IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

TS MEDIA, INC., *et al.* Plaintiffs v. PUBLIC BROADCASTING SERVICE, Defendant.	**Case No. 2018 CA 001247 B** **Judge Anthony C. Epstein** **Next Hearing:** **May 25, 2018** **Initial Conference**

PLAINTIFFS' OPPOSITION TO DEFENDANT PUBLIC BROADCASTING SERVICE'S SPECIAL MOTION TO DISMISS THE THIRD AND FOURTH CLAIMS FOR RELIEF

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1. INTRODUCTION

TS Media Inc. ("TSM") and Public Broadcasting Service ("PBS") were in a commercial relationship whereby TSM created the show *Tavis Smiley* for distribution by PBS – a private corporation. To mask its misconduct, PBS now tries to elevate this private, commercial action into a First Amendment dispute and wrongly asserts that two counts are subject to the District of Columbia's anti-SLAPP legislation. This attempt to create a First Amendment issue is without merit; the anti-SLAPP statute has no applicability; and this Court should deny the motion.

PBS claims that it received a misconduct complaint concerning TSM's owner Tavis Smiley. PBS then enlisted its law firm to conduct a sham inquiry so it could end its tense relationship with Mr. Smiley. PBS's assertions that Mr. Smiley engaged in harassment or any other misconduct are entirely meritless and a smokescreen to deflect from its own misconduct.

On December 13, 2017, PBS exercised a technical provision of its television production contract with TSM and announced it would stop distribution of *Tavis Smiley*. In order to protect its commercial interests, PBS chose to issue a press release trashing Mr. Smiley's reputation by stating that it found "multiple, credible allegations of conduct that is inconsistent with the values and standards of PBS."

PBS's conduct was intentionally aimed to cause – and, in fact, did cause – maximum damage. Now that PBS is being held to account for its misconduct, it is attempting to avoid liability for its interference with Plaintiffs' various agreements and commercial relationships by hiding behind the D.C.'s Anti-Strategic Lawsuits Against Public Participation Act ("D.C. Anti-SLAPP Act" or "the Act"). This is a meritless motion. First, the D.C. Anti-SLAPP Act expressly excluded the commercial speech at issue in this case. There can be no doubt that PBS was attempting to protect itself from a backlash from its viewers, contributors and sponsors –

which could harm its business interests – by making false claims against Mr. Smiley. Such commercial speech, "directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance" is expressly excluded from the D.C. Anti-SLAPP Act. D.C. Code §§ 16-5501(3), 16-5505. PBS's statements were not about any political debate or public issue – they were to protect PBS's commercial interests as a production company and network. Consequently, PBS cannot shield its commercially-motivated and tortious statements under the Act.

Furthermore, assuming *arguendo* PBS made a prima facie showing under the Act, Plaintiffs would still prevail. Under the Act's "likely to succeed" test, Plaintiffs can establish that they will prevail on the two claims at issue – intentional interference with contract and with business expectancy. Finally, if despite these issues the Court is inclined to grant this motion, then it should first allow Plaintiffs to conduct targeted discovery pursuant to the Act.

2. STATEMENT OF FACTS

a. Background

In 1991, Mr. Smiley began offering political commentary on radio shows in Los Angeles. Mr. Smiley developed his commentary and began his own radio show, *The Tavis Smiley Show*, which was distributed nationally, initially by National Public Radio and, more recently, by Public Radio International. Mr. Smiley later developed a national late-night television show, *Tavis Smiley*, on PBS. Declaration of Tavis Smiley ("Smiley"), ¶ 2.

Mr. Smiley has never shied away from controversy. For many years, Mr. Smiley was one of the few progressive voices that expressed both support for, and criticism of, former President Barack Obama. Many persons felt Mr. Smiley should not criticize the nation's first

African American president. But this criticism – including from within PBS – did not stop Mr. Smiley from taking principled positions which he believed in. *Id.* at ¶ 4.

b. PBS and Its Tense Relationship with TSM.

