IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JAP HOME SOLUTIONS, INC.; GUSTAVO FRECH BARRIERO; and JESUS ANTON PEREZ,

Plaintiffs,

v.

LOFFT CONSTRUCTION, INC.; ALEJANDRO R. SANGUINETTI; JOHN E. DRURY; and JOSÉ GALLEGO ESPINA,

Defendants.

Case No. 2017-CA-003390 B
Judge: Hon. Michael L. Rankin
Next Event: Status Conference on November 17, 2017 at 10:30 a.m.

REPLY IN SUPPORT OF DEFENDANT JOSÉ GALLEGO ESPINA'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT OR, IN THE ALTERNATIVE, MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

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Defendant José Gallego Espina ("Mr. Gallego"), by counsel, respectfully submits this Reply in Support of his Special Motion to Dismiss Pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code sections 16-5501, *et seq.* (the "D.C. Anti-SLAPP Act" or the "Act"), or, in the alternative, Motion to Dismiss Pursuant to Rule 12(b)(6).

INTRODUCTION

Plaintiffs' Opposition ("Pltfs.' Opp.") underscores precisely why their claims of "defamation/defamation per se" and "conspiracy to defame" against Mr. Gallego should be dismissed with prejudice pursuant to the D.C. Anti-SLAPP Act.

The defamation claims in Plaintiffs' Complaint focus on three aspects of Mr. Gallego's reporting: (1) the pending civil lawsuit filed by Lofft Construction, Inc. ("Lofft") against JAP Home Solutions, Inc. ("JAP") and Gustavo Frech Barriero ("Frech") in D.C. Superior Court—the Lofft Lawsuit—in which Lofft has alleged a claim for "misappropriation and conspiracy to acquire possible business" ("malversación y conspiración para apropiarse de posibles negocios"), Gallego Decl. ¶¶ 41–42, Exs. H–I; (2) that Frech "appeared" as a "director" of JAP in publicly-available documents, Compl. ¶ 55, Gallego Decl. ¶ 20, Exs. B–C; and (3) that Jesús Antón ("Antón"), JAP's owner, is named in the Second Amended Complaint filed in the Lofft Lawsuit, Compl. ¶¶ 70–73, Gallego Decl. ¶ 44, Exs. H–I (collectively, the "Challenged Statements"). These statements are found in the first and last of three articles Mr. Gallego wrote for *El Español*, in which he was reporting on the public controversy surrounding jobs and other benefits that family members of prominent Spanish government officials receive in Washington, D.C. When the certified English translations of Mr. Gallego's first and third articles are read, in their entirety, and the statements that Plaintiffs challenge viewed in context, it is clear that Plaintiffs' defamation claims fail as a matter of law. *See* Gallego Decl., Exs. C and I.

Plaintiffs—apparently realizing that the meritless claims alleged in their Complaint are not actionable—use their Opposition to inundate the Court with blatant mischaracterizations of Mr. Gallego's reporting, misstatements of fact, and arguments that have no bearing, whatsoever, on the allegations of their Complaint—including brand new claims based on statements in *other* articles that are not even mentioned in the Complaint and are not properly before the Court. Plaintiffs attach lengthy, self-serving "affidavits" full of inadmissible, irrelevant, and at times barely coherent arguments in support of their conclusory accusations against Mr. Gallego—"affidavits" that are not signed under penalty of perjury and do not even meet basic standards of admissibility under D.C. law. Plaintiffs' desperate strategy to muddy the waters in order to fend off dismissal, however, is ineffective to say the least; Plaintiffs only highlight the frivolous nature of their claims and underscore why the Anti-SLAPP motion should be granted.

At its core, Plaintiffs' claims against Mr. Gallego are a classic SLAPP—Plaintiffs did not like Mr. Gallego's reporting, so they sued him. Indeed, Plaintiffs' Opposition and the inadmissible "affidavits" they have submitted in support of it—documents replete with baseless, *ad hominem* attacks on Mr. Gallego's character, including charges of "lies", accusations of "amoral" and "despicable" conduct, and even threatening allusions to potential "criminal" prosecution of Mr. Gallego for his reporting[1]—only confirm that this lawsuit is nothing more

[1] *See* Affidavit of Jesús Antón ("Antón Affidavit"), ¶ 17(x) (stating that Mr. Gallego "lies outright"); *id.* ¶ 25 (stating that "Mr. Gallego lied, without excuse"); *id.*, ¶ 46 (stating that Mr. Gallego "lied in exposing the facts and collecting the data"); ¶¶ 38, 49 (calling Mr. Gallego "amoral," "criminal," and "despicable"); ¶ 49 (stating that the way "in which Mr. Gallego still exposes the dates on which this error was finally corrected, is simply an act of professional, personal baseness and, if the penal courts so determine"). Mr. Gallego concurrently moves to strike this "affidavit," which is unsigned, undated, and was not made under penalty of perjury. *See* Defendant José Gallego Espina's Objections to and Motion to Strike the Affidavit of Jesús Antón in its Entirety or, in the Alternative, to Strike Portions Thereof ("Def.'s Mot. to Strike & Objections to Antón Affidavit"). *See also*, *e.g.*, Affidavit of Gustavo Frech ("Frech Affidavit"),

than a pretext to bully and retaliate against him for doing his job as a journalist, and to bolster Plaintiffs' litigation position in the Lofft Lawsuit. The D.C. Anti-SLAPP statute was designed to stop abusive lawsuits like this one, and to prevent journalists like Mr. Gallego, who fairly and accurately reported on issues of significant public concern, from being subjected to drawn out civil litigation. Plaintiffs have not only failed to show that their claims against Mr. Gallego are likely to succeed on the merits, their Complaint fails to even state a cognizable defamation claim against him. Plaintiffs' claims should be dismissed with prejudice.[2]

ARGUMENT

I. THE D.C. ANTI-SLAPP ACT APPLIES TO PLAINTIFFS' CLAIMS.

As detailed in Mr. Gallego's opening brief, the D.C. Anti-SLAPP Act grants defendants "substantive rights to expeditiously and economically dispense of litigation aimed to prevent

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¶ 15(a)(i) ("Gallego lied about everything for his personal gain."); *id*., ¶ 15(c)(xi) (claiming that Mr. Gallego "lied about how contracts are awarded" and "lied about how quantities and contracts are created"). Mr. Gallego also concurrently moves to strike the Frech Affidavit, which is also not signed under penalty of perjury. *See* Defendant José Gallego Espina's Objections to and Motion to Strike the Affidavit of Gustavo Frech in its Entirety or, in the Alternative, to Strike Portions Thereof. ("Def.'s Mot. to Strike & Objections to Frech Affidavit").

