

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
1. The Injunction Proceedings and the Court’s Memorandum Opinion Granting a TRO Provide Important Background for the Court’s Consideration of the Pending Motions	1
2. The Pending Motions are Perverse	2
3. Defendants Deliberately Violated the Rules Governing 12(b)(6) Motions and Raise Extraneous Issues.....	3
ARGUMENT	4
I. Plaintiffs Have Adequately Pled Their Causes of Action.....	4
A. Plaintiffs Have Adequately Alleged a Claim for Defamation.....	5
1. The Advertisement Is Reasonably Susceptible of a Defamatory Meaning.....	5
2. Plaintiffs Need Not Plead Special Damages.....	10
B. Plaintiffs Have Adequately Alleged Appropriation of Their Likenesses	11
1. The Advertisement Was Sufficiently Commercial in Nature to Subject USA Next and Montini to Liability	11
2. Appearing in Public Does Not Waive an Appropriation Claim	15
3. Oregon Law Allows Non-Celebrities to Sue for Appropriation of Name or Likeness.....	16
4. The Use of Plaintiffs’ Image Was Hardly “Incidental” to the Advertisement as a Whole	17
5. Montini Is Liable Both Directly and as USA Next’s Agent.....	17
C. Plaintiffs Have Stated a Claim for Invasion of Privacy (False Light) Under Oregon Law	18
1. Plaintiffs Have Alleged Both a Direct and an Implied False Statement	18
2. The Advertisement Directly Places Plaintiffs in a False Light	19
3. The Advertisement Additionally Could Reasonably Be Interpreted as Placing Plaintiffs in a False Light by Implication.....	20

4.	Because False Light Must be Viewed in Context, the Advertisement is Highly Offensive to a Reasonable Person	21
5.	There Is No Heightened Pleading Standard for False Light Claims.....	22
D.	Plaintiffs Have Sufficiently Pled Intentional Infliction of Emotional Distress	23
1.	The Plaintiffs Have Alleged Acts That, in Context, Constitute Intentional Infliction of Emotional Distress	23
2.	Plaintiffs Have Alleged Conduct Distinct From Their Libel Claim.....	26
3.	Plaintiffs Have Alleged Sufficient Facts Demonstrating Severe Emotional Distress.....	27
E.	Plaintiffs Are Entitled to Punitive Damages Under Oregon Law.....	27
F.	The Extra-Record Material Relied On By the Defendants Is Improper, Should Be Stricken and Costs Should Be Imposed	29
II.	Jurisdiction Over Montini and Venue Are Proper in This District.....	31
A.	Montini Is Subject to Personal Jurisdiction in This District.....	31
1.	Montini Is Subject to General Personal Jurisdiction in This District Under D.C. Law	32
2.	Montini Is Also Subject to Specific Personal Jurisdiction in D.C.....	34
3.	Exerting Personal Jurisdiction Over Montini Comports With Due Process	36
4.	If Necessary, Plaintiffs Should Be Permitted Jurisdictional Discovery.....	38
B.	Venue Is Proper in This District	39
1.	Venue Is Proper Because This District Has Substantial Contacts With the Underlying Claims	40
2.	Venue Is Proper Because Both Defendants Are Subject to Personal Jurisdiction in This District.....	42
3.	Montini Has Not Carried His Burden to Justify Transfer	43
III.	Defendant Montini’s Rule 12(f) Motion to Strike Should Be Denied.....	44
	CONCLUSION	46

TABLE OF AUTHORITIES

CASES

Aftergood v. CIA, 355 F. Supp. 2d 557 (D.D.C. 2005)44

Anderson v. Fisher Broadcasting Cos., 712 P.2d 803 (1986)..... 11, 12, 14, 16

Ann-Margret v. High Society Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980) 16

Arrington v. New York Times Co., 434 N.E.2d 1318 (N.Y. 1982) 21

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026 (1987)..... 37, 38

Ault v. Hustler Magazine, Inc., Civ. No. 86-381-FR, 1986 WL 20896 (D. Or. Oct. 20, 1986) 26, 27

