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.

DEFENDANT JOSÉ GALLEGO ESPINA'S SPECIAL MOTION TO DISMISS PURSUANT TO THE D.C. ANTI-SLAPP ACT, D.C. CODE SECTIONS 16-5501 *ET SEQ*.

José Gallego Espina ("Mr. Gallego"), defendant in the above-captioned action, by and through his undersigned counsel, hereby moves to strike and to dismiss Plaintiffs' causes of action against him pursuant to D.C. Code sections 16-5501 *et seq*. (hereinafter the "D.C. Anti-SLAPP Act" or the "Act").

Dated: September 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2017, a copy of the foregoing 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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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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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.

MEMORANDUM OF POINTS AND AUTHORITIES 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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In support of his Special Motion to Dismiss under the District of Columbia Anti-SLAPP Act of 2010, D.C. Code sections 16-5501 *et seq.* (hereinafter the "D.C. Anti-SLAPP Act" or the "Act"), Defendant José Gallego Espina ("Mr. Gallego") respectfully submits the following memorandum of points and authorities.

INTRODUCTION

Plaintiffs' defamation claims against Mr. Gallego are a textbook example of a Strategic Lawsuit Against Public Participation ("SLAPP"). Recognizing the chilling effect such lawsuits have on free speech, the D.C. Council seven years ago enacted the "Anti-SLAPP Act of 2010" to provide a path for the prompt dismissal of meritless claims that aim to silence debate and criticism on issues of public concern—claims precisely like those brought by Plaintiffs.

Plaintiffs JAP Home Solutions, Inc. ("JAP"), Gustavo Frech Barriero ("Frech"), and Jesus Anton Perez ("Anton") have sued Mr. Gallego based on Spanish-language articles he wrote in March and April 2017 for *El Español*, an online news publication based in Spain, that reported on public contracts for projects at the Spanish Embassy in Washington, D.C. that had been awarded to JAP. The articles focused mostly on the nepotism among senior public officials in the Spanish Government and employees of the Embassy. As part of this reporting, Mr. Gallego's articles also delved into the personal and familial connections between JAP and high-level Spanish government and Embassy officials, including that Plaintiff Frech, an employee of JAP, is married to Maria Pedrosa de Guindos, the niece of Spain's economy minister and, at the time, a General Secretary at the Embassy. Such matters are, unquestionably, of significant public interest and concern.

JAP and Frech are defendants in a pending civil lawsuit filed in D.C. Superior Court by Lofft Construction, Inc. ("Lofft"), in which Lofft alleges that Frech diverted business from Lofft

to himself and JAP while still employed by Lofft. Apparently unhappy that Mr. Gallego's reporting drew public attention to the Lofft Lawsuit, and unhappier still that Mr. Gallego refused to sign a document at Plaintiffs' request stating (incorrectly) that attorneys for Lofft had provided Mr. Gallego with private information, Plaintiffs have filed frivolous defamation claims against a journalist who did nothing more than accurately report publicly-available information.

Because Mr. Gallego's articles incontestably address an issue of public interest, the *only way* Plaintiffs' claims can survive dismissal under the Anti-SLAPP Act is if Plaintiffs can meet the heavy burden of demonstrating they are "likely to succeed on the merits." D.C. Code § 16-5502(b). As explained in detail below, Plaintiffs cannot satisfy this burden for three principal reasons: ***first***, Plaintiffs cannot establish that Mr. Gallego's reporting was false, let alone defamatory; ***second***, the statements that Plaintiffs complain of are protected by the fair report privilege, and ***third***, as limited purpose public figures, Plaintiffs cannot demonstrate that Mr. Gallego acted with "actual malice."

Plaintiffs' claims against Mr. Gallego are precisely what the D.C. Anti-SLAPP Act was designed to stop: claims intended to burden and harass a journalist whose reporting the Plaintiffs do not like. The D.C. Anti-SLAPP Act's heightened protection for speech must be applied to this action. For the reasons set forth herein, Defendant Gallego respectfully requests that the Court dismiss Plaintiffs' claims against him with prejudice pursuant to D.C.'s Anti-SLAPP Act, or, in the alternative, for failure to state a claim pursuant to Rule 12(b)(6).

FACTUAL BACKGROUND

A. Mr. Gallego's initial reporting on the personal and family connections between high-level Spanish government officials, the Embassy, and JAP

Mr. Gallego is an experienced investigative journalist for *El Español*, a Spanish-language online news publication based in Spain. Born and raised in Seville, Spain, Mr. Gallego is a

native Spanish speaker who also speaks English fluently; he has worked as a journalist for 14 years in both print and broadcast media, and is currently based in Washington, D.C., where he has reported for *El Español* since June 2016. Gallego Decl. ¶¶ 1–4.

In connection with his reporting for *El Español*, in September 2016 Mr. Gallego began investigating the appointments of relatives of Spanish politicians to high-level positions in Washington, D.C. His reporting stemmed from the resignation of Spain's former minister of industry, energy and tourism, José Manuel Soria; in April 2016 Mr. Soria resigned from his position because of documents in the Panama Papers that connected him to overseas tax havens. Gallego Decl. ¶ 5. In September 2016, when it was reported that the Spanish government was going to appoint Mr. Soria to a position at the World Bank in Washington, D.C., Spanish media also reported that a niece of Spain's economy minister, Luis de Guindos, was already working at the World Bank, and that two other nieces of Mr. de Guindos were working at the Spanish Embassy in Washington, D.C. *Id*. Mr. Soria withdrew his nomination in September 2016, shortly before *El Español* published an article written by Mr. Gallego in which he reported on the privileges and opportunities Mr. Soria would receive if he were appointed to a World Bank position. Gallego Decl. ¶ 6. Mr. Gallego's September 2016 article also reported on the three nieces of Spain's economy minister, Mr. de Guindos, and the controversy surrounding how they obtained their positions at the World Bank and the Embassy. Gallego Decl. ¶ 7.