[2] Notwithstanding the fact that Defendants consented to a two-week extension to October 12 for Plaintiffs to file their Opposition, *see* Plaintiffs' Unopposed Motion for an Extension of Time to File a Responsive Pleading, Plaintiffs filed their Opposition late. In requesting leave after the deadline had passed to file their Opposition out of time, Plaintiffs inaccurately styled their motion as a "consent" motion. Mr. Gallego did not consent to that motion. *Compare* Plaintiffs' Consent Motion and Points of Authorities for Leave to File Out of Time, Oct. 13, 2017 *with* Plaintiffs' Revised Motion and Points of Authorities for Leave to File Out of Time, Oct. 16, 2017. Plaintiffs' "consent" motion follows an unfortunate pattern of inaccurate and misleading statements made by Plaintiffs to the Court. *See, e.g.,* Defendant Gallego's Motion to Strike (moving to strike Paragraph 76 of Plaintiffs' Complaint, which falsely alleges that Mr. Gallego used the phrase "delito de malversación" in his reporting); *compare* Frech Affidavit, ¶ 15(a)(iii) ("I am not the owner, partner, representative or director of JAP Home Solutions.") *with* Pltfs.' Opp., at p. 35, Ex. 1 (Affidavit of Gustavo Frech dated February 5, 2016), ¶ 2 ("I am currently a Partner at JAP Home Solutions ("JAP") located in Washington DC.").

their engaging in constitutionally protected actions on matters of public interest." Committee Rpt. On Bill 18-893 (Nov. 18, 2010) at 4.

Plaintiffs concede that to fall within the scope of the Act Mr. Gallego must only make a "prima facie showing" that Plaintiffs' claims against him "arise from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b); *see also* Pltfs.' Opp. at 11. As the parties agree, the D.C. Anti-SLAPP Act defines an "[a]ct in furtherance of the right of advocacy of public interest" as (1) "[a]ny written or oral statement" made "[i]n connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," *id.* § 16-5501(1)(A)(i); (2) "[a]ny written or oral statement" made "[i]n a place open to the public or a public forum in connection with an issue of public interest," *id.* § 16-5501(1)(A)(ii); or (3) "[a]ny other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest." *Id.* § 16-5501(1)(B); *see also* Pltfs.' Opp. at 11. The term "public interest" is defined broadly as any "issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place." *Id.* § 16-5501(3).[3] Once Defendant has made this prima facie showing, his special motion to dismiss must be granted, with prejudice, unless Plaintiffs can demonstrate their "claim is likely to succeed on the merits." *Id.* § 16-5501.

Plaintiffs contend that Mr. Gallego's reporting does not qualify for Anti-SLAPP Act

[3] In discussing the standards applied under the D.C. Anti-SLAPP Act, Plaintiffs' argue that "[t]he 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." § 16-5501 (emphasis added). Nowhere, however, do they allege that Mr. Gallego's reporting (as the speaker) was "primarily directed toward [Mr. Gallego's] commercial interests"—nor could they.

protection because "there is no public interest involved in the [Lofft Lawsuit] Gallego falsely reported on because the civil complaint was expressly directed toward protecting Lofft's *private, economic interests*." Pltfs.' Opp. at 13 (emphasis in original). This argument is frivolous. As is clear from the articles at issue, Mr. Gallego (accurately) reported allegations made in the Lofft Lawsuit within the larger context of a story about jobs and other benefits that family members of Spanish government officials receive in Washington, D.C.—an issue of clear "public interest."

Contrary to Plaintiffs' stunning misrepresentation to the contrary,[4] the operative Second Amended Complaint filed in the Lofft Lawsuit *specifically alleges* that Plaintiff Frech and JAP (including JAP's owner, Plaintiff Antón) benefitted directly from Frech's wife's connections to the Spanish Embassy; it alleges that "[t]hrough his wife's contacts at the Embassy, [Frech] improperly manipulated the timeline of the contract, past the time of his employment at Lofft to deprive Lofft of the business." *See* Gallego Decl. Ex. F, ¶ 18(c). That Lofft made that allegation in the context of its pending civil lawsuit against JAP is precisely what Mr. Gallego reported,[5] and that information is relevant to the larger, public controversy surrounding jobs and benefits afforded to the relatives of prominent Spanish government officials in the U.S. *See* Gallego Decl. Ex. I at 3. One need only read Mr. Gallego's articles to reject the absurd notion that his reporting concerned nothing more than a private "employment/contract dispute." Pltfs.' Opp. at

[4] *See* Pltfs.' Opp. at 12 (contending that the Second Amended Complaint filed by Lofft "does not contain a single allegation, or inference, of nepotism, contract rigging, bid rigging, or contract assignments related to the Embassy").

[5] *See* Gallego Decl. Ex. I at 3 (reporting that "Lofft claims that Frech had been working with them since November of 2013 until the 5th of February of 2015 when he went to work for [JAP]. Amongst the charges placed against him [in the Lofft Lawsuit] there is one for misappropriation and conspiracy to acquire possible business. This is where the Embassy appears. According to Lofft between November of 2014 and January of 2015 while Frech was working for them he prepared an offer for the Embassy to work in the Chancellery without telling them. He later used his wife's contacts in the Embassy to delay the hiring time frames until his work relationship with Lofft had ended on the 5th of February 2015. Frech denies everything.")

12. The California state court cases that Plaintiff cites—none of which involve a journalist reporting on matters of public concern—are inapposite and not binding on this Court.[6] *Asia Econ. Inst. v. Xcentric Ventures, LLC*, 2010 WL 11462989 (C.D. Cal. Apr. 20, 2010) (slip copy) and related cases are also entirely inapplicable; despite Plaintiffs' repeated attempts to rewrite Mr. Gallego's articles to fit their claims, Mr. Gallego has not "accuse[d] plaintiff[s] of criminal conduct." *Id.*

Finally, Plaintiffs' argument in a footnote that the D.C. Anti-SLAPP Act should not apply because "the goal of the litigation is to win the lawsuit—not to punish Gallego and intimidate him into silence" fundamentally misunderstands the law. Pltfs.' Opp. at 20, fn. 5. Plaintiffs' motive is irrelevant. The D.C. Anti-SLAPP Act does not include an intent requirement, and other jurisdictions with Anti-SLAPP statutes have refused to impose an intent requirement. *See, e.g.*, *Equilon Enterprises LLP v. Consumer Cause Inc.*, 52 P.3d 685, 690 (Cal. 2002). Mr. Gallego need only demonstrate that Plaintiffs' claims arise from his expressive conduct

