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

REPLY IN SUPPORT OF DEFENDANT PUBLIC BROADCASTING SERVICE'S OPPOSED SPECIAL MOTION TO DISMISS PLAINTIFFS' TORT CLAIMS UNDER THE D.C. ANTI-SLAPP ACT

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PBS's special motion to dismiss must be granted under the D.C. Anti-SLAPP Act (the "Act") because PBS has made a *prima facie* showing that Plaintiffs' tort claims arise from speech in connection with a "public figure" and an "issue of public interest," and Plaintiffs have not demonstrated that their tort claims are "likely to succeed on the merits." D.C. Code § 16-5502(b).

I. PBS HAS MADE A PRIMA FACIE CASE FOR ANTI-SLAPP PROTECTION

Plaintiffs' prior admissions and Mr. Smiley's own conduct establish that PBS's statements to the public that it had received multiple, credible allegations of workplace misconduct against Mr. Smiley, that it had hired an outside law firm to investigate, and that it had indefinitely suspended distribution of his show are all protected under the Act – PBS's statements related to a "public figure" about an "issue of public interest." PBS Mem. at 5-7.

Plaintiffs' Opposition is a stark about-face. Their Opposition contends "Mr. Smiley is, to some extent, a public figure." Opp'n at 11. Their Complaint, however, alleges that Mr. Smiley is unquestionably a ***major*** public figure – an "accomplished author of 22 books;" recipient of almost 20 honorary degrees; the star of national radio and televisions shows; and "one of America's most well-known and respected media personalities." Compl. ¶¶ 19-21. Plaintiffs' Opposition says that PBS's statements were "not related to any particular … issue of public interest." Opp'n. at 8. The Complaint, however, alleges that the PBS statements were connected to the "#MeToo movement:" that "in approximately October 2017, sexual harassment in the workplace became a major topic of conversation throughout the United States;" that PBS used the Smiley press statements to show its allegedly belated "commitment to women's rights," to address purported failures to "deal with sexual harassment" concerns, and to address sexual relationships in the workplace. Compl. ¶¶ 28-30. Moreover, Mr. Smiley went on multiple,

prominent national television shows discussing the PBS statements and PBS's decision to suspend distribution of *Tavis Smiley* as part of the #MeToo movement, further demonstrating that Mr. Smiley is a public figure and that this speech is connected to the #MeToo movement. *See* Nes Decl. ¶¶ 9-10.

Plaintiffs' about-face is an attempt to evade the binding effect of their admissions, which establish irrefutably that the PBS statements regarding its suspension of distribution of *Tavis Smiley* related to a "public figure" and were about matters of "public interest" under the Act. D.C. Code §§ 16-5501(3); 5502(b).

Plaintiffs now argue, though, that the PBS statements are exempted from the Act because they were "directed primarily toward protecting the speaker's commercial interests rather than … sharing information about a matter of public significance." Opp'n at 7-8. Plaintiffs have the burden to prove that this "commercial interests" exception applies. *See Doe No. 1 v. Burke*, 91 A.3d 1031, 1043-44 (D.C. 2014) (holding that speaker had no burden to disprove commercial motivation and party opposing Anti-SLAPP motion failed to prove commercial speech exception); *see also Simpson Strong-Tie Co., Inc. v. Gore*, 230 P.3d 1117, 1126 (Cal. 2010) (plaintiff has burden to establish "commercial speech" exemption under analogous California Anti-SLAPP statute). Plaintiffs fail to prove that exception here.

First, as Plaintiffs' pleading admissions prove, PBS's statements were not "directed primarily" toward any "commercial interest;" rather, as a public broadcasting service, PBS shared information it had received about Mr. Smiley, a "public figure," relating to a "matter of public significance." PBS Mem. at 2-7.

Second, PBS is a 501(c)(3), non-profit public broadcasting service without commercial or profit pressures. Its mission is to select and distribute a variety of noncommercial, educational

programming. PBS seeks to "empower[] individuals to achieve their potential and strengthen the social, democratic, and cultural health of the U.S." by offering, in part, "non-commercialized news programs that keep citizens informed on world events and cultures and programs that expose America to the worlds of music, theater, dance and art."[1] Likewise, PBS's member stations, the entities to whom PBS provides programming for broadcast and exhibition, are public television stations that are "non-commercial, educational licensees." *Id.* As a result, PBS – the speaker under the Act – has no commercial interest to protect.

Finally, PBS's statements and its decision to suspend distribution of *Tavis Smiley* did not propose any commercial transaction, solicit viewers or funding, or attempt to undercut any competition. To the contrary, the statements disclosed misconduct allegations about its own longtime, national late-night television host and that the show was *suspended*; such statements are not an advertisement of any sort.[2]

Courts have repeatedly rejected similar attempts by plaintiffs to evade dismissal under the narrow "commercial speech" exemption – even in circumstances that undeniably include some commercial or profit-making motives that simply do not exist for PBS. *See, e.g., Farah v. Esquire Magazine, Inc.*, 863 F. Supp. 2d 29, 38-39 (D.D.C. 2012) (dismissing tort claim under D.C. Anti-SLAPP Act and rejecting applicability of "commercial speech exception" to blog post related to "Birther Movement" by Esquire Magazine); *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 343-45 (2004) (holding that "any economic motivation that Planned Parenthood may have had in publishing the challenged Web site speech . . . would be insufficient by itself to turn the statements into commercial speech" beyond California anti-SLAPP protection); *Simpson v. Johnson & Johnson*, No. 2016 CA 001931 B (D.C. Super. Ct. Jan. 13,

[1] *See* Nes Supp. Decl. ¶ 2, Ex. H (attaching http://www.pbs.org/about/about-pbs/mission-statement/).
[2] *See* Nes Decl. Exs. F & G.