Thereafter, Mr. Gallego continued to investigate issues connected to the appointments of relatives of Spanish politicians to high-level positions in Washington, D.C. Gallego Decl. ¶ 8. During the course of his reporting, he discovered that one of Mr. de Guindos' nieces who then worked as a General Secretary at the Embassy, Maria Pedrosa de Guindos, is married to Plaintiff Frech, and that Frech was listed in public documents as a director of JAP, a home improvement

and general contracting firm owned by Plaintiff Anton. Gallego Decl. ¶¶ 7, 9–11; Compl. ¶¶ 2–4. Mr. Gallego learned through his research that several public contracts had been awarded by Spain's Ministry of Foreign Affairs (the "Ministry") to JAP while Frech's wife was employed at the Embassy, and that Frech's wife was a colleague of Bélen Moreno, the Embassy's economic chief who oversees the contracting and bidding process for Embassy contracts and recommends to the Ministry who should receive a particular contract. Gallego Decl. ¶¶ 9–10.

Mr. Gallego contacted Frech and Anton on March 20, 2017, to seek their comments for an article he was preparing about the contracts awarded to JAP while Frech's wife was an Embassy employee. While both Frech and Anton admitted that Frech was listed as a director of JAP in public documents, they told Mr. Gallego that it was a mistake. Gallego Decl. ¶¶ 12–14.

On March 20, the tablet version of Mr. Gallego's first of three articles reporting on public contracts for projects at the Embassy that had been awarded to JAP was sent to *El Español*'s daily edition subscribers. Gallego Decl. ¶ 16. The article stated that Frech "figures as a co-director of JAP" in the public database of the Virginia State Corporation Commission, but that both Frech and Anton had stated it was a "mistake" and the result of an "error on the accountant's part" that would take six months to correct. *See* Gallego Decl. ¶¶ 16, Exs. B–C.

After that first article was published, Frech contacted Mr. Gallego via email, stating that Anton could provide Mr. Gallego with documentation proving that Frech was not a director of JAP, but that Mr. Gallego could not disclose or refer to the documents in future articles. Gallego Decl. ¶ 17. Via email, Frech sent Mr. Gallego a letter dated March 6, 2017 from an accounting firm retained by Frech, as well as a copy of JAP's Articles of Incorporation, dated February 21, 2014, listing Anton as the director of the corporation, and an undated letter addressed to the Virginia Department of Consumer and Regulatory Affairs from JAP requesting removal of Frech

as a director of JAP. *Id.* Frech's email transmitting these documents specifically instructed Mr. Gallego that he could not disclose or refer to these documents in his reporting. *Id.* Nothing in these documents was inconsistent with Mr. Gallego's March 20 article; the article reports that Frech appeared as a director of JAP in public records, and includes comments from both Frech and Anton stating that was a mistake. Gallego Decl. ¶ 19.

The evening of March 20, 2017—the morning of March 21 in Spain—the first article was published on *El Español*'s website, *see* Gallego Decl. ¶ 20, Exs. B–C; the article states that Frech "appears" as a director of JAP in public records, but that both Frech and Anton stated the listing was the result of "an administrative error." Per Frech's request, Mr. Gallego did not include in the article the documents Frech had provided him. Gallego Decl. ¶ 17. On March 21, 2017, Mr. Gallego was informed by a representative of Spain's ministry of education that Frech's wife would be removed from her position at the Embassy. Gallego Decl. ¶ 21.

On March 22, 2017, a second article written by Mr. Gallego was published on *El Español*'s website; this article describes the dismissal of Frech's wife from her position at the Embassy. Gallego Decl. ¶ 22, Exs. D–E. After this article was published, another Spanish national newspaper, *El Confidencial*, published an article that suggested her removal was related to the controversy surrounding JAP's contracts with the Embassy. Gallego Decl. ¶ 22.

B. The Lofft Lawsuit and Mr. Gallego's third article

After the second article was published, Mr. Gallego learned about a lawsuit filed by Lofft Construction, Inc. ("Lofft") against JAP and Frech in D.C. Superior Court, Case No. 2015 CA 5203 B (the "Lofft Lawsuit"). Gallego Decl. ¶ 24. In gathering information about the Lofft Lawsuit, Mr. Gallego spoke to Frech, Anton, and several other sources familiar with the lawsuit. Gallego Decl. ¶¶ 24–25. Mr. Gallego also obtained copies of the docket and the Second

Amended Complaint filed in the Lofft Lawsuit, which were publicly available, and he confirmed that the Second Amended Complaint had not been dismissed. Gallego Decl. ¶¶ 27, 39, Ex. F.

The Second Amended Complaint filed by Lofft alleges that, while working for Lofft, Frech had diverted business from Lofft to himself and JAP. In particular, in paragraph 18, subparagraph c, of the Second Amended Complaint, Lofft alleges in support of its misappropriation claim that from November 2014 through January 2015 Frech "covertly prepared an estimation for a lucrative roof improvement at the Spanish Embassy in Washington, D.C." and, "[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. ¶ 26, Ex. F, ¶ 18. At an April 21, 2017 meeting, Anton asked Mr. Gallego to sign a document stating that attorneys, including counsel for Lofft, had contacted Mr. Gallego and revealed private information; Mr. Gallego declined. Gallego Decl. ¶ 31.

On April 27, 2017, Mr. Gallego's third article was published on *El Español*'s website. Gallego Decl. ¶ 40, Exs. H–I. In that third article, Mr. Gallego reports that the Second Amended Complaint filed in the Lofft Lawsuit alleges a claim for "misappropriation and conspiracy to acquire possible business" ("malversación y conspiración para apropiarse de posibles negocios"). Gallego Decl. ¶ 41. The third article also reports that "Anton and his company [JAP] both appear in the lawsuit" ("Anton y su sociedad figuran igualmente en la demanda") filed by Lofft. Gallego Decl. ¶ 44.