[6] Indeed, the cases cited by Plaintiff could not be farther afield from the issues before this Court. None concern a journalist's reporting on ongoing litigation. In *Rivero v. American Federation of State, County and Municipal Employees*, 105 Cal.App.4th 913 (2003), the court of appeal determined that a supervisor could proceed with a defamation claim based on a union's distribution of information about him to the janitors he supervised; the court found that plaintiff's claims "concerned the supervision of a staff of eight custodians" and, as such, did not concern a "topic of widespread, public interest." *Id.* at 924. Plaintiffs misstate the holding of *Olaes v. Nationwide Mutual Insurance Co.*, 135 Cal.App.4th 1501 (2006), which did not analyze whether the plaintiff was or was not in the public eye; instead, a complaint was allowed to proceed where the court of appeal determined that an employer's statements made during the course of a sexual harassment investigation were not made during an "official proceeding authorized by law" for purposes of the California Anti-SLAPP statute, and that "an investigation by a private employer concerning a small group of people does not rise to a public interest under [California's law]." *Dyer v. Childress*, 147 Cal.App.4th 1273 (2007) is likewise off base; that case concerned a false light right of publicity and defamation action brought by an individual who had a movie character named after him; the court of appeal found that the "representation of [plaintiff] as a rebellious slacker is not a matter of public interest[.]" Finally, the court in *Du Charme v. Int'l Brotherhood of Electrical Workers, Local 45*, 110 (2003) determined California's Anti-SLAPP statute did not apply to a statement about plaintiff's termination made on defendant's website.

regarding an "issue of public interest," which he has done.

Defendant's opening brief demonstrated that, for multiple reasons, Mr. Gallego's reporting is an "act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(a). Plaintiffs' Opposition does not—and could not—demonstrate otherwise.

II. PLAINTIFFS' FAIL TO MEET THEIR BURDEN TO SHOW THAT THEIR CLAIMS ARE "LIKELY TO SUCCEED ON THE MERITS."

Mr. Gallego has carried his burden of establishing that Plaintiffs' claims against him "arise from an act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b). Accordingly, the Court *must* grant his special motion to dismiss unless Plaintiffs meet their burden of demonstrating that their claims are *likely* to succeed on the merits. D.C. Code § 16-5502(b) (emphasis added). *See Boley v. Atlantic Monthly Grp.*, 950 F. Supp. 2d 249, 251 (D.D.C. 2013) ("If a plaintiff presents an insufficient legal basis for the claims or when no evidence of sufficient substantiality exists to support a judgment for the plaintiff, the anti-SLAPP motion should be granted." (internal quotations and citations omitted)). Put simply, the D.C. Ant-SLAPP Act "places the initial burden on the claimant to present legally sufficient evidence substantiating the merits" of its claim. *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1237 (D.C. 2016). Plaintiffs, therefore, must show that the factfinder, "when properly instructed on the law, including any applicable heightened fault and proof requirement, could reasonably find for the claimant on the evidence presented." *Id.* at 1236. Because Plaintiffs have failed to meet that burden, the defamation claims against Mr. Gallego should be dismissed with prejudice.

A. The Challenged Statements must be considered in the context of the entire publication, as understood by an ordinary reader.

Plaintiffs repeatedly argue that the Challenged Statements must be read in context. Defendant agrees. What is remarkable about Plaintiffs' Opposition, however, is its insincerity—

after repeatedly acknowledging that context matters, Plaintiffs ignore it. They cherry-pick snippets of Mr. Gallego's reporting, taking statements out of context and mischaracterizing them for the Court, and then argue that these statements are defamatory. Yet it is axiomatic that "a statement … may not be isolated and then pronounced defamatory, or deemed capable of defamatory meaning. Rather, any single statement or statements must be examined within the context of the entire" publication. *Heard v. Johnson*, 810 A.2d 871, 886 (D.C. 2002); *see also White v. Fraternal Order of Police*, 909 F.2d 512, 526 (D.C. Cir. 1990) (court must "examine the entire context" in analyzing defamation claim).

Plaintiffs' purported "contextual reading" of Mr. Gallego's reporting, Pltfs.' Opp. at 20–24, consists of a confusing array of inaccurate quotations lifted from Mr. Gallego's articles and devoid of proper context, intermingled with commentary from Plaintiffs. This makes their arguments difficult to follow, at best, and incoherent, at worst. For that reason, Mr. Gallego urges the Court to read the certified translations of his articles that contain the Challenged Statements in their entirety, as an average reader of those articles would. *See* Gallego Decl., Exs. C and I; *see also Farah v. Esquire Magazine*, 736 F.3d 528, 535 (D.C. Cir. 2013) ("Consistent with the 'actual facts' requirement, "the 'statement' that the plaintiff must prove false … is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said.'" (citations omitted)). Despite Plaintiffs' attempts to insert defamatory meaning into Mr. Gallego's reporting, "[n]othing in law or common sense supports saddling" him "with civil liability for a defamatory implication nowhere to be found in [his] published" articles. *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987) (en banc).

B. The Challenged Statements pled in Plaintiffs' Complaint are not actionable because they are substantially true and not defamatory.

To pursue a claim for defamation, a plaintiff must allege and prove four elements by a

preponderance of the evidence: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Rosen v. American Israel Public Affairs Committee, Inc.*, 41 A.3d 1250, 1255–1256 (D.C. 2012) (citation omitted); *Blodgett v. University Club*, 930 A.2d 210, 222 (D.C. 2007) (same). Plaintiffs fail to demonstrate a likelihood of prevailing on the merits as to the first element because, as Defendant has shown, the Challenged Statements are substantially true. *See White*, 909 F.2d at 520 ("[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established.").

1. Translation of "misappropriation" to "malversación."

Plaintiffs continue to assert, without any evidentiary support, that "malversación" is used "specifically in Spain [] to describe the crime of misappropriating, embezzling, or using public funds or resources." Pltfs.' Opp. at 10.[7] This is belied by the record before this Court.

As an initial matter, Plaintiffs appear to have abandoned the versions of Mr. Gallego's articles that Plaintiffs translated from Spanish to English using the website Google Translate. *See* Pltfs.' Opp. at 20, n. 4 (stating that "[a]ll English translations are to Gallego's certified translations, unless otherwise noted").[8] The certified Spanish-to-English translation of Mr.

[7] Plaintiffs falsely alleged in their Complaint that Mr. Gallego used the phrase "delito de malversación" in his third article. Compl. ¶ 76. The word "delito" (Spanish for "crime") does not appear anywhere in Mr. Gallego's reporting. Plaintiffs now explain that this misstatement was made in "error." *See* Plaintiffs' Opposition to Defendant's Motion to Strike at 5.