PBS is a private corporation funded by a variety of sources. While claiming a national mandate, PBS has been woefully inadequate in creating, supporting and distributing minority programming. Indeed, the majority of PBS's daily featured personalities have been white males, which does not reflect America. The lone exception has been Mr. Smiley. *Id.* at ¶¶ 4-5.

In 2002, TSM and PBS entered into a production and distribution agreement for *Tavis Smiley*. Under the agreement, PBS provided TSM with less than 20% of the funding needed to create and produce the show. TSM was required to raise the vast majority of the funding for the show itself. PBS steadfastly refused to increase its funding for the show. *Id.* at ¶¶ 5-6.

PBS requested that Mr. Smiley assist with its promotional and fund raising campaigns but Mr. Smiley refused to do so. While Mr. Smiley was never obligated to assist with PBS's promotional campaigns, his refusal was a source of tension with PBS executives. Moreover, PBS's officials did not cultivate a relationship with Mr. Smiley. Indeed, PBS barely ever spoke with the TSM team on anything other than technical issues concerning the show. *Id.* at ¶ 7.

PBS has also been hostile to the editorial content of *Tavis Smiley*. The show is focused on issues that matter to persons of color. PBS, however, complained when Mr. Smiley had controversial African American guests, and effectively tried to stop any such guests from appearing. By contrast, PBS never raised such issues about white guests who espoused equally controversial positions (if not even more controversial). *Id.* at ¶ 8.

Despite PBS's minimal support for the last fourteen years, *Tavis Smiley* was the only daily national talk program on PBS featuring an African American host. Each year in November, TSM and PBS entered into a new agreement for the following year. *Id.* at ¶ 9.

In November 2017, the parties entered into a new agreement for the fifteenth season of *Tavis Smiley* which was set to begin in January 2018. *Id.* at ¶ 10. Under the terms of the parties' Distribution Agreement, PBS was required to make its first payment within ten days. *Id.*, Exh. A (November 2017 Agreement, Exh. D-1). PBS has failed and refused to make the payment. *Id.* at ¶ 10. PBS now claims that it received a complaint about Mr. Smiley in November 2017. PBS's Answer and Counterclaims (hereafter "PBS Answer"), at p. 1.

In November 2017, PBS was embarrassed at its own failures to address its most popular white host's sexual misconduct that came out at another network.[1] PBS saw this allegation as a perfect pretext to end its hostile relationship with Mr. Smiley. Rather than hire an independent third-party, PBS instead asked its law firm to conduct an "investigation" designed to "find" a reason for PBS to terminate its tense relationship with TSM.

PBS preordained the result of its law firm's inquiry to not only terminate the relationship, but to effectively destroy Mr. Smiley. Despite the fact that monies under the November 2017 Agreement were due and owing, PBS did not make required payment. PBS claimed that there was an ongoing investigation – though that was not a proper basis to suspend payment under the November 2017 Agreement. Smiley, Exh. A. This refusal had catastrophic economic consequences for TSM. Smiley, ¶ 14; Declaration of Kenneth Browning ("Browning"), ¶¶ 3, 5.

On December 12, 2017, PBS informed TSM's counsel that PBS intended to exercise its option to not distribute the *Tavis Smiley* show under paragraph 9.1 of the November 2017

[1] *See e.g.*, Nes Decl., Exh. B (discussing PBS's secondary role to CBS in dealing with sexual harassment claims against popular host Charlie Rose).

Agreement. PBS claimed that the decision was made in response to the supposed investigation. Browning, ¶ 3. TSM's counsel questioned the validity of the investigation and PBS's failure to provide any due process – including PBS's complete failure to provide Mr. Smiley with the opportunity to respond to the allegations. *Id.* at ¶ 4.

TSM's counsel made clear to PBS the catastrophic damages PBS would cause by its rush to judgment. Only after realizing the public backlash that would be caused by its poor decision-making process did PBS request an interview of Mr. Smiley. Browning, ¶ 5.