C. Plaintiffs' Complaint

Plaintiffs filed their Complaint in this action on May 16, 2017 against Defendants Lofft Construction, Inc. ("Lofft"), Alexandro R. Sanguinetti, John E. Drury, and Mr. Gallego. Of the

four counts listed in Plaintiffs' Complaint, two are claims against Mr. Gallego: Count I ("defamation per se/defamation") and Count II ("conspiracy to defame").

Plaintiffs' defamation claims against Mr. Gallego appear to center on the third of the three articles he wrote for *El Español*, in which Mr. Gallego reports that in the pending civil lawsuit filed by Lofft against JAP and Frech in D.C. Superior Court—the Lofft Lawsuit—Lofft alleges 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. Mr. Gallego's reporting was based on Lofft's Second Amended Complaint, which, as detailed above, specifically alleges a claim for "misappropriation." *See* Gallego Decl. ¶ 26, Ex. F ¶ 18. Plaintiffs' defamation claims against Mr. Gallego appear to be based specifically on Mr. Gallego's translation of "misappropriation" as "malversación," which they claim is "an offense in Spain that is considered to be highly criminal and corrupt[.]" Compl. ¶ 76.

Though Plaintiffs only use the word "defame[]" in relation to Mr. Gallego's use of the word "malversación," Plaintiffs' Complaint also takes issue with two other statements in Mr. Gallego's reporting. The first of the two statements relates to Mr. Gallego's reporting, in the first of his three articles for *El Español*, that Frech was listed as a "director" of JAP in public documents. *See, e.g.*, Compl. ¶ 55. Mr. Gallego's reporting was based on JAP's annual report and the information concerning JAP in the publicly-available database on the Virginia State Corporation Commission's website, both of which listed Frech as a director of the company at the time Mr. Gallego's article was published. *See* Gallego Decl. ¶ 11. Mr. Gallego's reporting states that Frech "appears" as a director of JAP in public records, but that both Frech and Anton stated that the listing was "an administrative error." *See* Gallego Decl. ¶ 20, Exs. B–C.

Plaintiffs' Complaint also alleges that the third of the three articles Mr. Gallego wrote for *El Español* "falsely states that Anton, JAP's owner, is named in the [Lofft Second Amended] Complaint" and that the article "falsely states that Anton and his company are equally implicated in the proceedings" and that the article "alleges collusion with the Spanish government and the Spanish Embassy[.]" Compl. ¶¶ 70–73. This allegation appears to relate to a single sentence in the third article, in which Mr. Gallego reported that "Anton and his company [JAP] both appear in the lawsuit" ("Anton y su sociedad figuran igualmente en la demanda"). Gallego Decl. ¶ 44. Mr. Gallego's reporting was based on Lofft's Second Amended Complaint, which states in paragraph 19 that "Frech, intentionally and maliciously, undertook an active, on-going business conspiracy with JAP, and its chief officer, Jesus Anton Perez, to conceal and divert other construction business, on at least a [sic] six (6) other occasions, from Lofft to JAP for financial benefit and thus damaging Lofft." Gallego Decl. Ex. F ¶ 19.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE SUBJECT TO AN ANTI-SLAPP MOTION

A. The D.C. Anti-SLAPP Act broadly applies to claims that target the exercise of free speech about issues of public interest.

The D.C. Anti-SLAPP Act, D.C. Code § 16-5501 *et seq.,* was enacted to ensure the quick dismissal of precisely the types of claims Plaintiffs assert in their Complaint by providing defendants like Mr. Gallego with "substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest." Committee Rpt. On Bill 18-893 (Nov. 18, 2010) at 4; *see also Forras v. Rauf*, 39 F. Supp. 3d 45, 53 (D.D.C. 2014), *aff'd on other grounds*, 812 F.3d 1102 (D.C. Cir. 2016) (citations and quotations omitted).

The "broad protections afforded by the Act," *id*., are clear-cut, and their applications to the facts at issue here are straightforward. The Act mandates, in relevant part, that:

> (b) If a party filing a special motion to dismiss under this section makes 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, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code § 16-5502(b).

The Act provides for a stay of discovery, an expedited hearing on the special motion to dismiss, and for the issuance of a ruling as soon as practicable after that hearing. *Id.* § 16-5502(c), (d). The Act further provides that "[i]f the special motion to dismiss is granted, dismissal shall be with prejudice." *Id.* Successful defendants are entitled to costs and attorneys' fees upon an appropriate showing. *Id.* § 16-5504(a).

There can be no question that the Anti-SLAPP Act applies to Plaintiffs' defamation claims against Mr. Gallego. Indeed, in advocating for adoption of the Act, the Council's Committee on Public Safety and the Judiciary recognized the increase in the use of lawsuits, like this one, as a tool to punish and attempt to silence the expression of an opposing point of view:

> Such lawsuits, often referred to as strategic lawsuits against public participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech … on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights.

Committee Rpt. On Bill 18-893 (Nov. 18, 2010) at 1.

As described in further detail, below, Plaintiffs' lawsuit is a quintessential SLAPP, and courts have not hesitated to apply D.C.'s Anti-SLAPP statute to defamation claims of the type alleged here. *See, e.g. Boley v. Atlantic Monthly Magazine*, 950 F. Supp. 2d 249 (D.D.C. 2013)

(dismissing defamation claim under D.C.'s Anti-SLAPP statute); *Farah v. Esquire Magazine*, 863 F. Supp. 2d 29, 38 (D.D.C. 2012) (same).