2017), Hrg. Tr. at 39:14-40:8 (Demeo, J.), Nes Supp. Decl. Ex. I (dismissing tort claims against nonprofit under D.C. Anti-SLAPP Act and rejecting applicability of "commercial interest" exception because the nonprofit did not have "a commercial interest to protect").[3]

Plaintiffs, on the other hand, fail to cite even a *single* case from *any* jurisdiction holding that the statements of a public broadcasting service such as PBS – or any nonprofit for that matter – were excluded from Anti-SLAPP protection under like circumstances. Plaintiffs have simply failed to meet their burden to demonstrate that the "commercial interest" exception applies here. As a result, the Act protects PBS's speech.

II. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR TORT CLAIMS

Because the Act applies, Plaintiffs must establish that their claims "are likely to succeed." DC. Code § 16-5502(b). However, Plaintiffs fail to show that they can establish the requisite actual malice. Plaintiffs argue only that PBS's speech is not protected by the First Amendment. Opp'n at 11-13. But, as PBS establishes above, that is incorrect. As a result, actual malice is required, and Plaintiffs do nothing at all to show that they can meet this standard.

In fact, as a matter of law, they cannot prove actual malice. There is no dispute that PBS's statements were true: PBS received misconduct allegations, an investigation was commenced by PBS's outside law firm, Mr. Smiley spoke with investigators as part of that process, and his show was suspended. Compl. ¶¶ 6, 8, 31, 33, 43. Moreover, as a matter of black-letter law, PBS's statement that Mr. Smiley's conduct was inconsistent with its "values

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[3] *See also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) ("If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment."); *Indus. Waste & Debris Box Serv., Inc. v. Murphy*, 4 Cal. App. 5th 1135, 1150–51 (2016) ("[w]hether speech has a commercial or promotional aspect is not dispositive of whether it addresses a matter of public interest."); *Mendoza v. ADP Screening & Selection Servs., Inc.*, 182 Cal. App. 4th 1644, 1653 (2010) (under analogous California anti-SLAPP law "speech does not lose its constitutional protection because it is 'undertaken for profit,' and the fact that a party seeks to make a profit from its speech 'is not constitutionally significant.'").

and standards" is non-actionable opinion. PBS Mem. at 8-10. In any event, Mr. Smiley has admitted that he had sexual relationships with subordinates and that the public could legitimately view such relationships as inappropriate, so the PBS statement was true and certainly not made "recklessly." Compl. ¶ 40; Nes Decl. ¶ 10; PBS Mem. at 8. Thus, as a matter of law, Plaintiffs cannot succeed on the merits of their tort claims.[4]

III. PLAINTIFFS ARE NOT ENTITLED TO TARGETED DISCOVERY

Because actual malice is absent as a matter of law, discovery would be of no avail. But even if Plaintiffs could make an argument that there is any disputed factual issue about actual malice, they have failed to specify any "targeted discovery" that would establish it. *See* D.C. Code 16-5502(c)(2) (allowing discovery only "[w]hen it appears ***likely*** that targeted discovery will enable the plaintiff to ***defeat*** the motion") (emphasis added). Rather, they have outlined in their Opposition broad, generalized "topics" of discovery that amount to nothing more than the type of fishing expedition the Act forbids. And Plaintiffs make no showing how any of those over-broad requests would likely support a finding of actual malice. Courts have denied similar discovery requests.[5]

IV. CONCLUSION

Because PBS has made a *prima facie* showing that Plaintiffs' tort claims arise from speech in connection with a "public figure" and an "issue of public interest" and Plaintiffs have not demonstrated that their tort claims are "likely to succeed on the merits," PBS's special motion to dismiss should be granted under the D.C. Anti-SLAPP Act.

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[4] Plaintiffs likewise fail to proffer admissible evidence of other elements of their tort claims. For example, they offer no evidence that PBS acted with the specific intent to interfere with their contracts or business expectancies.

[5] *See, e.g.*, *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249, 263 (D.D.C. 2013) (denying targeted discovery request under D.C. Anti-SLAPP Act); *Simpson*, No. 2016 CA 001931 B, Hrg. Tr. at 49:11-50:15 (Demeo, J.), Nes Supp. Decl. Ex. 1 (denying targeted discovery request under D.C. Anti-SLAPP Act); *Tutor-Saliba Corp v. Herrera*, 136 Cal. App. 4th 604, 617-19 (2006) (denying targeted discovery under California Anti-SLAPP Act; plaintiff "made no showing whatsoever how the discovery was likely to lead to admissible evidence" to oppose the motion).

Dated: May 11, 2018

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