[8] While Plaintiffs claim to be quoting directly from Defendant's certified translations in their Opposition they often do not do so. *Compare, e.g.,* Pltfs.' Opp. at 21 ("[t]his is why it was not necessary to draw up an actual contract . . .") with Gallego Decl. Ex. C at 2 ("[t]his is why *most*

Gallego's third article makes clear that he reported accurately that Lofft's claims against Frech in the Lofft Lawsuit include a claim for "misappropriation." Gallego Decl. Ex. I at 5. Further, when the word "malversación" is read in the context of Mr. Gallego's article, it is clear he was reporting on the *civil lawsuit* filed by Lofft, a private party, against JAP. *See, e.g.*, Gallego Decl. Ex. I at 3 ("The lawsuit does not only focus on the Embassy's contracts but also on the alleged unfair competition by Frech against his former employer. They claim that he manipulated the timeframes until his work relationship with Lofft was finished (Feb. 2015) trying to cut them off from any money they could have made from this business. Antón and his company both appear in the lawsuit. If both parties do not reach an agreement they will end up in a civil trial.").

Plaintiffs attach a number of Spanish-language dictionary entries to their Opposition; yet none of these sources contradicts those Mr. Gallego provided in support of his Motion. The evidence is clear: an accurate Spanish translation of the legal term "misappropriation" is "malversación." *See* Gallego Decl. ¶ 43, Exs. J, K; *see also* Declaration of Katie Townsend ("Townsend Decl.") ¶¶ 2–4, Exs. A–C. Nor do Plaintiffs offer any evidence to dispute Mr. Gallego's testimony that while writing his third article he consulted a Spanish-English dictionary of legal terms, as well as a journalistic manual, that explained that "malversación" may be used for claims involving misappropriation related to private companies. *See* Gallego Decl. ¶ 43, Exs. J–K. Whether the term may *also* be used to mean embezzlement in a criminal context does not

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times it was not necessary to draw up an actual contract . . . "). Further, their inaccurate use of quotation marks implies that certain words are found in Mr. Gallego's reporting when they are not. *See, e.g.*, Pltfs.' Opp. at 21 (arguing that contracts "are not an 'allowance' to be paid directly to Gustavo or JAP"; the word "allowance" does not appear in Mr. Gallego's article). To make matters worse, the "affidavits" submitted in support of Plaintiffs' Opposition repeatedly misquote and/or mistranslate Mr. Gallego's articles; the language used in those affidavits rarely matches the certified translations submitted by Mr. Gallego. *See, e.g.*, Def.'s Mot. to Strike & Objections to Frech Affidavit, Specific Objections Nos. 27, 53, 59, 79; *see also, e.g.,* Def.'s Mot. to Strike & Objections to Antón Affidavit, Specific Objections Nos. 60, 63, 70, 77, 79, 87, 104.

matter; nowhere in Mr. Gallego's third article does he use the word "crime," let alone state that Plaintiffs have been criminally charged with the embezzlement of public funds. Gallego Decl. Ex. I. Where, as here, "defamatory implication [is] nowhere to be found in the published article itself," *Tavoulareas*, 817 F.2d at 782, Plaintiffs' claims must fail. Mr. Gallego's translation of the legal term "misappropriation" to "malversación" cannot be deemed false or defamatory.

Finally, as detailed in Defendant's opening brief (and not rebutted by Plaintiffs), even if "malversación" could appropriately be read in the context of Mr. Gallego's reporting to mean the "crime of embezzling public funds," which it cannot, courts have recognized that news reports that describe legal or technical matters in laypersons' terms are considered substantially true for purposes of evaluating claims of defamation, even when they might contain technical legal inaccuracies. *See, e.g.*, *Armstrong v. Thompson*, 80 A.3d 177, 185 (D.C. 2013) (defendant's "failure to use the precise term of art to describe the agency's reaction to Mr. Armstrong's wrongdoing does not make her statement false").

2. Frech "appear[ed]" as a "director" of JAP in publicly-available documents.

Plaintiffs argue that Mr. Gallego's reporting that Frech "appear[ed]" as a co-director of JAP in publicly-available documents is false and defamatory because Mr. Gallego purportedly "[knew] for a fact that this designation is an error and that [Frech] never, in fact, exercised that position." Pltfs.' Opp. at 20.[9] Plaintiffs' argument is frivolous. Mr. Gallego reviewed public documents—including JAP's own annual report—that identified Frech as a co-director of JAP. Gallego Decl. ¶ 11. When presented with this information, Plaintiffs stated this was an

[9] Plaintiffs repeat this assertion in their "contextual analysis" of Article II, an article that is not mentioned anywhere in their Complaint. Though Plaintiffs reference a "Second Article" in their Complaint, *see* Compl. ¶ 70, this is a reference to Mr. Gallego's third article, which was published on April 27, 2017. *See* Gallego Decl. Ex. H–I.

administrative error. They did not deny that Frech was listed in publicly-available documents as a director of JAP—nor could they have; it is a fact. Gallego Decl. ¶¶ 12–14. Further, though Antón provided Mr. Gallego with documents to support his claim that Frech's listing as a co-director of JAP was an error after the initial publication of Mr. Gallego's first article, those documents were of questionable reliability, *see* Gallego Decl. ¶¶ 17–19, and Antón, via Frech, *expressly told* Mr. Gallego that he was not to disclose or refer to them in his articles, *see* Gallego Decl. ¶ 11; Gallego Decl. Ex. A at 2 (e-mail from Frech to Mr. Gallego providing documents and stating, in underlined text, that "todos son privados y confidenciales y no tiene autorizacion para su uso, publicacion, distribucion y/o divulgacion" / "all are private and confidential and you have no authorization for their use, publication, distribution and/or disclosure").

To be clear, in each instance where Mr. Gallego discussed Frech's relationship with JAP in his articles, he accurately stated that Frech "appears as" a director in public documents, and included both Frech's and Antón's denials that Frech was, in fact, a director. *See, e.g.*, Ex. C at 2; ("JAP Home Solutions, a company in whose papers [Frech] appears as a co-director"); Ex. C at 5 ("*El Español* has also contacted Jesús Antón and Gustavo Frech. The first assures the company is his alone and prefers not to provide any documents to confirm this or that the alleged administrative error for which Frech appears as director is being corrected."); *see also* Ex. I at 5 ("Jesús Antón, the company's owner, has been saying since the news broke out on March 21 that [Frech] is only an employee and that the fact that he appears as Director in the company's records is just an administrative error, on the part of his accountant: He provides other various documents supporting this."). Though Plaintiffs clearly would have preferred that Mr. Gallego not report that publicly-available information listed Frech as a director of JAP, that Mr. Gallego included this fact in his articles does not make his reporting false or defamatory.