B. Plaintiffs' claims against Mr. Gallego fall squarely within the scope of the Anti-SLAPP Act.

To trigger the protections afforded by the D.C. Anti-SLAPP Act, Mr. Gallego need *only* make a "prima facie showing" that Plaintiffs' claims "arise from an act in furtherance of the right of advocacy on issues of public interest." D.C. Code § 16-5502(b). The Act defines "public interest" broadly; 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" qualifies. *Id.* § 16-5501(3). An "act in furtherance of the right of advocacy on issues of public interest" may be shown in three ways: (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). Though he need only meet one of these definitions, Mr. Gallego's reporting satisfies all three.

First, Mr. Gallego's reporting for *El Español* concerned "an issue under consideration or review by a … judicial body[.]" D.C. Code § 16-5501(1)(A)(i). As stated above, Plaintiffs appear to center their defamation claims on three statements contained within Mr. Gallego's articles: (1) that Frech was listed as a "director" of JAP in publicly-available documents; (2) that a publicly-available civil complaint filed against JAP in D.C. Superior Court alleges a claim for "misappropriation and conspiracy to acquire possible business" ("malversación y conspiración

para apropiarse de posibles negocios"); and (3) that, in relation to the same civil complaint, "Anton and his company [JAP] both appear in the lawsuit" ("Anton y su sociedad figuran igualmente en la demanda") (collectively the "Challenged Statements"). The latter two of the three Challenged Statements relate to Mr. Gallego's reporting on the contents of the Lofft Lawsuit's Second Amended Complaint. See Gallego Decl. ¶¶ 41, 44. These two Challenged Statements are thus directly connected to "an issue under consideration or review by a … judicial body." D.C. Code § 16-5501(1)(A)(i); *see also Forras*, 39 F. Supp. at 53 (holding that defendants made a prima facie showing that alleged defamatory statements are protected where the statements at issue were made in the defendants' motion to dismiss pending before a judicial body); *see also Colt v. Freedom Communications, Inc*., 109 Cal. App. 4th 1551, 1560 (Cal. Ct. App. 2003) (dismissing plaintiffs' claims under California's anti-SLAPP statute where "[t]he articles fairly describe the gist of plaintiffs' misconduct" and where "plaintiffs' quarrel with the language of the articles involves a level of exegesis beyond the ken of the average reader of newspaper articles"); *see also Sipple v. Foundation for Nat. Progress*, 71 Cal. App. 4th 226, 247 (Cal. Ct. App. 1999) (dismissing plaintiffs' claims under California's anti-SLAPP statute where reporter covered court proceedings, noting that the anti-SLAPP statute applied "to afford the utmost freedom of access to courts without fear of being subsequently harassed by derivative tort actions" (citations omitted)).

Second, the Challenged Statements in the three *El Español* articles qualify for protection as written statements made "[i]n a place open to the public or a public forum in connection with an issue of public interest." D.C. Code § 16-5501(1)(A)(ii). *El Español*'s website is a "place open to the public" because it is published online and anyone with a working internet connection or access to one can view it. *Boley*, 950 F. Supp. 2d at 249 (finding that *The Atlantic*'s website

was a "place open to the public"); *see also Abbas v. Foreign Policy Group, LLC*, 975 F. Supp. 2d 1, 11 (D.D.C. 2013). And the Challenged Statements clearly concern an "[i]ssue of public interest," which includes, among other items, any issue related to a "public figure." D.C. Code § 16-5501(1)(A)(ii) & (3).

Mr. Gallego's initial reporting stemmed from the resignation of Spain's former minister of industry following the public release of documents that linked him to overseas tax havens. Gallego Decl. ¶ 5. The reporting that followed concerned potential nepotism and other issues related to Luis de Guindos, Spain's economy minister, and the appointment of his three nieces—well-known in Spain—to high-level government positions in Washington, D.C. Gallego Decl. ¶¶ 7, 22. Controversies surrounding the appointments of relatives of Spanish politicians to high-level government positions is a topic of great interest and importance to the Spanish public. Gallego Decl. ¶ 8; *see also* Juan José Mateo, *Spaniards flunk politicians on fight against corruption*, El Pais (Nov. 16, 2016), available at https://perma.cc/88XY-DN8Q; Juan José Mateo Ruiz-Gálvez, *Spain falls to worst position in perceptions of corruption index*, El Pais (Jan. 25, 2017), available at https://perma.cc/52Z5-3PL6; *Fears over corruption soar as Spain suffers swathe of high profile cases*, El Pais (Apr. 10, 2017), available at https://perma.cc/CLJ2-CR6L. Plaintiff Frech's wife was a public employee and the niece of a powerful government official; her appointment to and subsequent removal from her government position at the Embassy was likewise of significant public interest, and reported on by other national online newspapers in Spain. Gallego Decl. ¶ 7; *see also* P. Gabilondo, *La embajada de EEUU releva a la sobrina de Guindos tras la polémica con su marido*, El Confidencial (Mar. 22, 2017), available at https://perma.cc/QMW2-ZADL/. Mr. Gallego's reporting also described a civil lawsuit alleging, among other things, that Frech "covertly prepared an estimation for a lucrative roof improvement

at the Spanish Embassy in Washington, D.C." and, "[t]hrough his wife's contacts at the Embassy, [Frech] improperly manipulated the timeline of the contract, . . ." to benefit himself and JAP. *See* Gallego, Decl. ¶ 26. This too is undoubtedly a matter of significant public interest to Spanish citizens. And, as detailed below, *infra* Section II.C., Plaintiffs Frech and Anton are public figures for purposes of the controversy at issue. D.C. Code § 16-5501(3).[1] Mr. Gallego was clearly reporting on public figures and issues of significant public interest within the meaning of the D.C. Anti-SLAPP Act.