On December 13, 2017, PBS's counsel met with Mr. Smiley. In violation of the accepted standards of workplace investigations, PBS refused to identify any of the specific allegations against Mr. Smiley or the identity of the accusers (even by position or some other anonymous process). Mr. Smiley steadfastly denied he engaged in sexual harassment, assault or any other misconduct. Browning, ¶ 6; Smiley, ¶¶ 11-13.

Within a few hours of the December 13, 2017 interview, PBS's counsel sent a letter indicating that PBS had decided to invoke Section 9.1 of the November 2017 agreement suspend distribution of *Tavis Smiley*. Within an hour, *Variety* published an article on the Internet claiming to have spoken with PBS. The article, which was labeled "Exclusive," stated that the publication was told by sources that the investigation found multiple credible allegations that Mr. Smiley had engaged in consensual relationships with subordinates. Nes Decl., Exh. G.[2]

To protect its brand in the television marketplace – particularly among the minority community – PBS issue a press release explaining the commercial reasons for its decision. Moving Papers, Nes Decl., ¶ 7 & Exh. F. PBS misled the public claiming to have hired an

[2] PBS has furthered its harassment campaign – and fishing for a valid basis for its action – by conducting audits into TSM's books and records. TSM has fully complied. Smiley Decl., ¶ 18.

outside law firm.[3] PBS also falsely stated that there were supposedly "multiple, credible allegations of conduct that is inconsistent with the values and standards of PBS." *Id.*

c. Plaintiffs' Damages.

Plaintiffs have entered into numerous agreements with third parties, including sponsorship agreements (and potential sponsorship agreements) designed to support Plaintiffs' mission of presenting programming on issues impacting persons of color, women and children, and the poor. For example, TSG entered into an agreement to produce a live performance tour featuring Tavis Smiley entitled "*Death of a King*." Similarly, Plaintiffs entered into an agreement Public Radio International to broadcast a weekly radio program. Each of these entities terminated its relationship with Plaintiffs because of PBS's unnecessary and unsubstantiated claims about Mr. Smiley. Smiley, ¶¶ 14-16.

3. ARGUMENT

a. The D.C. Anti-SLAPP Statute.

A "SLAPP" (strategic lawsuit against public participation) is an action "filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Council of the District of Columbia, Report of Committee on Public Safety and the Judiciary on Bill 18–893, at 1 (Nov. 18, 2010) (hereinafter "Report on Bill 18–893"). Thus, the goal of a SLAPP "is not to win the lawsuit but to punish the opponent and intimidate them into silence." *Id.* at 4 (citations omitted). Enacted in 2012, the D.C. Anti–SLAPP Act was designed to protect targets of such meritless lawsuits by creating "substantive rights with regard to a defendant's ability to fend off" a SLAPP. *Id.* at 1. The rights created by the Act comprise a special motion to dismiss a complaint, D.C. Code § 16–5502, and a special motion to quash

[3] *See* www.msk.com (biographies of three MSK Washington, D.C.-based attorneys (James Guerra, Joan Lanigan and Eric Schwartz) show prior work at or for PBS).

discovery. D.C. Code § 16–5503. "The D.C. Council passed the Act in response to what the Council described as an upsurge in 'lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view.'" *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1332 (D.C. Cir. 2015) (quoting Report on Bill 18–893, at 1).

Under the Act, the party filing a special motion to dismiss must first "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." D.C. Code § 16–5502(b). Once that showing is made, the burden shifts to the nonmoving party, who must "demonstrate[ ] that the claim is likely to succeed on the merits." *Id*. If the plaintiff cannot meet that burden, the motion to dismiss must be granted. *Id*.

b. The Statements that PBS Claims Are at Issue Are Matters of PBS's Commercial Interest – Not the Public Interest.

For PBS to prevail, it 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." D.C. Code § 16–5502(b). The D.C. Council carefully defined the phrase "issue of public interest" in the Act. Irrespective of the public nature of the statement or even its importance to issue of public discourse, the Council expressly stated that the phrase "issue of public interest" does not protect commercially-motivated and false statements:

> 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.***

D.C. Code § 16-5501(3) (emphasis added).