Finally, Plaintiffs' Opposition fails to articulate why merely reporting that Frech—who is undisputedly an employee of JAP, Compl. ¶ 3—"appears" as a "director" in publicly-available documents is defamatory. They offer no explanation as to how Mr. Gallego's accurate reporting of that fact could possibly make Frech appear "odious, infamous, or ridiculous." *Fleming v. AT&T Information Servs., Inc.*, 878 F.2d 1472 (D.C. Cir. 1989) (citations omitted).[10]

3. Antón is named in the operative Second Amended Complaint filed in the Lofft Lawsuit.

Plaintiffs' Opposition also fails to demonstrate that Mr. Gallego's reporting that Antón is named in the Second Amended Complaint in the Lofft Lawsuit is false and defamatory. Though Plaintiffs weakly argue that "[e]ven read in English, the inference is that [Antón] is named as a defendant in the complaint," Pltfs.' Opp. at 23, nothing "in law or common sense" supports that contention. *Tavoulareas*, 817 F.2d at 782. Antón—the sole owner of JAP—even goes so far as to falsely claim in his affidavit that he is "not named or mentioned in the [Second Amended Complaint]," Antón Affidavit ¶ 7. The plain language of that filing shows otherwise: "[Frech] undertook an active, on-going business conspiracy with JAP, and its chief officer, Jesús Antón Perez, to conceal and divert other construction business"); Gallego Decl. Ex. F ¶ 19; *see also* ¶¶ 22–23 (alleging that "Frech and JAP conspired together to transfer Lofft's business secrets" and "Frech and JAP … transferred and exchanged Lofft's insider business files and information"). As detailed in Defendant's opening brief, it is an absolute defense to a defamation claim that, as here, the statements are substantially true. *E.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S.

[10] Defendant further directs the Court to Exhibit 1 to Plaintiffs' Opposition, which contains an affidavit signed by Frech on February 5, 2016. In it Frech swears under penalty of perjury that he is "currently a Partner at JAP Home Solutions ('JAP') located in Washington, DC." *Id.* As noted above, this directly contradicts the "affidavit" Frech submitted in support of Plaintiffs' Opposition that is not signed under penalty of perjury. *See* Frech Affidavit, ¶ 15(a)(iii) ("I am not the owner, partner, representative or director of JAP Home Solutions.").

496, 517 (1991); *Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001). Plaintiffs may not hold Mr. Gallego liable for "inferences" that may be drawn from substantially true facts. *See White*, 909 F.2d at 520 ("[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established.").

C. Plaintiffs' raise new "defamatory" statements in their Opposition that are not pled in their Complaint, should not be considered by the Court, and, in any event, are not actionable.

Plaintiffs' Opposition attempts to assert an array of new claims found nowhere in their Complaint. This Court need only consider the Challenged Statements alleged in Plaintiffs' Complaint; Plaintiffs' new claims are not properly before it. *See Sharp v. Rosa Mexicano*, 496 F. Supp. 2d 93, n.3 (D.D.C. 2007) (holding that "plaintiff cannot raise new claims for the first time in an opposition brief"; "plaintiff did not raise them in his complaint, and did not file an amended complaint"); *see also Coleman v. Pension Benefit Guar Corp.*, 94 F. Supp. 2d 18, 24 n. 8 (D.D.C. 2000) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss"). Yet even if the Court did consider Plaintiffs' new claims, each must fail. Nothing in Plaintiffs' Opposition can save their Complaint against Mr. Gallego.

1. "Denuncia"

Plaintiffs' Opposition debuts their claim that Mr. Gallego's use of the word "denuncia" to describe the operative complaint against Plaintiffs in the Lofft Lawsuit is defamatory. *See* Pltfs.' Opp. at 10 (arguing that "denuncia" is "used in Spanish to indicate a criminal charge in the context of litigation" and arguing that "demanda" or "petición" should have been used instead). As noted above, this claim is entirely absent from their Complaint and should not be considered for that reason alone. In any event, the claim is meritless.

First, Plaintiffs attempt to impose a narrow definition of the word "denuncia" where none

exists. Spanish media often uses the word "denuncia" in the context of civil lawsuits. Supp. Gallego Decl. ¶ 11. Further, Mr. Gallego used the word "denuncia" interchangeably with the word "demanda"—the word Plaintiffs claim he should have used—in his reporting, and read in the context of his articles as a whole, it is clear that he is describing *civil* claims alleged by Lofft, a private party, in the Lofft Lawsuit. *See, e.g.*, Gallego Decl. Ex. H at 3, Ex. I at 2 ("La demanada, presentada mucho antes de que *El Español* desvelara esta conexion familiar entre Frech y la embajada." / "The lawsuit was presented way before *El Español* unveiled the connection between Frech and the Embassy."). Finally, and tellingly, Plaintiffs' *own certified translator* used the word "denuncia" twice when translating the English word "complaint" in the context of that civil case. *See* Frech Affidavit, Ex. 2 ("The *complaint* alleges that Gustavo Frech used his wife's contacts in the Embassy to delay the call for bids to replace the roof of the consulate offices until after he had left the company he was working for" / "En esta *denuncia* se dice que Gustavo Frech uso los contactos de su mujer en la embajada para retrasar el concurso de la cambio del tejado de la Cancilleria hasta que dejara su anterior empresa" and "… peri si que se os menciona en una *denuncia* civil contra JAP …" / "a civil *complaint* brought against JAP, Jesus Anton, and Gustavo Frech in which the Embassy is mentioned …") (emphasis added).

Finally, as discussed above, *infra* Section II.B.1, even if Mr. Gallego's word choice was imperfect or even technically inaccurate, "[s]light inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Foretich v. CBS*, 619 A. 2d 48, 60 (D.C. 1992) (citations omitted). Whether Plaintiffs were "sued" for misappropriation as opposed to "charged" with misappropriation is immaterial.

2. "Nepotism"

Plaintiffs also now claim, for the first time in their Opposition, that use of the word

"nepotism" in the headline of the first of Mr. Gallego's three articles is defamatory.[11] Because this allegation is pled nowhere in their Complaint, it should be disregarded by the Court. *Sharp*, 496 F. Supp. at 97, n. 3. However, even if the Court considers Plaintiffs' new claim it must fail.

