IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

CLOSE IT! TITLE SERVICES, INC., et al., Plaintiffs v. MICHAEL S. NADEL, et al., Defendants.	Case No. 2018 CA 005391 B Judge William M. Jackson NEXT EVENT: Initial Conference Friday October 26, 2018 at 9:30 a.m.

REPLY POINTS AND AUTHORITIES
IN SUPPORT OF SPECIAL MOTION TO DISMISS AND MOTION TO DISMISS

Defendants Sean Smith and Erin Wrona ("Smith and Wrona") submit these points and authorities in support of their special motion to dismiss ("Anti-SLAPP motion") and motion to dismiss ("12(b)(6) motion") and in reply to the opposition briefs filed by Plaintiffs Close It! Title Services, Inc. d/b/a Federal Title & Escrow Company ("Federal Title") and Todd Ewing ("Ewing") ("Opp. Br.").[1]

REPLY POINTS AND AUTHORITIES

I. PLAINTIFFS' DEFAMATION LITIGATION IS A SLAPP

1. Federal Title's and Ewing's opposition is telling in that they remain silent about Federal Title's identification of the underlying incident "as a reminder *to the public* about the importance of cybercrime *awareness and education*." *See* Compl. Exh. A at 3 (emphasis added). Smith's and Wrona's special motion establishes a prima facia showing that the Plaintiffs' claims "arise[] from an act in furtherance of the right of advocacy on issues of public interest." *See* D.C.

[1] Plaintiffs consolidated most of their arguments in their Opposition to Special Motion to Dismiss. References here will be to that brief and its exhibits unless otherwise noted.

Code § 16-5502. That admission standing alone makes out prima facia grounds for a non-frivolous anti-SLAPP motion. But there also is more.

2. That Federal Title and Ewing did not name the reporter or the NPR radio station as defendants in their defamation action is of no import to applying the anti-SLAPP statute, which defines (and protects) an "[a]ct in furtherance of the right of advocacy on issues of public interest" to include any statement made "in connection with an issue under consideration or review by . . . a judicial body." *See* Opp. Br. at 4-6; D.C. Code § 16-5501(1)(A)(i). Smith's and Wrona's underlying case against Federal Title, Ewing, and others was filed in the federal district court at the time of the publication of the NPR story and now is pending before this Court. The anti-SLAPP statute also provides its protection to acts in any "public forum in connection with an issue of public interest," an envelope that encloses Smith's and Wrona's attorney's statements to the NPR reporter. D.C. Code § 16-5501(1)(A)(ii).

3. The anti-SLAPP statute does not generally exclude all matters of commercial interest to the parties as Plaintiffs would have the Court believe. *See* Opp. Br. at 4-6. Indeed, D.C. Code § 16-5501 defines an issue of public interest to include "economic or community well-being" or "a service in the marketplace," which Federal Title provides through its real estate escrow and closing services, and which a malicious hacker disrupted, under Federal Title's theory of the case, a problem that now pervades our society and affects its well-being. *See id.*; Compl. Exh. A at 1; Anti-SLAPP motion ¶ 5. The statute's exclusion instead is tailored to carve out "statements directed *primarily* toward protecting the speaker's commercial interests rather than commenting on or sharing information about a matter of public significance." D.C. Code § 16-5501(3) (emphasis added). The allegedly defamatory comments here fall within "commenting or sharing information about a matter of public significance" in that they relate directly to the

underlying case and claims that Smith and Wrona asserted in their complaint before the federal court and are not *primarily* directed to any commercial interests, even if the Court considers recovery of stolen property by judicial process a commercial activity. *But see* BLACK'S LAW DICTIONARY (Abr. 6th ed. 1991) (defining "commercial activity" to mean "any type of business or activity which is carried on for a profit."). Smith and Wrona expect no profit from their underlying case, only recovery for their stolen funds, which was a massive economic loss.

4. Federal Title's and Ewing's citation to a footnote in *Newmeyer v. Sidwell Friends School*, 128 A.3d 1023 (D.C. 2015), cannot be relied upon for the conclusion that Smith and Wrona have failed to make a prima facie showing of a matter of public concern. *See* Opp. Br. at 5-6. In *Newmeyer* the D.C. Court of Appeals affirmed the denial of an anti-SLAPP motion brought by a husband in a footnote both because it was untimely and because the defendant failed to make out "any issue of public interest." *Newmeyer*, 128 A.3d at 1043 n.17. The *Newmeyer* court found that "underlying [the] questions [on review] is a troubled marriage," a matter that is considered private even when it becomes the subject of litigation in a public forum. *See id.* at 1027. *Newmeyer* is unlike this case, in which even Federal Title recognized the subject was of public interest, at least until it had to oppose Smith's and Wrona's anti-SLAPP motion.