Third, for these same reasons, the Challenged Statements also meet the requirements for Anti-SLAPP protection because Mr. Gallego's reporting is "expressive conduct that involves … communicating views to members of the public in connection with an issue of public interest" within the meaning of D.C. Code § 16-5501(1)(B). *See Boley*, 950 F. Supp. at 256 (holding that an investigation by federal authorities is a matter of public interest that qualifies for protection under § 16-5501(1)(B)); *Farah*, 863 F. Supp. 2d. at 38 (holding that online reports that communicated to members of the public regarding an issue of public concern qualify for protection under § 16-5501(1)(B)); *see also McCree v. McCree*, 464 F.2d 922, 928 (D.C. 1983) (adopting the "general rule of statutory construction" that a "remedial statute should be construed liberally in order to effectuate the purposes for which it was enacted").

As detailed above, Mr. Gallego's reporting certainly concerns an issue of public interest and concern—the issuance of public contracts for projects at the Spanish Embassy to companies with familial ties to the Embassy and the Spanish government. Because the Challenged Statements concern matters of public interest involving public figures and pending judicial

[1] D.C.'s Anti-SLAPP statute does not expressly define "public figure," but the D.C. Court of Appeals has interpreted the Anti-SLAPP Act to "import[] the definition of 'public figure' used throughout defamation law." *Doe No. 1 v. Burke*, 91 A.3d 1031, 1041 (D.C. 2014).

proceedings, Plaintiffs' claims against Mr. Gallego are subject to a special motion to dismiss under the Anti-SLAPP Act.

C. To avoid dismissal under the Anti-SLAPP Act, Plaintiffs must establish that their defamation claims are likely to succeed on the merits.

Having made 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," Mr. Gallego's special motion to dismiss *must* be granted with prejudice, D.C. Code § 16-5502(b), (d), unless Plaintiffs demonstrate that their claims against him are "*likely* to succeed on the merits." D.C. Code § 16-5502(b) (emphasis added). Plaintiffs plainly cannot meet this burden. For each of the reasons set forth below, Plaintiffs' defamation claims against Mr. Gallego fail as a matter of law.

II. PLAINTIFFS CANNOT ESTABLISH THAT THEIR CLAIMS ARE "LIKELY TO SUCCEED ON THE MERITS"

As the D.C. Court of Appeals has noted, "[a] court's review for legal sufficiency is a particularly weighty endeavor when First Amendment rights are implicated." *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016). In evaluating a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act, the court must "consider whether a properly instructed jury could find for the plaintiff 'both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.'" *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984)). The court must "test the legal sufficiency of the evidence to support the claims" and, if it concludes that the claimant cannot prevail as a matter of law, dismissal is appropriate. *Id.* at

1236, 1240.[2] Following these principles and the guidance of the D.C. Anti-SLAPP Act, Plaintiffs' defamation claims must be dismissed with prejudice.

A. Plaintiffs cannot prove that any of the Challenged Statements are false or defamatory.

"To pursue a claim for defamation, a plaintiff must allege and prove four elements: (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). Where, as here, a plaintiff alleging defamation is a public figure or limited purpose public figure, "the fault component embodied in the third defamation element is heightened; the plaintiff must then show by clear and convincing evidence that the defendant's [alleged] defamatory statement was published with actual malice, i.e. either subjective knowledge of the statement's falsity or a reckless disregard for whether or not the statement was false." *Doe No 1*, 91 A.3d at 1044.

Under the Anti-SLAPP Act, it is Plaintiffs' burden to demonstrate that they are likely to succeed as to each of these elements. If they are unable to do so with respect to any one of them, their claims must be dismissed. As set forth below, Plaintiffs cannot carry their burden as a matter of law; they cannot even establish the first element of a defamation claim—that Mr.

[2] As of the filing of this motion, petitions for rehearing in the *Mann* appeal by the appellants remain pending before the Court of Appeals. Those petitions, however, do not challenge this standard articulated by the Court of Appeals.

Gallego made any false statement of fact about Plaintiffs, or that any of the statements, if false, were defamatory in nature—let alone all four.

The burden of proving the Challenged Statements are false rests squarely on Plaintiffs, and they must do so by a preponderance of the evidence. *See Klayman v. Segal*, 783 A.2d 607, 613 (D.C. 2001). To show falsity, a plaintiff "must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue." *Carpenter v. King*, 792 F. Supp. 2d 29, 34 (D.D.C. 2011) (quoting *Lane v. Random House*, 985 F. Supp. 141, 150 (D.D.C. 1995)). It is an absolute defense to a defamation claim if the statements are substantially true. *E.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *Klayman*, 783 A.2d at 613; *Carpenter*, 792 F. Supp. 2d at 34.

Further, the law of defamation concerns only "*material[]*" falsity. *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001) (emphasis added). Errors "effect[ing] no material change in meaning" cannot give rise to liability. *Masson*, 501 U.S. at 516. Therefore, the Challenged Statements must be deemed substantially true and, thus, not actionable "so long as the substance, the gist, the sting, of the libelous charge [was] justified," even if the defendant "cannot justify every word of the alleged defamatory matter." *Id.* at 516–517 (citations and internal quotation marks omitted). Stated another way, a statement is "not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Id.* at 517 (citation omitted); *see also Dall v. Pearson*, 246 F. Supp. 812, 813 (D.D.C. 1963) (granting summary judgment in libel action where newspaper's account of plaintiff's testimony was substantially true). Where, as here, a defendant conveys materially true facts, a plaintiff cannot establish defamation or hold the defendant responsible for inferences that may be drawn from those facts. *See White v. Fraternal Order of Police*, 909 F.2d

512, 520 (D.C. Cir. 1990) ("[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 caries a negative implication does not give the Plaintiff a meritorious defamation cause of action.").