PBS's statements concerning Mr. Smiley were related solely to PBS's commercial interests. It is only in hindsight that PBS is now claiming that its statements had anything to do with some sort of national trend related to sexual harassment in the entertainment industry. PBS clearly contacted *Variety* and issued a press release solely to protect its commercial interest and

buttress its business decision to suspend Mr. Smiley's show. PBS was acting like any other television distributor trying to protect its brand (especially after PBS bungled the Charlie Rose matter) which is a purely commercial pursuit.[4]

Indeed, it is clear that PBS's press release was designed to protect its commercial interest in the television market as its letter to Mr. Smiley's counsel concerns provisions of the November 2017 agreement between TSM and PBS. It only even mentions an investigation elliptically, without saying what is at issue in the investigation. Browning, Exh. A. PBS's spokesperson's comments about Mr. Smiley were not related to any particular political debate or issue of public interest that the Act was designed to protect. Instead, PBS contacted the press for one purpose – to explain its decision to suspend *Tavis Smiley* (*i.e.*, to protect its commercial interests).

Therefore, the D.C. Anti-SLAPP statute is inapplicable to this action.

c. Plaintiffs Will Prevail On The Merits Of Their Claims.

If the moving party makes a "prima facie showing" that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest," the burden shifts to the party

[4] PBS's reliance on California authorities (Moving Papers, p. 7) is misplaced. In *McGarry v. University of San Diego*, 154 Cal. App. 4th 97 (2007), the university responded a news organization's request for a comment on its decision to fire its football coach. While the court examined whether the reasons for termination of a football coach could be a matter of public interest under the California anti-SLAPP statute, it did not analyze a situation where the speaker's commercial interest was the primary motivating factor under a provision such as D.C. Code § 16-5501(3). PBS affirmatively issued a press release in an attempt to gather ammunition for the next stage of its commercial dispute with TSM. *See* Nes Decl., Exh. F. Similarly, in *Maranatha Corrections, LLC v. Department of Corrections*, 158 Cal. App. 4th 1075, 1085-86 (2008), the Director of the California Department of Corrections made public statements about terminating a contract based on the contractor's improper withholding of monies. The director was a public official in the state's government speaking about the public's money. PBS, by contrast, is a private entity and affirmatively issued a press release and contacted the media to discuss the termination of a television show distribution contract – a purely commercial endeavor.

opposing the motion to "demonstrate[ ] that the claim is likely to succeed on the merits." D.C. Code § 16–5502 (b). Assuming, *arguendo*, PBS is able to show that it was advocating about an issue of public interest, this Court must still deny the motion because Plaintiffs are likely to prevail on the merits of their claims.

The court in *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1232-33 (D.C. 2016), held that "the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion." The court rejected an invitation to use case law interpreting "likelihood of success" for preliminary injunctions and stays, citing "the different purpose and impact of the court's ruling in the two contexts." *Id*. at 1234. There is evidence to support each of Plaintiffs' tort claims – intentional interference with contract and tortious interference with business expectancy.

i. Plaintiffs can establish a likelihood of success on the merits of their intentional interference with prospective contractual relations claim.

There are four basic elements to a claim for intentional interference with prospective contractual relation: "(1) existence of a valid contractual or other business relationship; (2) the defendant's knowledge of the relationship; (3) intentional interference with that relationship by the defendant; and (4) resulting damages." [5] *Onyeoziri v. Spivok*, 44 A.3d 279, 286 (D.C. 2012)

[5] Some defendants argue there is an implied qualification on the third element – namely that a plaintiff must demonstrate that a defendant's interference was wrongful or improper. While the propriety of a defendant's conduct may be a *defense* to an intentional interference claim, it is not an element of plaintiff's claim. Instead, the burden is on the defendant to establish that its conduct was "legally justified or privileged." *Onyeoziri*, 44 A.3d at 286. Plaintiff has no burden to show that the interference was, in fact, wrongful. *See NCRIC*, 957 A.2d at 901.