5. Smith's and Wrona's underlying lawsuit is a matter of great public significance and issue of public policy as it concerns, among other theories, the development of the law surrounding when a court will assign liability to a party if malicious hackers manage to penetrate their information systems and use them to deceive other, innocent parties. These issues are particularly acute when fiduciaries are involved because fiduciaries have elevated responsibilities

to their clients imposed by law. Ewing is a member of the bar of this Court[2] and Federal Title is an escrow agent and one of its "primary functions is to hold and disburse funds on behalf of [its] customers." *See* Opp. Br. Exh. A ¶ 4. An attorney naturally "owes a fiduciary duty to his client and must serve the client's interests with the utmost loyalty and devotion." *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001); *see also* D.C. Rules of Professional Conduct Rule 1.3 (Diligence) and Rule 1.6 (Confidentiality of Information; see particularly Comment 40: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients"). And, like an attorney, an escrow agent also assumes fiduciary duties to the parties it serves. *See Wagman v. Lee*, 457 A.2d 401, 404-05 (D.C. 1983) (describing that an escrow agent for parties to a land sale "must conduct [the] transaction with scrupulous honesty, *skill* and *diligence*.") (emphasis added, and internal citations and quotations omitted.) Federal Title's and Ewing's arguments to the contrary, that they did not *cause* the loss of the stolen funds by some affirmative act, *see* Opp. Br. at 8-9, are unavailing because their fiduciary responsibilities and any resulting liability may encompass acts of omission, including the possibility that their information systems were insufficiently protected, when considering their fiduciary responsibilities to their clients, including Smith and Wrona. These issues are matters of public interest protected by the anti-SLAPP statute because they now pervade modern life and public discussion. *See* Anti-SLAPP motion ¶ 5.

6. Finally, Federal Title's and Ewing's efforts to distinguish Smith's and Wrona's authorities supporting that their underlying case is a matter of public concern have been relegated

[2] *See* Complaint ¶ 8 and Partial Answer to Complaint ¶ 8, Case No. 2018 CA 004613 B, filed in this Court in the underlying action.

to a footnote. *See* Opp. Br. at 6 n.3. They have made no effort to distinguish why the subject matter of Smith's and Wrona's case and the WAMU story, involving malicious computer hacking is not on par with other important public issues of the present like sexual harassment and climate change. Even a casual review of any current U.S. newspaper likely will return news stories about all three of these prevalent subjects of public concern.

II. PLAINTIFFS' CLAIMS FAIL ON THE MERITS

7. The Anti-SLAPP Act's "likely to succeed" standard for overcoming a properly-filed special motion to dismiss requires that Federal Title and Ewing present evidence – not merely allegations – that must be legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in their favor. *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1220-21 (D.C. 2016). Federal Title and Ewing have failed to do this for each of their claims.

a. Plaintiffs' Cited Authorities Do Not Support That the Statements Are Defamatory

8. The merits of Federal Title's and Ewing's defamation claims are unsupported by their assertion that they did not affirmatively steal Smith's and Wrona's money. *See* Opp. Br. at 8-9. Ewing's declaration that he did not steal Smith's and Wrona's money or that Federal Title did not steal the money does not transform Smith's and Wrona's attorney's either/or and if/then statements into false assertions of fact that are defamatory. *See* Opp. Br. Exh. A ¶ 6. Legal causation is one of the main points of contention in the underlying case where Federal Title's assertion that it is a "technologically savvy title company" will be tested. *See* Compl. ¶ 9. Federal Title publicly stated that the theft stemmed from a breach of their information systems, implicating itself in the events that caused the loss of Smith's and Wrona's money. *See* Compl. Exh. A at 2.

