, Mr. Smiley admitted on national television that "there are some people who believe there is no such thing as a consensual relationship in the workplace. I hear that point of view and I respect it." *See id.* ¶ 10. Thus, Mr. Smiley admitted that his relationships with subordinates could be viewed as inappropriate.

Second, PBS's statement that Mr. Smiley's conduct, including the uncontested fact of sexual relationships with subordinates, was inconsistent with its values and standards is non-actionable as an opinion. *See, e.g.*, *Rosen v. Am. Israel Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1253, 1257-60 (D.C. 2012) (holding that AIPAC's statement to the New York Times that it fired Rosen because his behavior "did not comport with the standards that AIPAC expects of its employees," was a non-actionable opinion that was not provably false even where such standards were unwritten but assumed); *McClure v. Am. Family Mut. Ins. Co.*, 223 F.3d 845, 853 (8th Cir. 2000) (statements to press that insurance agents had engaged in "conduct unacceptable by any business standard" was non-actionable opinion).

Third, even if the statements were not true or non-actionable opinion, Plaintiffs cannot prove "actual malice." There are no facts or evidence to suggest, let alone prove by clear and convincing evidence, that PBS believed its statements to be false or made them with reckless disregard for their falsity. At most, Plaintiffs allege, in conclusory fashion, that the investigation was "poorly executed and incomplete," "biased and littered with poor planning and analysis," and "violate[d] fundamental practices responsible workplace investigators follow when conducting this type of investigation." *See* Compl. ¶¶ 6, 7, 38-39. These allegations, while certainly untrue, are nonetheless insufficient on their face ***as a matter of law*** to demonstrate "actual malice" because making statements based on an alleged incomplete or even a negligent investigation is legally insufficient to establish "actual malice." *See, e.g.*, *Nader v. De Toledano*, 408 A.2d 31. 55-57 (D.C. 1979) (holding that even if a jury could infer that an individual "knew nothing about [his source's] general reliability" and was negligent in failing to independently verify the accuracy of a statement before re-publishing it, such an inference was legally insufficient to constitute "actual malice."); *Jankovic v. Int'l Crisis Grp. (Jankovic III)*, 822 F.3d

576, 590 (D.C. Cir. 2016) ("Absent evidence that a writer had reason to doubt his research and sources, his failure to investigate further or question his sources did not show actual malice or a reckless disregard for the truth."); *Doe No. 1 v. Burke*, 91 A.3d 1031, 1045 (D.C. 2014) (similar).

Plaintiffs also allege in conclusory and implausible fashion that PBS's speech was based on animus toward Mr. Smiley and that PBS used the #MeToo movement as a pretext for racial discrimination. *See* Compl. ¶¶ 4, 25, 34, 60 & 69. This too, while wholly without merit, is insufficient on its face ***as a matter of law***. Demonstrating that a party acted out of spite, animus, or hostility is not a substitute for proving "actual malice," which depends solely on belief as to truth or falsity of the allegedly false and defamatory statements. *See Thompson*, 134 A.3d at 311, 313 (holding that defendant's motives for making allegedly defamatory statements were "beside the point" even if she was motivated by "ill-will" because "'actual malice' must be shown regardless of the speaker's motives"); *Nader*, 408 A.2d at 40 ("the New York Times rule of actual malice redirects the focus of inquiry from the common law's emphasis on the defendant's attitude toward the plaintiff as the animus for defamatory publication to the defendant's attitude toward the truth or falsity of the content of such a publication"). In other words, proving an intent to inflict harm or bad motive does not establish "actual malice."

In sum, PBS's statement that it received "multiple, credible allegations" of misconduct cannot be said to be made with "actual malice." *See supra* at 8-11. Thus, Plaintiffs are not likely to succeed on the merits of their tort claims.

2. Plaintiffs Cannot Satisfy the Elements of Their Tort Claims

Apart from their inability to overcome constitutional restrictions that apply to their tort claims, Plaintiffs are not likely to succeed because they cannot satisfy certain elements of their tortious interference claims.

To recover for intentional interference with contract or business expectancy, Plaintiffs must prove (1) existence of a valid contract with a third party or other business relationship; (2) PBS's knowledge of the contract or business relationship; (3) PBS's intentional interference causing a breach or disruption of the contract or business relationship; and (4) resulting damages. *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 900 (D.C. 2008).[9] In addition, Plaintiffs must show that PBS's conduct was improper; *i.e.*, that it was not legally justified or privileged. *NCRIC, Inc.*, 957 A.2d at 901. Plaintiffs are not likely to succeed on their tort claims for at least three, independent reasons.

First, Plaintiffs cannot prove that PBS's protected speech *caused* any alleged interference. The Complaint offers nothing more than conclusory allegations about causation. Compl. ¶¶ 63, 69. Following PBS's public statements at issue here, Mr. Smiley admitted on national television that he'd had sexual encounters with subordinates and he acknowledged that these sexual encounters with subordinates could legitimately be viewed as an abuse of power and inappropriate for the workplace. *See supra* at 4. If contracting parties refused to do business with Mr. Smiley's companies because of his own public admissions, then the alleged statements did not cause the harm.