(quoting *NCRIC, Inc. v. Columbia Hosp. for Women Med. Ctr., Inc.*, 957 A.2d 890, 900 (D.C. 2008).[6]

As detailed in the Browning and Smiley Declarations, Plaintiffs establish:

- Plaintiffs had valid contracts and business relationships with, *inter alia*, Walmart, the Annie E. Casey Foundation and others (Smiley, ¶ 14);
- PBS was informed of these relationships by both Mr. Smiley and his counsel (Smiley, ¶ 14; Browning, ¶¶ 3-5);
- PBS intentionally interfered with these by issuing a press release for its own commercial purposes in which it stated not just that it decided to exercise a technical provision of its agreement to suspend distribution of *Tavis Smiley*, but instead wrongfully stating that there were "multiple, credible allegations of misconduct" and that the investigation had been conducted by an independent law firm – not its long-time counsel MSK (Nes Decl., Exh. F); and
- Plaintiffs suffered damages (Smiley, ¶ 17).

ii. Plaintiffs can establish a likelihood of success on the merits of their tortious interference with business expectancy.

The elements of a claim for interference with business expectancy are: (1) the existence of a valid contract/business expectancy; (2) knowledge on the part of the interferer; (3) intentional interference causing termination of the contract or relationship or causing a failure of

[6] Although the parties' agreements contain a Virginia choice of law, that doesn't necessarily apply to tort claims. Determining which state's law might apply for tort claims is a detailed analysis that beyond the scope of the motion. Under D.C.'s choice of law principles, courts employ a refined governmental interest analysis. They "evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be most advanced by having its law applied to the facts of the case under review." *Hercules & Co. v. Shama Rest. Corp.*, 566 A.2d 31, 41 (D.C. 1989). The D.C. interference with contract and business expectancy laws are essentially identical to that in most of the states. As PBS is a D.C. corporation, there is a strong governmental interest in applying the District's law.

performance by one of the parties; and (4) resultant damage. *McNamara v. Picken*, 866 F. Supp. 2d 10, 15 (D.D.C. 2012) (quoting *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (describing a claim for interference with business expectancy under D.C. law).[7]

As detailed in declarations:

- Plaintiffs had valid business expectancies with, *inter alia*, Hyundai, Mills Entertainment, Carnival Cruise Lines and others (Smiley, ¶ 14);
- PBS was informed of these relationships by both Mr. Smiley and his counsel (Smiley, ¶ 14; Browning, ¶¶ 3-5);
- PBS intentionally interfered with these business relationships by issuing a press release for its own commercial purposes wrongfully stating there were "multiple, credible allegations of misconduct" and that the investigation had been conducted by an independent law firm (Nes Decl., Exh. F); and
- Plaintiffs suffered damages (Smiley, ¶ 17).

iii. PBS's wrongful conduct is not protected by the First Amendment.

PBS argues that the First Amendment shields it from Plaintiffs' intentional interference claims. This argument is meritless and only applies when Plaintiffs are public figures and the speech is of public concern. *Phila. Newspapers, Inc. v. Hepps,* 475 U.S. 767, 775 (1986).

While Mr. Smiley is, to some extent, a public figure. The issue in PBS's press release did not invoke a matter of public concern. *See Ayala v. Washington*, 679 A.2d 1057, 1064 (D.C.

[7] Under D.C. law, "a plaintiff must allege business expectancies, not grounded in present contractual relationships, but which are commercially reasonable to expect." *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999) (internal quotation marks omitted). Thus, the resultant damage element of this tort includes "the pecuniary loss of the benefits of the ... prospective relation ... [and] consequential losses for which the interference is the legal cause." *Nat'l Passenger R.R. Corp. v. Veolia Transp. Servs.*, 592 F. Supp. 2d 86, 100 (D.D.C. 2009) (quoting Restatement (Second) of Torts § 774A (1979).

1996) ("Whether a statement addresses a matter of public concern is a question of law.") Protected speech concerns the ordering of government and society at large. *Id.* at 1065.