9. Federal Title's and Ewing's citation to the article published by CNA, Opp. Br. at 10 n.8, does not counsel differently and supports Smith and Wrona. Smith and Wrona have shown that the law requires the Court to evaluate the attorney's comments within the entire context of the story. *See* Anti-SLAPP motion ¶¶ 6-9. Likewise, the CNA article highlights that the fair report privilege and substantial truth doctrine underlie other court decisions to dismiss defamation claims against attorneys where an attorney fairly reported the "gist" or a "rough and ready" summary of the case. *See* Kayla Riera-Gomez and Mark Sullivan, *Think Before Speaking: Defamation Pitfalls for the Unwary Lawyer* at 2.[3] The article also relates that "'cautionary terms' signal to the reader that he or she is reading allegations rather than conclusive statements of fact." *Id.* at 3. The statements that Federal Title and Ewing allege are defamatory contain such terms: "Federal Title *either* caused . . . *or* stole it" and "*if they weren't* responsible for helping steal the money, it certainly *seems* like they knew . . . that the money was gone." *See* Compl. ¶ 17 (emphasis added). The statements underlying Federal Title's and Ewing's case simply are not defamatory even under the authorities that they cite.

10. Federal Title's and Ewing's citation to *Armenian Assembly of Am., Inc., v. Cafesjian*, 597 F. Supp. 2d 128 (D.D.C. 2009), to show that the judicial proceedings privilege does not apply misses the point made in Smith's and Wrona's motion. *See* Opp. Br. at 11. In *Armenian Assembly*, the federal district court, reviewing a three-sentence argument in a motion to dismiss, concluded that the judicial proceedings privilege did not apply to press releases issued by a party about defamation claims when the parties disputed the element of publication.

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[3] Available at https://dnnd5wwcy.blob.core.windows.net/portals/26/OpenContent/Files/1852/Think_Before_Speaking_-_Defamation_Pitfalls_for_the_Unwary_Lawyer-1.pdf?sr=b&si=DNNFileManagerPolicy&sig=jUUYhXvBIkzVVQnfBtoZiaRJPdbdaiARkceyfKcTqXA%3D.

Id. at 139-40. On the other hand, Smith's and Wrona's motion points out that the federal complaint linked to WAMU's website story[4] provides additional context to the story in which contains the allegedly defamatory statements. The federal complaint, which enjoys the privilege, contains additional detail and echoes the allegations quoted from Smith's and Wrona's attorney by the reporter. *See* 12(b)(6) motion ¶¶ 5-6. It would be incoherent to find the attorney's quoted statements defamatory, while any reader also can read the same or similar allegations in the linked complaint, which are protected by the privilege.

b. The Alleged Defamatory Statements Do Not Concern Ewing

11. Ewing's new attempt to insert himself into the claims is similarly unavailing. *See* Opp. Br. at 10-11. Ewing asserts that he "personally built virtually all of the company's referral network of real estate agents and lenders, who are all aware that Ewing controls the company.[5]" Opp. Br. at 10-11; Exh. A ¶ 3. Ewing's cited authority does not support that the alleged defamatory statements could reasonably be interpreted to be against him personally. In *Croixland Properties Ltd. P'Ship v. Corcoran*, 174 F.3d 213 (D.C. Cir. 1999), Ewing's authority, parties made specific references to "the owners" of a dog racing track having connections to organized crime. *See id.* at 215-16. On appeal, the *Croixland* court held that the specific

[4] Federal Title's Complaint alleges that the attorney's statements also were published over the air on the radio and were excerpted and linked through McDermott Will & Emery LLP's website. See Compl. ¶ 17 and Exh. B. For purposes of the pending motions, the Court should presume that these facts are true, however, it does not change the legal analysis of the statements. The Complaint alleges no other facts about an on-air broadcast, nor does Ewing's declaration.

[5] Ewing's declaration is at odds with Close It! Title Service, Inc.'s corporate records with the District of Columbia Department of Consumer and Regulatory Affairs that list David A. Conforti and Joseph Gentile as the governors of the corporation and do not list Ewing at all. *See* Close It! Title Service, Inc., Initial File Number: C00004817524 in database available at corponline.dcra.dc.gov; *In re Estate of Barfield*, 736 A.2d 991, 995 n.7 (D.C. 1999) ("[T]he trial court is entitled to take judicial notice of matters of public record").