Second, Plaintiffs cannot prove that PBS made its public statements with the specific intent or independent purpose of interfering with Plaintiffs' third-party contracts or business

[9] The PBS-TSM Agreements contain a choice of law provision under which Virginia law applies to claims brought under the contract. The provision, however, does not necessarily extend to tort claims brought by TSM or PBS or a third party such as TSP and TSG. If Virginia law does apply, Plaintiffs' tort claims are barred by VA Code § 8.01-223.2, which provides immunity from civil liability for claims of tortious interference based on statements regarding matters of public concern to third parties that are protected by the First Amendment, unless plaintiffs prove such statements were made with actual malice. As explained above, Plaintiffs cannot make this showing. Moreover, although the elements of tortious interference are similar under D.C. and Virginia law, under Virginia law Plaintiffs have to affirmatively prove that PBS's interference was accomplished through improper means for interference with at-will contracts and business expectancies and, for the business expectancy claim, that a competitive relationship existed between PBS and the third-party allegedly interfered with. *See Dunlap v. Cottman Transmission Sys., LLC*, 287 Va. 207, 216 (2014); *17th St. Assocs., LLP v. Markel Int'l Ins. Co.*, 373 F. Supp. 2d 584, 600 (E.D. Va. 2005.)

expectancies, as they must. *See Havilah Real Property Servs., LLC v. VLK, LLC*, 108 A.2d 334, 346 (D.C. 2015) ("[T]he 'motive' behind the interference is the key consideration in determining whether recovery under the tort is available."); *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 326 (D.C. 2008) (affirming dismissal of claim "because plaintiffs did not allege that appellees *intended* to cause a breach of the contract between the owners and Aisha Murray") (emphasis added); *see also Marshall v. Allison*, 908 F. Supp. 2d 186, 202 (D.D.C. 2012) ("motive or purpose to disrupt ongoing business relationships is required to establish liability, not merely intent to interfere or knowledge that conduct will harm plaintiff's business dealings"). PBS's motive and purpose in informing the press about the allegations uncovered in the investigation was not to disrupt Plaintiffs' third-party contracts or business expectancies. PBS made its statements solely for the purpose of answering inquiries from the press and informing the viewing public that *Tavis Smiley* would no longer be distributed to PBS member stations.

Third, PBS is not liable because its speech, on which Plaintiffs base their claim, was protected, legally justified, and privileged under the First Amendment – it concerned a public figure and a matter of national public interest. *See supra* at 5-7, 8-9. In addition, PBS's statements are protected by the "common interest" privilege because PBS's primary purpose in making its statements was to inform the public and its member stations about the allegations the investigation uncovered and PBS's decision, as a result, to indefinitely suspend distribution of *Tavis Smiley* to PBS member stations. *See Blodgett v. Univ. Club*, 930 A.2d 210, 223-24 (D.C. 2007); *Moss v. Stockard*, 580 A.2d 1011, 1024 (D.C. 1990). In particular, (1) PBS's statements to the press were made in good faith and, in fact, were true; (2) PBS had an interest in Mr. Smiley's conduct and in the distribution of *Tavis Smiley* to PBS member stations; and (3) given the public interest in Mr. Smiley as a public figure and *Tavis Smiley* as a nationally broadcast

show, and the substantial public interest in the #MeToo movement, the press (and by extension the viewing public and PBS's member stations) to whom PBS communicated had a corresponding interest in the subject matter of PBS's statements.

Plaintiffs' business expectancy claim also fails for another independent reason. Plaintiffs do not name, identify, or otherwise describe in any detail any existing business expectancies allegedly interfered with. *See* Compl. ¶¶ 66-72. This failure alone renders the claim unlikely to succeed. *See, e.g.*, *Nyambal v. Alliedbarton Sec. Servs., LLC*, 153 F. Supp. 3d 309, 316 (D.D.C. 2016) (under D.C. law, "interference claims are routinely dismissed where the plaintiff fails to . . . identify any facts related to future contracts compromised by the alleged interferer").

For these reasons, Plaintiffs are not likely to succeed on the merits of their tort claims.

V. CONCLUSION

For the reasons set forth above, PBS respectfully requests that the Court grant its special motion to dismiss Counts III and IV of Plaintiffs' Complaint pursuant to the D.C. Anti-SLAPP Act and award PBS its attorney's fees and costs associated with the present motion. PBS will file a separate motion to recover its costs and attorney's fees, if applicable.

Dated: April 16, 2018

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Grace E. Speights
Grace E. Speights (DC Bar No. 392091)
W. Brad Nes (DC Bar No. 975502)
Amanda B. Robinson (DC Bar No. 1017689)
P. David Larson (DC Bar No. 1015203)

1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: +1.202.739.3000
Facsimile: +1.202.739.3001
E-mail: grace.speights@morganlewis.com
E-mail: brad.nes@morganlewis.com
E-mail: amanda.robinson@morganlewis.com
E-mail: david.larson@morganlewis.com

Attorneys for PBS