Mr. Gallego's reporting focused on the broad topic of nepotism—the practice among those with power or influence of favoring relatives or friends, especially by giving them jobs—which is a significant area of ongoing public concern for Spanish citizens. *See Luis de Guindos slammed for Nepotism*, El Pais, Sept. 29, 2013, available at https://perma.cc/773P-2Z3T*;* Miguel Jiminez, *Economy minister's niece gives up regulator job*, El Pais, Sept. 23, 2017, available at https://perma.cc/C5BF-2NB4. Indeed, Mr. Gallego's first article does not only discuss Plaintiffs; it discusses how Luis de Guindos, Spain's current Minister of Economy, attempted to make his ex-cabinet partner the Executive Director of the World Bank. Gallego Decl. Ex. C at 2. Similarly, Mr. Gallego's third article mentions Plaintiffs and the Lofft Lawsuit, but it also discusses other individuals with familial ties to the Spanish government who have received work in Washington, D.C. Gallego Decl. Ex. C at 2 (describing controversy surrounding the high-profile jobs given to de Guindos' three nieces); Gallego Decl. Ex. I at 7–9 (discussing the wife of the Executive Director of the World Bank, who was hired to work in the kitchen at the Ambassador's residence, and a niece of de Guindos who worked at the World Bank).

Mr. Gallego's articles accurately reported Plaintiffs' family ties to the Embassy and to prominent Spanish government officials, and accurately reported on Embassy contracts that were awarded to Frech and JAP. *See* Gallego Decl., Ex. C and I. His articles also included Plaintiffs'

[11] *See* Gallego Decl. Ex. C at 2 ("Nepotism at the Spanish Embassy in Washington"). Contrary to Plaintiffs' arguments, the headline of Mr. Gallego's third article does not contain the word "nepotism"; the word "nepotism" appears at the top of *El Español*'s website, above the article, to indicate the section of the online newspaper in which it appears, and the general subject matter of the article. *See id.,* Ex. H at 2 (screenshot of article as it appears on *El Español*'s website).

views that they received no favor based on their familial ties to the Embassy. *See* Gallego Decl. Ex. I at 3 (quoting Antón as stating that "[n]either I nor JAP Home Solutions, or any of our employees have ever used our family ties in an irregular or unethical fashion, to benefit our business" and that "[w]e have never asked for any special favors from any clients, in detriment of our competitors"). Taken as a whole, Mr. Gallego's articles on the topic of nepotism among Spanish officials in Washington, D.C. were objective, accurate, and fair. Plaintiffs' effort to invent a defamation claim by viewing an article's headlines in isolation must fail. *See Klayman*, 783 A.2d at 613 ("'context' serves as a constant reminder that a statement in an article may not be isolated and then pronounced defamatory, or deemed capable of a defamatory meaning"); *see also Foley v. Lowell Sun Publ'g Co.*, 552 N.E. 2d 196, 197 (Mass. 1989) (holding that headline "Police Log [—] Officer assaulted; two men charged" was not defamatory because "[w]hen the statement is read in the context of the article as a whole, its clear meaning" is not defamatory).

Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir. 1987)—the case primarily relied upon by Plaintiffs in support of their claim that use of the word "nepotism" in the headline of one of Mr. Gallego's articles is defamatory—undercuts their argument. There, an oil corporation president and his son brought a libel action against *The Washington Post* for an article which stated that the president had "set up" his son in a prominent position with a shipping management company that did business with the oil corporation. *Id.* at 763. Though the D.C. Circuit acknowledged that the article's statement that an influential father had "set up" his son in a profitable job "can reasonably be interpreted as capable of bearing a defamatory meaning" because it "accuses [plaintiff] of nepotism," *id.* at 780, the court *ruled for the defendant* when it determined that "no reasonable jury could, on this record, find that the 'set up' allegation was false." *Id.* at 786.

Similarly, no reasonable jury here, when viewing Mr. Gallego's articles in their entirety,

could conclude that the articles are false. On the contrary, Mr. Gallego's reporting was accurate and conveyed materially true facts. *See White*, 909 F.2d at 520 ("[I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established."); *Coles v. Washington Free Weekly, Inc.*, 881 F. Supp. 26, 31 (D.D.C. 1995) ("That the truth carries a negative implication does not give the Plaintiff a meritorious defamation cause of action.").

3. Criminal Conduct

Plaintiffs cite *Fleming v. AT&T Info. Servs. Inc.*, 878 F.2d 1472 (D.C. Cir. 1989) for the notion that "the false imputation of criminal conduct is inherently defamatory." *Id.* at 1475. *Nowhere* in Mr. Gallego's reporting is there *any* allegation that Plaintiffs have committed or are accused of committing a crime. Plaintiffs have even acknowledged this fact in their Opposition to Defendant's Motion to Strike, admitting that the allegation in Plaintiffs' Complaint that Mr. Gallego's article contained the word "delito" (crime in Spanish) is false. *See* Opposition to Defendant's Motion to Strike at 5. Indeed, none of the articles cited by Plaintiffs even mention the word "crime," let alone allege that Plaintiffs have committed one.

Plaintiffs' new claims that Mr. Gallego's articles supposedly "alleg[e] that [Antón] and [Frech] are purposefully contracting for jobs under $50,000 to evade having contracts written, inferring contract grant rigging to avoid reporting and detection," that "leads the reader to believe that they are purposefully, and *criminally*, keeping contract prices low to evade detection of *yet another criminal act*," Pltfs. Opp. at 22, 21 (emphasis in original), are not properly before this Court and, in any event, are entirely baseless. Nowhere in Mr. Gallego's reporting does he assert that Antón and Frech were seeking to "avoid reporting and detection" or to "criminally [] keep[] contract prices low." *See* Gallego Decl. Exs. C, E, I. Pursuant to Spanish law, "minor

contracts" are defined as those that "have a duration of less than one year and a value below EUR 18,000 for services and supplies and EUR 50,000 for public works. These contracts can be awarded directly to any supplier without publication." *See* Second Gallego Decl. Ex. O. Mr. Gallego's reporting accurately stated that, because JAP's contracts fell below the threshold that requires public reporting, that information about JAP's contracts would not be available to the public on Spain's Transparency Website. *See* Second Gallego Decl. ¶ 12. Reporting that is truthful, even if it "carries a negative implication does not give the Plaintiff a meritorious defamation cause of action." *Coles*, 881 F. Supp. at 31.