Bates v. C&S Adjusters, 980 F.2d 865 (2d Cir. 1992)41

Battaglieri v. Mackinac Center for Public Policy, 261 Mich. App. 296 (2004) 12

Beecher v. Montgomery Ward & Co., 517 P.2d 667 (Or. 1973) 5, 7, 11

Bellairs v. Beaverton Sch. Dist., No. Civ. 04-770-JO, 2004 WL 1900417 (D. Or. Aug. 23, 2004) 6, 7, 8

Beverley v. Choices Women's Medical Center, Inc., 78 N.Y.2d 745 (1991) 13

Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 103 S. Ct. 2875 (1983)..... 13

Bowling v. Missionary Servants of the Most Holy Trinity, No. 91-5920, 1992 WL 181427 (6th Cir. July 30, 1992)..... 13

Brewer v. Hustler Magazine, Inc., 749 F.2d 527 (9th Cir. 1984)..... 16

C.A.R. Yew, Inc. v. Corwin, 708 P.2d 644 (Or. Ct. App. 1985) 11

Campbell v. Safeway, Inc., 332 F. Supp. 2d 1367 (D. Or. 2004) 27

Caraway v. L.S. Agency, No. 85 Civ. 1855-CSH, 1986 WL 12529 (S.D.N.Y. Oct. 27, 1986) 14, 17

Caudle v. Thompson, 942 F. Supp. 635 (D.D.C. 1996) 10

Checkley v. Boyd, 14 P.3d 81 (Or. Ct. App. 2000)..... 24, 25

<i>Cibenko v. Worth Publishers, Inc.</i> , 510 F. Supp. 761 (D.N.J. 1981).....	21
<i>Condit v. Star Editorial, Inc.</i> , 259 F. Supp. 2d 1046 (E.D. Cal. 2003).....	16
<i>Conley v. Gibson</i> , 355 U.S. 41, 78 S. Ct. 99 (1957).....	5
<i>Dickson v. United States</i> , 831 F. Supp. 893 (D.D.C. 1993)	32, 38
<i>Doctor's Assocs., Inc. v. Stuart</i> , 85 F.3d 975 (2d Cir. 1996).....	43
<i>Downing v. Abercrombie & Fitch</i> , 265 F.3d 994 (9th Cir. 2001)	12
<i>El-Fadl v. Central Bank of Jordan</i> , 75 F.3d 668 (D.C. Cir. 1996).....	39
<i>El-Hadad v. Embassy of the United Arab Emirates</i> , 69 F. Supp. 2d 69 (D.D.C. 1999), <i>rev'd in part on other grounds</i> , 216 F.3d 29 (D.C. Cir. 2000).....	30, 31
<i>Farmers Educ. & Coop. Union of Am. v. WDAY</i> , 89 N.W.2d 102 (Neb. 1958)	7
<i>Farnsworth v. Hyde</i> , 512 P.2d 1003 (Or. 1973)	7
<i>Fender v. City of Oregon City</i> , 811 F. Supp. 554 (D. Or. 1993)	7
<i>First of Michigan Corp. v. Bramlet</i> , 141 F.3d 260 (6th Cir. 1998)	41
<i>Gill v. Hearst Pub. Co.</i> , 253 P.2d 441 (Cal. Ct. App. 1953).....	15
<i>Gorman v. Ameritrade Holding Corp.</i> , 293 F.3d 506 (D.C. Cir. 2002).....	32, 34
<i>Hall v. May Dep't Stores Co.</i> , 637 P.2d 126 (Or. 1981)	26, 28
<i>Harris v. Pameco Corp.</i> , 12 P.3d 524 (Or. Ct. App. 2000).....	27
<i>Helicopteros Nacionales de Colombia, S.A. v. Hall</i> , 466 U.S. 408, 104 S. Ct. 1868 (1984).....	32
<i>Helmer v. Doletskaya</i> , 393 F.3d 201 (D.C. Cir. 2004)	32
<i>Herron v. Veneman</i> , 305 F. Supp. 2d 64 (D.D.C. 2004).....	30, 31
<i>Hetfield v. Bostwick</i> , 901 P.2d 986 (Or. Ct. App. 1995).....	24
<i>Hinish v. Meier & Frank Co.</i> , 113 P.2d 438 (Or. 1941)	16, 17
<i>Hinkle v. Alexander</i> , 417 P.2d 586 (Or. 1966)	10, 11
<i>Holder v. Haarmann & Reimer Corp.</i> , 799 A.2d 264 (D.C. 2001).....	37, 38