references to "the owners" were enough to support defamation claims by the owners where "the statements at issue lead the listener to conclude that the speaker is referring to the plaintiff *by description*, even if the plaintiff is never named or is misnamed." *Id.* at 216 (emphasis added). No such specific references to Ewing or an unnamed owner are here, where the alleged defamatory statements refer only to Federal Title, a fictitious trade name of a District of Columbia corporation. *See* Compl. ¶¶ 2, 17. Federal Title's other authorities agree with and rely on the RESTATEMENT (SECOND) OF TORTS § 564 cmt. b, which explains that a reference implicating an otherwise unnamed party requires "a description or reference to [the Plaintiff] that those who hear or read reasonably understand the plaintiff must be the person intended." None of the alleged defamatory statements allude to the existence of Ewing or any other individual and so they do not concern him.

c. Plaintiffs' Offer No Support for Their Improperly-Pleaded False Light Claim

12. Federal Title's arguments about its improperly-pleaded false light claim offer no support to show why the D.C. Court of Appeals would stray from the law as it is recited in the RESTATEMENT (SECOND) OF TORTS § 652I (1977) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."). The D.C. Court of Appeals has looked with approval to the Restatement for other aspects of the law regarding a false light claim. *See, e.g.*, *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985) ("This court has relied on the Restatement's formulation of the law applicable to 'invasion of privacy' in determining the appropriate contours of a cause of action for invasion of that right."). Federal Title oddly cites the federal district court's decision in *Zimmerman v. Al Jazeera Am.*, 246 F. Supp. 3d 257, 275 (D.D.C. 2017) in support of its argument, but a paragraph later distances its argument from the "non-

binding U.S. District Court" opinion in *Southern Air Transp., Inc. v. Am. Broad Companies, Inc.*, 670 F. Supp. 38 (D.D.C. 1987) that Smith and Wrona cite for the fact that the District of Columbia likely would follow the Restatement with respect to Section 652I. *See* Opp. Br. at 13; 12(b)(6) motion ¶ 12. Federal Title cannot make out a false light claim because it is a corporation and not an individual. And, as discussed in Smith's and Wrona's Motion to Dismiss and Section b, above, Ewing has failed to make out a false light claim for lack of a false statement that concerns him. Even assuming the statements concern him (which they do not), Ewing also cannot make out a false light claim because the attorney's statements are not false statements of fact as Smith and Wrona have discussed with respect to Federal Title's defamation claim. *See* 12(b)(6) motion ¶¶ 4-11.

d. Plaintiffs' Cited Authority Does Not Support Their Tortious Interference Claim

13. Federal Title and Ewing cite *Onyeoziri v. Spivok*, 44 A.3d 279 (D.C. 2012) for the elements of a tortious interference claim. *See* Opp. Br. at 14. *Onyeoziri* is an appeal from an order dismissing a tortious interference claim on summary judgment, but it supports that Federal Title must identify a specific business relationship and the defendant's knowledge of the relationship to be well-pleaded. Indeed, the *Onyeoziri* court again looked to the Restatement with approval when considering defenses asserted against claims of tortious interference, including when a defendant may impose a defense of asserting a legally-protected interest to defeat a tortious interference claim. *See id.* at 288. *See also* RESTATEMENT (SECOND) OF TORTS § 766 (1979) ("To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract.").

14. Federal Title and Ewing again looks to Ewing's declaration for facts they failed to plead in the Complaint. *See* Opp. Br. at 14-15; Exh. A. Ewing's declaration recites that Federal Title lost business as a result of publication of the WAMU story with the allegedly defamatory statements, but Federal Title and Ewing say nothing about how Smith and Wrona knew about these relationships and they never will be able to show that tortious interference damages (if any) resulted from the attorney's quoted statements in the story or the mere fact that WAMU reported that a lawsuit had been filed against them alleging a panoply of claims and theories of recovery would have received the same recoiling reaction from real estate agents and lenders who had relationships with Federal Title and Ewing.

e. Smith and Wrona Cannot Be Held Liable for Their Attorney's Allegedly Tortious Conduct