1. Translation of "misappropriation" to "malversación"

Plaintiffs' defamation claims are based on their patently inaccurate assertion that by using the word "malversación," Mr. Gallego reported that Frech and JAP had been "charged" with "embezzlement," an "offense in Spain that is considered to be highly criminal and corrupt." Compl. ¶¶ 74–77. Plaintiffs even go so far as to fabricate the contents of Mr. Gallego's reporting, alleging in their Complaint that Mr. Gallego used the phrase "delito de malversación" in his third article. *Id.* ¶ 76. This is incorrect; the word "delito" (Spanish for "crime") does not appear anywhere in any of the three articles written by Mr. Gallego. *See* Gallego Decl. Exs. C, E, I. And, contrary to Plaintiffs' assertions, Mr. Gallego accurately reported on the contents of the operative Second Amended Complaint filed in the Lofft Lawsuit, a civil action pending in D.C. Superior Court, which alleges a claim of "misappropriation" against JAP and Frech. Gallego Decl. Ex. F ¶ 18. As numerous Spanish-English legal dictionaries attest—including ones that were consulted by Mr. Gallego—an accurate Spanish translation of the legal term "misappropriation" is "malversación." *See* Gallego Decl. ¶ 43, Exs. J, K.[3]

The *only* evidence Plaintiffs muster in support of their assertion that Mr. Gallego defamed Plaintiffs by translating "misappropriation" as "malversación" is a version of Mr. Gallego's article Plaintiffs translated from Spanish to English using the website Google

[3] *See also* Declaration of Katie Townsend ("Townsend Decl."), ¶¶ 2–4, Exs. A–C.

Translate. Compl. ¶ 70, fn. 4. Plaintiffs' own allegations, however, undercut any reliance on this deeply flawed translation method. Plaintiffs' Complaint states—with regard to their spurious claim that Mr. Gallego falsely reported that Anton and JAP are equally implicated in the Lofft Lawsuit—that the English translation of Mr. Gallego's article produced by Google Translate "does not accurately translate what is stated in the Spanish article." Compl. ¶ 72, fn. 5. In short, Plaintiffs ask this Court to rely on the version of Mr. Gallego's article produced by Google Translate for purposes of evaluating Plaintiffs' claim that use of the word "malversación" is false and defamatory, but *not* for purposes of evaluating Plaintiffs' claim that Mr. Gallego falsely reported that Anton and JAP are named in the Lofft Lawsuit. This is a contradictory and wholly self-serving use of an unreliable translation method.[4]

The *certified* Spanish-to-English translation of Mr. Gallego's third article—which was prepared by an official translator for the Spanish courts—makes clear that Mr. Gallego's article was accurate, and that it stated exactly what Mr. Gallego intended it to state: Lofft's claims against Frech in the Lofft Lawsuit include a claim for "misappropriation." Gallego Decl. Ex. I at 5. Further, given the context of Mr. Gallego's article, in which he reports on allegations made in a *civil* lawsuit filed by Lofft, a reasonable person could not interpret "malversación," as written in Mr. Gallego's third article, to refer to the crime of embezzlement.

In any event, even if Mr. Gallego's word choice *was* imperfect or even technically inaccurate, which it was not, "[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) (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 267 U.S. App. D.C. 337, 346 (D.C. Cir. 1988)). Courts

[4] Indeed, concurrently with this Motion, Mr. Gallego moves to strike the uncertified translations attached to the Complaint as Exhibits 7 and 10, as well as Paragraph 76, which falsely alleges that Mr. Gallego used the phrase "delito de malversación" in his reporting.

have recognized that legal proceedings are complex, and journalists are not expected to be attorneys; as such, 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"). As such, Mr. Gallego's translation of the legal term "misappropriation" to "malversación"—a translation supported by multiple legal dictionaries, as well as the certified translation by an official translator for Spanish Courts that is the only translation properly before this Court—cannot be deemed false and defamatory even if this Court agrees with Plaintiffs' unsupported claim that the term "malversación" in Mr. Gallego's article means "embezzlement."

2. Frech was listed in publicly-available documents as a "director" of JAP.

Plaintiffs similarly cannot establish that Mr. Gallego's reporting on publicly-available documents that listed Frech as a director of JAP is false. Before reporting that Frech was listed as a director of JAP, Mr. Gallego obtained a copy of JAP's annual report, dated September 14, 2016, which listed Frech as a director. Gallego Decl. ¶ 11. Further, Mr. Gallego searched the publicly-available database of corporations found on the website of the Virginia State Corporation Commission on September 14, 2016 and again on March 7, 2017 (shortly before publication of his first article); both times, the website listed Frech as a director of JAP. *Id.* Finally, Mr. Gallego provided both Frech and Anton with the opportunity to respond; both Frech and Anton admitted that Frech was listed as a director of JAP in publicly-available documents, but stated that this was an administrative error. Gallego Decl. ¶¶ 12–14. Mr. Gallego included that comment in his reporting. *Id.* ¶ 14. Mr. Gallego engaged in responsible, thorough

newsgathering, and his report that Frech was listed as a director of JAP in publicly-available documents was demonstrably true and therefore cannot, as a matter of law, be actionable.