Finally, in another example of Plaintiffs blatantly mischaracterizing Mr. Gallego's reporting, they allege for the first time in their "contextual analysis" of Article I, Pltfs.' Opp. at 21, that "Gallego makes a direct comparison between JAP and a Spanish architect, Moneo, who is associated with the theft/misuse of public funds." Mr. Gallego's first article reported that repairs at the Ambassador's residence were assigned to JAP and that the reason repairs were needed was because "the building presented several structural defects which did not permit outdoor use." Gallego Ex. C at 3–4. The article explained that Moneo, another architect, had been sued for allegedly shoddy construction at the Ambassador's residence and that JAP was being hired to purportedly repair Moneo's poor construction. *Id.* There is no assertion in Mr. Gallego's article that Moneo and JAP are linked; Plaintiffs' claims are baseless.

D. The Challenged Statements are privileged as accurate reports of court proceedings.[12]

[12] Completely misapprehending the applicable law, Plaintiffs cite to *Washington Times Co. v. Bonner*, 86 F.2d 836, 841 n.4 (D.C. Cir. 1936), for the proposition that "the facts asserted as predicate of the fair comment must be true …"). Defendant asserts that Mr. Gallego's reporting is covered by the fair *report* privilege, not the fair *comment* privilege. The fair report privilege is specifically designed to protect journalists who are disseminating the contents of official records, including judicial documents, even where such documents may contain inaccurate information. *See Yohe v. Nugent*, 321 F.3d 35, 44 (1st Cir. 2003) ("'[A]ccuracy' for fair report purposes refers

Plaintiffs attempt to use their Opposition as a means to challenge the merits of the claims levied against them in the Lofft Lawsuit. Such arguments are irrelevant to Mr. Gallego's motion. The fair report privilege protects reporting when, as here, it disseminates fair and accurate accounts of official actions and proceedings. *White*, 909 F.2d at 527; *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985) ("The availability of the privilege encourages the media to disseminate official records—whether verbatim or in fair summaries—without fear of liability for any false, defamatory material that they might contain."). The salient fact is not whether Plaintiffs are liable for the claims alleged by Lofft in its Second Amended Complaint, but whether Mr. Gallego accurately reported on the contents of that filing.

There is no doubt that he did. As explained in Defendant's opening brief, Mr. Gallego's reporting drew directly from the Second Amended Complaint in which Lofft asserted a "misappropriation" claim against Frech. Plaintiffs challenge the accuracy of Mr. Gallego's reporting "that there were 'charges' against Plaintiff for 'malversación,'" but as explained above, misappropriation is a correct and suitable translation for "malversación." As Mr. Gallego's reporting is a fair and accurate description of information in a judicial document, it is protected by the fair report privilege. *See Dameron*, 779 F.2d at 739 (holding that the fair report privilege applies where it is "apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings").

E. Plaintiffs, as limited purpose public figures, have failed to plausibly allege publication with "actual malice."

Defendant has demonstrated that Plaintiffs are limited purpose public figures for

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only to the factual correctness of the events reported and not to the truth about the events that actually transpired."). Fair comment is a common law privilege recognized in the District of Columbia that protects commentary on matters of public interest based on facts available to the reader. *See Fisher v. Washington Post Co.*, 212 A.3d 335, 337 (D.C. 1965).

purposes of their defamation claims against Mr. Gallego, and accordingly they must prove not only that the Challenged Statements were false (which they have failed to do), but also, by clear and convincing evidence, that Mr. Gallego acted with "actual malice" (*i.e.* "with knowledge that [they were false or with reckless disregard of whether [they were] false or not."). *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Plaintiffs' argument that they are not limited purpose public figures is unavailing and Plaintiffs' threadbare assertion that Mr. Gallego published the Challenged Statements with actual malice lacks any basis in law or fact.

The parties agree on the standard: limited purpose public figures are "public figures for the more limited purpose of certain issues or situations." *Tavoulareas*, 817 F.2d at 772. Plaintiffs' *only* argument appears to be that Plaintiffs are not limited purpose public figures because the Lofft Lawsuit "is a private civil matter with a contract dispute." Pltfs.' Opp. at 26. Plaintiffs ignore the *actual* "public controversy" that is the subject of Mr. Gallego's reporting: the jobs and opportunities afforded to relatives of prominent Spanish government officials in Washington, D.C., like Frech's wife—niece of Spain's current Minister of Economy—who, until recently, was in a high-level position at the Embassy. *See* Def.'s Mot. at 24.

"To qualify as a public controversy, the law requires only that the issue be discussed publicly, and that the resolution of the issue affect others besides the immediate participants in the debate." *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 46–47 (D.D.C. 2005). The alleged awarding of public contracts to JAP, a company with family ties to the Embassy and the Spanish government, is unquestionably a significant facet of this public controversy.

Plaintiffs' assertion that there is "no evidence Gustavo [Frech] or Jesus [Antón] have any connection or ties to the controversy," Pltfs.' Opp. at 26, is perplexing, as little could be further from the truth. Both have close familial ties to prominent members of the Spanish government,

and both are at the center of the Lofft Lawsuit, which alleges that, while working for Lofft, Frech diverted business from Lofft to himself and JAP, and utilized his wife's contacts at the Spanish Embassy to benefit himself and JAP. Gallego Decl. Ex. F, ¶ 18(c). Further, Plaintiffs spoke to Mr. Gallego on the record, offering their perspective on whether their family ties afforded them benefits in the workplace.[13] As such, Plaintiffs clearly "play[] a significant role in the controversy," and the Challenged Statements are "germane to [Plaintiffs'] participation in the controversy." *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 114 (D.C. Cir. 2016).

Plaintiffs attempt to confuse the Court by arguing that "the Second Amended Complaint [filed in the Lofft Lawsuit] directly concerns a private issue with no allegations related to graft, embezzlement, or theft toward the Embassy or public resources." Pltfs.' Opp. at 26. This is misleading, at best, and intentionally inaccurate, at worst. As detailed above, Mr. Gallego does not report "allegations related to graft, embezzlement, or theft." *Id*. The Second Amended Complaint brings a claim for "misappropriation," specifically alleging in Paragraph 18(c) of that Complaint that "[t]hrough his wife's contacts at the Embassy, [Frech] improperly manipulated the timeline of the contract, past the time of his employment at Lofft to deprive Lofft of the business." Gallego Decl. Ex. F, ¶ 18(c). That is what Mr. Gallego reported and it relates directly to the use of public resources—namely, public contracts awarded by the Embassy.