15. Federal Title and Ewing claim that they can establish that Smith and Wrona ratified their attorney's conduct to assign vicarious liability. *See* Opp. Br. at 15. They cite that they put defendants on notice of their defamation claims and demanded retraction and that defendants refused to do so. *Id.* (Ewing's declaration says that the defendants "did not retract the statements." Exh. A ¶ 11.) They also implausibly claim that the use of the phrase "our money" by their attorney somehow shows that Smith and Wrona authorized his commentary. Such turns of phrase are frequently adopted by attorneys advocating for their clients even though it is plain the attorney did not share ownership of the stolen money. Again, Federal Title and Ewing only point to the mere existence of the attorney-client relationship as the basis for their theory of vicarious liability. Neither of these assertions is evidence of direction, control, authorization, or ratification by Smith and Wrona. Further, the statements made by their attorney to the WAMU reporter were not a type of transaction that required later ratification by Smith and Wrona to adopt it. *See* RESTATEMENT (SECOND) OF AGENCY § 82 (1958). The law governing the

professional conduct of attorneys and relegating non-lawyers to mere "layman" status shields Smith and Wrona from any liability attached to their attorney's statements. *See* 12(b)(6) motion ¶¶ 19-21. Federal Title's and Ewing's vicariously liability theory fails under the established law of agency.

III. PLAINTIFFS' REQUEST FOR DISCOVERY SHOULD BE DENIED

16. Federal Title and Ewing request that the Court authorize discovery of Smith, Wrona, and their attorney to defeat the anti-SLAPP motion. *See* Opp. Br. at 15-16. This request should be denied. The anti-SLAPP statute permits "targeted discovery" only where it "will enable the plaintiff to defeat the motion." D.C. Code § 16-5502(c)(2). Discovery here will not permit the Federal Title and Ewing to defeat the motion. Even if Federal Title and Ewing rest their ratification theory upon the letter that they sent to Smith's and Wrona's attorney's law firm, and inaction by Smith and Wrona in response, Federal Title and Ewing already possess that evidence, which fails to show any ratification or even why ratification would be necessary. And the request for discovery on the claim of vicariously liability necessarily seeks the communications between Smith and Wrona and their attorney about the underlying lawsuit, which are protected from disclosure by the attorney-client privilege. The Court should not sanction Federal Title's and Ewing's effort to pierce the attorney-client privilege under the guise of their claim of authorization or ratification, especially where Smith and Wrona have not yet pleaded any defenses that would put their privileged communications at issue as a shield from liability.

IV. PLAINTIFFS' REQUEST FOR FEES AND COSTS SHOULD BE DENIED IN ANY EVENT

17. Federal Title and Ewing label Smith's and Wrona's anti-SLAPP motion "frivolous" as they must to seek fees and costs for opposing the motion from a statute that

imposes an asymmetrical fee and cost award structure on the moving and responding parties. *See* Opp. Br. at 1, 4,6; D.C. Code § 16-5504(b) (the court "may" award fees to the *responding party* "*only if*" the court "finds that a motion brought under [the statute] is frivolous or is solely intended to cause unnecessary delay.") (emphasis added). As detailed in Section I, above, Smith's and Wrona's motion has made out a well-grounded, prima facie showing that Federal Title's and Ewing's defamation claims arise from an act in furtherance of the right of advocacy on issues of public interest and is not frivolous. Federal Title's and Ewing's request for an award of attorney's fees and costs should be denied in any event.

V. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED WITH PREJUDICE

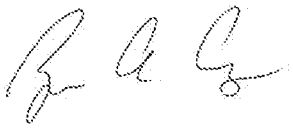
18. Should the Court grant Smith's and Wrona's anti-SLAPP motion, the District of Columbia's anti-SLAPP statute requires dismissal of the complaint with prejudice. *See* D.C. Code § 16-5502(d). Even if Smith's and Wrona's alternative Motion to Dismiss under Rule 12(b)(6) is granted, it is within the discretion of the Court to deny a motion to amend. *See Howard Univ. v. Good Food Servs., Inc.*, 608 A.2d 116, 120 (D.C. 1992). The Court should exercise its discretion to deny Federal Title's and Ewing's request for leave because the statements by Smith's and Wrona's attorney simply are not defamatory and cannot provide a foundation for their tort claims.

CONCLUSION

For the reasons stated in Smith's and Wrona's anti-SLAPP motion and 12(b)(6) motion and in the reply points and authorities recited here, the Court should dismiss Federal Title's and Ewing's complaint with prejudice and award Smith and Wrona their reasonable attorney's fees and costs for prosecuting the anti-SLAPP motion.

September 14, 2018

Respectfully submitted,



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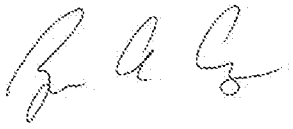
CERTIFICATE OF SERVICE

Service of the foregoing reply points and authorities will be made upon filing by the Court's electronic filing system that will serve copies upon all parties through their counsel of record by electronic transmission.



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