Moreover, Plaintiffs do not—and cannot—articulate why merely reporting that Frech was listed as a "director" of JAP in publicly-available documents could be considered defamatory. Even if that statement were false (which it is not), it does not meet the heightened standard for judging a statement to be defamatory: "[A]n allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Fleming v. AT&T Information Servs., Inc.*, 878 F.2d 1472, 1475–76 (D.C. Cir. 1989) (citations omitted). Plaintiffs, who acknowledge in their Complaint that Frech is an "employee of JAP," Compl. ¶ 3, fail to offer any reason whatsoever why Mr. Gallego's accurate reporting that publicly-available documents referred to Frech as a "director" of JAP could possibly make Frech appear "odious, infamous, or ridiculous." *Id.*

3. Anton was named and implicated in the Second Amended Complaint filed in the Lofft Lawsuit.

Finally, Plaintiffs' allegations that Mr. Gallego's third article purportedly "falsely states that Anton, JAP's owner, is named in the [Lofft Lawsuit's Second Amended] Complaint," "falsely states that Anton and his company are equally implicated in the proceedings," and "alleges collusion with the Spanish government and the Spanish Embassy," Compl. ¶¶ 71–73, are also not actionable. These statements are neither false nor defamatory. On the contrary, the article accurately states that Anton is named in the Second Amended Complaint filed in the Lofft Lawsuit. Gallego Decl. Ex. F, ¶ 19. Further, Mr. Gallego accurately reports that Anton, as "JAP's owner," is implicated in the Lofft Lawsuit. *Id.* at ¶ 19 (alleging that Frech "undertook an active, on-going business conspiracy with JAP, and its chief officer, Jesus Anton Perez, to conceal and divert other construction business"); *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"). Finally, Mr. Gallego's third article accurately reports on the allegations contained within Lofft's Second Amended Complaint—that Frech "covertly prepared an estimation for a lucrative roof improvement at the Spanish Embassy in Washington, D.C." and, "[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." *Id.* ¶ 18(c).

It is an absolute defense to a defamation claim where, as here, the statements are substantially true. *E.g.*, *Masson*, 501 U.S. at 517; *Klayman*, 783 A.2d at 613; *Carpenter*, 792 F. Supp. 2d at 34. And where, as here, a defendant conveys materially true facts, a plaintiff cannot establish defamation or hold the defendant responsible for inferences that may be drawn from those 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*, 881 F. Supp. at 31 (D.D.C. 1995) ("That the truth caries a negative implication does not give the Plaintiff a meritorious defamation cause of action.").

B. The Challenged Statements are privileged as accurate reports of court proceedings.

In the District of Columba, as elsewhere in the United States, accurate reporting on judicial proceedings is shielded from liability by the common-law fair report privilege. *See, e.g.*, *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88–90 (D.C. 1980); *Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985). This privilege protects the public's right to

"disseminate official records—whether verbatim or in fair summaries—without fear of liability for any false, defamatory material that they might contain." *Dameron*, 779 F.2d at 739.

The fair report privilege protects reports that are "(a) accurate and complete, or a fair abridgment of what has occurred, and (b) published for the purpose of informing the public as to a matter of public concern." *Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C. 2005) (quoting *Phillips*, 424 A.2d at 88). As with the element of falsity, accuracy for purposes of the fair report privilege is measured by whether a report is a substantially accurate account of judicial proceedings, not whether it is literally accurate in all respects. *White*, 909 F.2d at 527. The Challenged Statements at issue here easily meet these criteria.

As an initial matter, Mr. Gallego's reporting summarizes claims in the Second Amended Complaint filed in the Lofft Lawsuit, specifically that "Lofft claims that Frech had been working with [Lofft] since November of 2013 until the 5th of February 2016 when he went to work for JAP Home Solutions" and that "[a]mongst the charges placed against [Frech] there is one for misappropriation and conspiracy to acquire possible business." Gallego Decl. Ex. I at 5. There can be no question that Mr. Gallego is reporting on the allegations contained within Lofft's Second Amended Complaint; as such, Mr. Gallego's report is protected by the fair report privilege. *See Boley*, 950 F. Supp. 2d at 257–258 (holding the fair report privilege applied where the reporter "specifically attributed the statements to [the executive body] 'in such a manner that the average reader would be []likely to understand [them] … to be a report on or summary of an official document or proceeding'" (quoting *Dameron*, 779 F.2d at 739)); *see also White*, 909 F.2d at 528 (holding the fair report privilege applied where reporter accurately "summarized the gist of the allegations" contained within a proceeding).

The fair report privilege also applies to Plaintiffs' claims that Mr. Gallego purportedly falsely reported that Anton was named in the Second Amended Complaint filed in the Lofft Lawsuit, and that he was implicated throughout the proceedings. Compl. ¶¶ 71–73. As detailed above, Mr. Gallego's reporting accurately summarized the contents of Lofft's Second Amended Complaint, which both names Anton as the owner of JAP and alleges that Frech worked with Anton and JAP to deprive Lofft of business, including a contract for work at the Embassy.

Finally, the fair report privilege applies to Plaintiffs' claim that Mr. Gallego allegedly inaccurately stated that Frech appeared as a "director" of JAP in public documents. As detailed above, the fair report privilege permits a speaker to "disseminate official records." *Dameron*, 779 F.2d at 739. This is precisely what Mr. Gallego did; he reported contents of the official, publicly-available database of the Virginia State Corporation Commission, which listed Frech as a director of JAP. Mr. Gallego's reporting is fully shielded by the fair report privilege.

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

Plaintiffs are limited purpose public figures for purposes of their defamation claims against Mr. Gallego. Accordingly, they must prove not only that the Challenged Statements were false (which, as detailed above, they cannot do), but also, by clear and convincing evidence that Mr. Gallego acted with "actual malice"—*i.e.*, that the Challenged Statements were made "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, 279–80 (1964); *see also St Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Tavoulareas v. Piro*, 817 F.2d 762, 775–76 (D.C. Cir. 1987).

The U.S. Supreme Court has identified two categories of "public figures": "general purpose" and "limited purpose." *Tavoulareas*, 817 F.2d at 772. A limited purpose public figure

is one who voluntarily injects himself or is drawn into a particular public controversy and therefore becomes a public figure for a limited range of issues. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). The relevant inquiry turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the [alleged] defamation." *Id.*

The D.C. Circuit applies a three-part test to determine whether a defamation plaintiff is a limited purpose public figure. "First, the court must identify the relevant controversy and determine whether it is a public controversy. Second, the plaintiff must have played a significant role in that controversy. Third, the defamatory statement must be germane to the plaintiff's participation in the controversy." *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106, 114 (D.C. Cir. 2017) (quoting *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 585 (D.C. Cir. 2016)). Under this test, Plaintiffs fall squarely within the definition of limited purpose public figures.