PBS statements are not related to the ordering of government and society at large. Instead, PBS makes a commercial justification for its decision to suspend the distribution of a popular television show. PBS is not the government or, in this context, a journalist and it was not exposing some issue within the government or the failings of a public official. Instead, PBS engaged in purely commercial speech designed to protect PBS's own business interests in light of the failures to deal with the Charlie Rose situation earlier and its need to justify ending its tense relationship with Plaintiffs.

PBS's reliance on cases such as *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016), is misplaced. In that case, a former special agent brought a claim against a former co-worker concerning the contents of a letter the co-worker wrote to the United States Department of Agriculture relate to the agent's official conduct of his job. This case has no bearing whatsoever to the facts and circumstances presented here. In that case (unlike here), the plaintiff was a public official and the communication concerned the public's business. *Id.* Even if the letter was sent expressly to harm the plaintiff, the question was whether plaintiff was, in fact, a "public official" and, if so, whether the defendant's letter related to that person's "official conduct." *Id.* By contrast, there are no public issues involved in PBS's unilateral and false trashing of Mr. Smiley. Consequently, First Amendment issues such as actual malice – upon which PBS heavily relies – are entirely irrelevant to PBS false and commercially-motivated statements about Mr. Smiley.[8]

[8] Indeed, the press release that PBS issued on December 13, 2017 (Nes Decl., Exh. F) is remarkably different from the letter PBS's counsel sent to Plaintiffs' counsel concerning its decision (Browning Decl., Exh. A). The December 13 letter makes no mention of misconduct, harassment or any violation of PBS "values and standards."

As the press release and communications with *Variety* were commercial speech to protect PBS's business interests, it is not subject to First Amendment protections.

d. Under D.C. Law, Plaintiffs Are Entitled to Targeted Discovery.

Should the Court find that the D.C. Anti-SLAPP statute applies in this case and that PBS has satisfied its burden under the Act, and that Plaintiffs have not demonstrated that they are likely to succeed on the merits of their third and fourth claims for relief, Plaintiffs request that they be allowed to conduct targeted discovery under Section 16-5502(c)(2) of the Act so that they may present further evidence. Section 16-5502(c)(2) provides: "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." D.C. Code § 16-5502(c)(2). Plaintiffs are stymied in presenting the third-party contracts because of confidentiality agreements. Smiley, ¶ 14. However, by serving subpoenas concerning those contracts and the reasons for the third parties' termination of those agreements, plaintiffs will be freed from the restrictions of those provisions by their own terms and able to present them to the Court.. Such discovery will not be burdensome on PBS at all as it will be directed to third parties.

Plaintiffs also seek information concerning the veracity of the statements PBS made in its December 13, 2017 press release. First, to the extent that PBS claims that the press release was not made to support its commercial interests, discovery concerning how and why the release was crafted is relevant to that determination. Second, Plaintiffs seek evidence concerning the factual assertions in the press release, including but not limited to: (a) the supposed allegations of misconduct, PBS received; (b) the conduct of the alleged, investigation and what PBS told the supposed "outside law firm" it wanted from the investigation; (c) the support for the assertion that the "inquiry uncovered multiple, credible allegations of conduct that is inconsistent with the values of standards of PBS"; and (d) what exactly are the "values and standards of PBS." [9]

[9] This targeted discovery will not be unduly burdensome for PBS. Indeed, each of these issues is also relevant to Plaintiff's first and second claims for relief for breach of contract as well as

Targeted discovery should be a prerequisite to this Court giving serious consideration to granting PBS's special motion to dismiss.

4. CONCLUSION

For all the foregoing reasons, Plaintiffs TS Media, Inc., Tavis Smiley Presents, Inc. and The Smiley Group, Inc. respectfully urge this Court to deny PBS's special motion to dismiss the third and fourth claims for relief.

Dated: April 30, 2018

Respectfully submitted,

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PBS's affirmative claims against TSM for breach of contract as set forth in PBS's Answer (these claims are not part of this motion and are discovery on those claims is not stayed per D.C. Code § 16-5502(c)(1)). Even the targeted third-party discovery is relevant to plaintiff's first and second claims as well as to Plaintiffs' defense of PBS affirmative claims as set forth in PBS's Answer.

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