<i>Holy Land Found. for Relief & Dev. v. Ashcroft</i> , 333 F.3d 156 (D.C. Cir. 2003)	31
<i>In re Office Prods. Co. Sec. Litig.</i> , 251 F. Supp. 2d 58 (D.D.C. 2003)	41
<i>Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee</i> , 456 U.S. 694, 102 S. Ct. 2099 (1982).....	34
<i>Int'l Shoe Co. v. Washington</i> , 326 U.S. 310, 66 S. Ct. 154 (1945)).....	32
<i>Jackson v. Consumer Pubs.</i> , 256 A.D. 708 (N.Y. App. Div. 1939)	9
<i>Jacobsen v. Oliver</i> , 201 F. Supp. 2d 93 (D.D.C. 2002)	36
<i>Johnson v. U.S. Capitol Police Board</i> , No. 1:03-cv-00614, 2005 U.S. Dist. LEXIS 3589 (D.D.C. Mar. 2, 2005).....	45
<i>Judicial Watch, Inc. v. U.S. Dept. of Commerce</i> , 224 F.R.D. 261 (D.D.C. 2004)	45
<i>Jung v. Assoc. of Am. Medical Colleges</i> , 300 F. Supp. 2d 119 (D.D.C. 2004)	32, 35
<i>King v. Mensolascino</i> , 965 P.2d 442 (Or. 1976).....	21
<i>Kraemer v. Harding</i> , 976 P.2d 1160 (Or. Ct. App. 1999).....	27
<i>Leggett v. First Interstate Bank</i> , 739 P.2d 1083 (Or. Ct. App. 1987).....	28, 29
<i>Lennon v. Seaman</i> , 63 F. Supp. 2d 428 (S.D.N.Y. 1999)	44, 46
<i>Lewis v. Oregon Beauty Supply Co.</i> , 733 P.2d 430 (Or. 1987)	28
<i>Lex Tex Ltd. v. Skillman</i> , 579 A.2d 244 (D.C. 1990).....	36
<i>Lipsky v. Commonwealth United Corp.</i> , 551 F.2d 887 (2d Cir. 1976)	44, 46
<i>Madani v. Kendall Ford, Inc.</i> , 818 P.2d 930 (Or. 1991).....	24
<i>Manifold v. Wolf Coach, Inc.</i> , 231 F. Supp. 2d 58 (D.D.C. 2002)	36
<i>Marshall County Health Care Auth. v. Shalala</i> , 988 F.2d 1221 (D.C. Cir. 1993)	30
<i>Martin v. Senators, Inc.</i> , 418 S.W.2d 660 (Tenn. 1967).....	15, 16
<i>Martinez v. Democrat-Herald Pub. Co.</i> , 699 P.2d 818 (Or. Ct. App. 1983)	12, 14, 15
<i>McCaskey v. Continental Airlines, Inc.</i> , 133 F. Supp. 2d 514 (S.D. Tex. 2001).....	39, 44