"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). Even before the publication of Mr. Gallego's articles, there was an active public controversy regarding the privileges and opportunities afforded to Spanish government officials appointed to high level positions in Washington, D.C., as well as a controversy surrounding how family members of prominent Spanish officials, like Frech's wife, obtain these positions. Gallego Decl. ¶¶ 5–6. Further, the alleged awarding of public contracts to JAP, a company with familial ties to the Embassy and the Spanish government—including any favorable treatment JAP may have received as a result of those familial ties, as is alleged in the Lofft Lawsuit—is unquestionably a public issue. *Id*. Plaintiffs clearly "play[] a significant role in the controversy," and the

Challenged Statements are certainly "germane to [Plaintiffs'] participation in the controversy." *Kahl*, 856 at 114.

Plaintiffs are limited purpose public figures for purposes of claims related to their involvement in the Lofft Lawsuit; as such, they must prove that Mr. Gallego acted with actual malice to prevail on their defamation claims. But, put simply, Plaintiffs' Complaint does not—and Plaintiffs cannot—plead actual malice, let alone come close to demonstrating that they are "likely to succeed on the merits" as to that issue for purposes of the D.C. Anti-SLAPP Act. Without alleging any factual basis for their assertions, Plaintiffs simply claim that Mr. Gallego "negligently, purposefully, and knowingly made false and defamatory statements about Plaintiffs." Compl. ¶ 125.

Even if the Challenged Statements were deemed to be false (which they are not), and even if a defamatory implication could reasonably be drawn from the Challenged Statements (which it cannot), Plaintiffs would still be required to demonstrate that Mr. Gallego intended to convey the false implication alleged by plaintiff. *See, e.g., White*, 909 F.2d at 520 (holding report based on accurate facts not impliedly defamatory because "the particular manner or language" of the report at issue did not "suppl[y] additional, affirmative evidence suggesting that the defendant *intend[ed]* or *endorse[d]* the defamatory inference") (emphasis in original). Speakers are shielded from liability based on innocent misunderstanding, a rule that is grounded in similar reasoning as the standard that factually accurate statements are not defamatory. *Id.*

Plaintiffs have made no showing of falsity of any of the Challenged Statements, much less that Mr. Gallego acted with the requisite level of fault— actual malice—in making such statements. As such, Plaintiffs are far from "likely to succeed on the merits" of their defamation claims against Mr. Gallego. *See Boley*, 950 F. Supp. at 263 (deeming actual malice allegations

insufficient and dismissing complaint where plaintiff had "adduced no *facts* indicating that the [challenged] statements were false or made with actual malice, offering only broad and conclusory denials") (emphasis in original); *Thomas v. News World Communications*, 681 F. Supp. 55, 65 (D.D.C. 1988) (granting motion to dismiss where "[t]he complaint lacks any colorable claim that *The Washington Times* published the challenged statements with actual malice").

III. EVEN OUTSIDE THE ANTI-SLAPP FRAMEWORK, PLAINTIFFS' CLAIMS CANNOT SURVIVE A 12(b)(6) MOTION TO DISMISS

The Court should grant Defendant's special motion to dismiss under the Anti-SLAPP Act for the reasons detailed above. But even if viewed outside the Anti-SLAPP framework, Plaintiffs' claims against Mr. Gallego still can and should be dismissed with prejudice.

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face, testing whether a plaintiff has properly stated a claim," *Molina-Aviles v. Dist. of Columbia*, 797 F. Supp. 2d 1, 4 (D.D.C. 2011), and "[a] court may dismiss a complaint or any portion of it for failure to state a claim upon which relief may be granted." *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 217 (D.D.C. 2012) (citing Fed. R. Civ. P. 12(b)(6)). "To survive a motion to dismiss, a complainant must 'plead [] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). Further, "a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is 'plausible on its face.'" *Molina-Aviles*, 797 F. Supp. at 4 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]he Court 'need not accept inferences drawn by plaintiff[] if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations.'" *Parisi*, 845 F. Supp. 2d at 218 (quoting *Kowal v. MCI*

Commc'ns Corp., 16 F.3d 1271, 1276 (D.C. Cir. 1994)). Failure to meet these tests results in a summary dismissal of a plaintiff's claims.

Courts in the District of Columbia have long recognized that "[g]iven the threat to the First Amendment posed by nonmeritorius defamation actions, it is particularly appropriate for courts to scrutinize such actions at an early stage of the proceedings to determine whether dismissal is warranted." *Coles*, 881 F. Supp. at 30. "In [the First Amendment] area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function." *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 50 (D.C. 1983). "[S]ummary procedures are *even more essential*" where, as here, "[t]he threat of being put to a defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Wash. Post v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (emphasis added).

As detailed above, *see* Section II, *supra*, Plaintiffs have failed to state a claim for defamation, let alone show that they are likely to succeed on the merits. Thus, while dismissing Plaintiffs' claims against Mr. Gallego pursuant to the D.C. Anti-SLAPP Act will best serve the D.C. Anti-SLAPP's Act's purpose to create a substantive "immunity [for] individuals engaging in protected actions," Committee Rpt. On Bill 18-893 (Nov. 18, 2010) at 4, Plaintiffs' claims also fail to state a claim for defamation as a matter of law, and can be dismissed under Rule 12(b)(6).

CONCLUSION

For the reasons set forth above, Defendant Gallego respectfully requests that the claims against him be dismissed with prejudice pursuant to the D.C. Anti-SLAPP Act of 2010 or, in the

alternative, for failure to state a claim pursuant to Rule 12(b)(6), and that he be awarded reasonable attorneys' fees and costs.

Respectfully submitted,

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