Plaintiffs are assuredly limited public figures under well-established D.C. law, and they concede that a limited purpose public figure may prevail in a defamation suit only if he can produce "clear and convincing evidence" that the challenged publication was made with "actual malice"—*i.e.*, with "knowledge that it was false or with reckless disregard of whether it was

[13] *See, e.g.*, Gallego Decl. Ex. C at 5 ("As far as whether or not [Frech] has benefited from his personal relation, he denies this and assures that it is the complete opposite. 'I am being negatively affected because I am married to someone in public office.'")

false or not." *Boley*, 950 F. Supp. at 260. Plaintiffs "cannot show actual malice in the abstract; [they] must demonstrate actual malice *in conjunction* with a false defamatory statement." *Tavoulareas*, 817 F.2d at 794. They also must meet a heightened evidentiary burden—that is, they must show that "the evidence in the record could support a reasonable jury finding … that [Plaintiffs] have shown actual malice by clear and convincing evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255–256 (1986). Plaintiffs do not come close to meeting this burden.

Plaintiffs claim that they have "sufficiently explained" why Mr. Gallego's reporting was false, but—even if they had demonstrated falsity, which they have not—"falsity alone does not equate to actual malice." *Kahl*, 856 F.3d at 116. Further, their "evidence" that Mr. Gallego "recklessly reli[ed] on an unreliable third-party source—Defendant Sanguinetti," Pltfs.' Opp. at 28, is contrary to the record.[14] Indeed, evidence of Mr. Sanguinetti as the "unreliable source" could not possibly exist; as Mr. Gallego has stated, he based the Challenged Statements *on the Second Amended Complaint filed in the Lofft Lawsuit*. Nor do Plaintiffs offer any *evidence* for their assertion that Mr. Gallego "has been shown to turn a blind eye to the facts all of which suggests that he knew the statements were false and/or made in bad faith." Pltfs.' Opp. at 28. Actual malice allegations must fail where, as here, Plaintiffs have "adduced no *facts* indicating that the [challenged] statements were false or made with actual malice, offering only broad and conclusory details." *Boley*, 950 F. Supp. at 263.[15]

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[14] In particular, Plaintiffs' assertion that Mr. Gallego "recklessly" relied on Mr. Sanguinetti as a source for his reporting is found nowhere in their Complaint; this attempt to rehabilitate their failing claims by asserting new ones should be rejected by the Court. *See Sharp*, 496 F. Supp. 2d at 97 n. 3 ("[P]laintiff cannot raise new claims for the first time in an opposition brief" because "plaintiff did not raise them in his complaint, and did not file an amended complaint.").

[15] Plaintiffs waited until their Opposition to mention their desire to obtain discovery in this matter, and, further, have misstated the standard by which they may request limited discovery to support their actual malice allegations. Only "*[w]hen it appears likely* that targeted discovery will enable the plaintiff to defeat [an Anti-SLAPP] motion and that the discovery will not be

Finally, even if Plaintiffs are not limited purpose public figures (which they are), Plaintiffs have failed to even plead facts that would support a finding of negligence, or "a failure to observe an ordinary degree of care in ascertaining the truth of an assertion before publishing it to others," *i.e.* "a failure to make a reasonable investigation as to truth of the statement." *Moss v. Stockard*, 580 A.2d 1011, 1025–1026 (D.C. 1990). Mr. Gallego's reporting was well-researched and accurate. Plaintiffs' have failed to provide any evidence, whatsoever, to the contrary.

III. ALTERNATIVELY, PLAINTIFFS' CLAIMS AGAINST MR. GALLEGO SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6).

As detailed above and in Mr. Gallego's opening brief, this Court should grant Defendant's special motion to dismiss under the Anti-SLAPP Act. Even outside the Anti-SLAPP framework, however, Plaintiffs' claims against Mr. Gallego fail to properly state a claim, and Plaintiffs' arguments to the contrary only serve to highlight the deficiency of their claims.

As Plaintiffs' concede, in applying the Rule 12(b)(6) standard "the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations." Pltfs.' Opp. at 29 (citing *Warren v. District of Columbia*, 353 F.3d 36, 39 (D.C. Cir. 2004); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002)).

In addressing Defendant's argument that Plaintiffs have failed to state a claim upon which relief may be granted, Plaintiffs' Opposition addresses only Count II (Conspiracy to

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unduly burdensome, the court may order that *specified* discovery be conducted." D.C. Code § 16-5502(c)(2) (emphasis added). Plaintiffs have provided *no* evidence, let alone sufficient evidence that would make it "appear likely that targeted discovery" would enable them to defeat Defendant's motion. *Id.* Further, Plaintiffs have failed to indicate what "specified discovery," in particular, they believe would support their baseless actual malice claims. *Id.* Their request for discovery—like their claims—is entirely without merit. Plaintiffs reference to *Boley* does not assist them; there, the Court *dismissed* plaintiff's claims pursuant to the D.C. Anti-SLAPP Act, determining that "it does not appear that limited discovery would allow [plaintiff] to defeat the defendants' motion." *Boley*, 950 F. Supp. 2d at 263. The same is true here.

Defame), while ignoring Count I (Defamation) entirely. Plaintiffs state that "[p]leading conspiracy requires only that Plaintiffs allege an agreement between two or more persons to participate in an unlawful act, or in a lawful act in an unlawful manner, and an injury caused by an unlawful overt act performed by one of the parties to the agreement pursuant to, and in furtherance of, the common scheme." Pltfs.' Opp. at 30 (citing *Banneker Ventures, LLC v. Graham*, 225 F. Supp. 3d 1, 15 (D.D.C. 2016). Though Plaintiffs argue they have "meticulously stated a claim for relief against Gallego as to Count II," they failed to address their claim of conspiracy anywhere else in their Opposition or to point to an example of such "meticulous pleading" in their Complaint. Nor could they—the Complaint lacks any assertion of an "agreement between two or more persons" whatsoever, let alone an agreement that included Mr. Gallego. Further, the record before this Court is entirely devoid of any evidence that would point toward a conspiracy by Mr. Gallego to defame Plaintiffs. Finally, a claim of conspiracy under D.C. law "depends on the performance of some underlying tortious act." *Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983). Count II must fail because, no matter how much Plaintiffs may have disliked Mr. Gallego's reporting, there was nothing false or defamatory about it.

CONCLUSION

Plaintiffs have failed to state a claim for defamation or conspiracy to defame, let alone show that they are likely to succeed on the merits. For the reasons set forth above and in his opening brief, Mr. Gallego respectfully requests that the claims against him be dismissed with prejudice pursuant to the D.C. Anti-SLAPP Act or, in the alternative, for failure to state a claim for defamation or conspiracy to defame as a matter of law under Rule 12(b)(6), and that he be awarded reasonable attorneys' fees and costs.

Dated: October 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2017, a copy of the foregoing Reply In Support of Defendant José Gallego Espina's Special Motion to Dismiss under the District of Columbia Anti-SLAPP Act of 2010 was served on the following via CaseFileXpress:

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