<i>McGanty v. Staudenraus</i> , 901 P.2d 841 (Or. 1995).....	26, 27, 28, 29
<i>Muresan v. Philadelphia Romanian Pentecostal Church</i> , 962 P.2d 711 (Or. Ct. App. 1998).....	23
<i>Neufeld v. Neufeld</i> , 910 F. Supp. 977 (S.D.N.Y. 1996).....	40
<i>New York Magazine v. Metro. Transp. Auth.</i> , 987 F. Supp. 254 (S.D.N.Y. 1997), <i>rev'd in part on other grounds</i> , 136 F.3d 123 (2d Cir. 1998).....	14
<i>New York State Bar Ass'n v. Federal Trade Comm'n</i> , 276 F. Supp. 2d 110 (D.D.C. 2003).....	5
<i>O'Hilderbrant v. Columbia Broad. Sys., Inc.</i> , Civ. No. 42729, 1974 Cal. App. LEXIS 860 (Cal. Ct. App. June 28, 1974).....	21
<i>Paley v. Estate of Ogus</i> , 20 F. Supp. 2d 83 (D.D.C. 1998).....	29
<i>Peay v. Curtis Publ'g Co.</i> , 78 F. Supp. 305 (D.D.C. 1948).....	9
<i>Peck v. Tribune Co.</i> , 214 U.S. 185, 29 S. Ct. 554 (1909).....	8
<i>Pecoraro v. Sky Ranch for Boys</i> , 340 F.3d 558 (8th Cir. 2003).....	41
<i>Phillips v. Lincoln County School District</i> , 984 P.2d 947 (Or. Ct. App. 1999).....	22, 23
<i>Precept Med. Prods., Inc. v. Klus</i> , 282 F. Supp. 2d 381 (W.D.N.C. 2003).....	44
<i>Preston v. Martin Bregman Productions</i> , 765 F. Supp. 116 (S.D.N.Y. 1991).....	17
<i>Ranous v. Hughes</i> , 141 N.W.2d 251 (Wis. 1966).....	7
<i>Reesman v. Highfill</i> , 965 P.2d 1030 (Or. 1998).....	5, 19, 20
<i>Regency Capital, LLC v. Corpfinance Int'l, Inc.</i> , No. 02 Civ. 5615, 2003 WL 22400200 (S.D.N.Y. Oct. 20, 2003).....	34
<i>Reilly v. Chambers</i> , 215 F. Supp. 2d 759 (S.D. W. Va. 2002).....	40
<i>Robbins v. Bureau of Nat'l Affairs</i> , 896 F. Supp. 18 (D.D.C. 1995).....	29
<i>Robertson v. McClockey</i> , 666 F. Supp. 241 (D.D.C. 1987).....	7
<i>Saylab v. Hartford Mut. Ins. Co.</i> , 271 F. Supp. 2d 112 (D.D.C. 2003).....	10
<i>Second Amendment Found. v. U.S. Conference of Mayors</i> , 274 F.3d 521 (D.C. Cir. 2001).....	39

<i>Sheets v. Knight</i> , 779 P.2d 1000 (1989).....	27
<i>Shoppers Food Warehouse v. Moreno</i> , 746 A.2d 320 (D.C. 2000).....	35, 37
<i>Sizemore v. City of Madras</i> , Civ. No. 04-1501-HV, 2005 WL 35856 (D. Or. Feb. 2, 2005).....	24
<i>Skoog v. Clackamas County</i> , No. 00-1733-MO, 2004 WL 102497 (D. Or. Jan. 12, 2004).....	6, 7
<i>Smith v. U.S. Investigations Servs.</i> , No. 04-0711, 2004 U.S. Dist. LEXIS 23504 (D.D.C. Nov. 18, 2004).....	41
<i>South Utah Wilderness Alliance v. Norton</i> , 315 F. Supp. 2d 82 (D.D.C. 2004)	40, 44
<i>Spanel v. Pegler</i> , 160 F.2d 619 (7th Cir. 1947).....	7
<i>Sussman v. Bank of Israel</i> , 56 F.3d 450 (2d Cir. 1995)	43
<i>Sweet v. Ken</i> , 169 Misc. 407 (Supreme Ct. N.Y. County 1938).....	9
<i>Taylor v. Fed. Deposit Ins. Corp.</i> , 132 F.3d 753 (D.C. Cir. 1997).....	31
<i>Tele-Communications of Key West, Inc. v. United States</i> , 757 F.2d 1330 (D.C. Cir. 1985).....	29
<i>Thayer v. Worcester Post Co.</i> , 187 N.E. 292 (Mass. 1933)	16
<i>Thomas v. District of Columbia</i> , 887 F. Supp. 1 (D.D.C. 1995)	29
<i>Triangle Publ'ns v. Chumley</i> , 317 S.E.2d 534 (1984).....	8
<i>Turpin v. Mori Seki Co.</i> , 56 F. Supp. 2d 121 (D. Mass. 1999).....	33, 36
<i>United States v. Ferrara</i> , 54 F.3d 825 (D.C. Cir. 1995)	36
<i>Ward v. League for Justice</i> , 93 N.E.2d 723 (Ohio Ct. App. 1950).....	7
<i>Wheeler v. Green</i> , 593 P.2d 777 (Or. 1979).....	28
<i>Wiggins v. Phillip Morris, Inc.</i> , 853 F. Supp. 457 (D.D.C. 1994).....	45
<i>Wood v. Miller</i> , 76 P.2d 963 (Or. 1938).....	18
<i>Zhu v. Federal Housing Fin. Bd.</i> , No. 03-5297, 2004 WL 1249788 (D.C. Cir. June 7, 2004).....	32

STATUTES

D.C. Code § 13-422 32

D.C. Code § 13-423(a) 34, 38

Fed.R.Civ.P. 8(a)(2) 5, 10

Fed.R.Civ.P. 12(b)(6) 5, 29, 44

Fed. R. Civ. P. 56 30, 31, 45

28 U.S.C. § 1391(a)(2) 40

28 U.S.C. § 1406(b) 44

MISCELLANEOUS

1 J. Thomas McCarthy, *The Rights of Publicity & Privacy* § 4:27 (2d ed. 2005) 14, 15

2 Am. Jur. 256 (Agency) 18

Restatement of Torts § 867 15

Restatement (Second) of Torts §§ 652B, 652D 16

Restatement (Second) of Torts § 652C 11

Restatement (Second) of Torts § 652C cmt. a 15

PRELIMINARY STATEMENT

This Memorandum of Points and Authorities is filed in Opposition to the pending motions to dismiss – motions that were filed reflexively and, despite their volume, are meritless. For the reasons set forth herein, the pending motions must be denied and the case should proceed.

1. The Injunction Proceedings and the Court’s Memorandum Opinion Granting a TRO Provide Important Background for the Court’s Consideration of the Pending Motions

Unlike in most cases where a motion to dismiss is filed, this Court is intimately familiar with the allegations and background to the Complaint alleging Defendants’ misappropriation and egregious misuse of Plaintiffs’ images. That is because the case began in March with plaintiffs’ successful motions for a temporary restraining order (TRO) and for a preliminary injunction. The Court received briefs, held hearings spanning two days, granted the motion for a TRO and issued a ten-page Memorandum Opinion in which it found a substantial likelihood of success on the invasion of privacy claim contained in the Complaint.¹

This is a case where, as set forth by the Court:

- “It was conceded by counsel for USA Next during oral argument that it did not have any legal right to the use the images of the plaintiffs. Thus, there was clearly an appropriation of the plaintiffs’ images...for the [defendants’] benefit.” Mem. Op. at 6.
- The plaintiffs can recover damages since their likenesses have been used without their consent by defendants in an “incendiary” advertising campaign. *Id.*
- Non-public figures have the same right as public figures to protect their image from misappropriation, since “an individual’s personal image is a unique commodity.” *Id.* at 7 - 8.

¹ The Court well-summarized the factual background and the allegations of the Complaint in its Memorandum Opinion, so we will dispense with a recitation here. *See* Mem. Op. at 1 – 3. Moreover, as with all Rule 12(b)(6) motions, the allegations of the Complaint speak for themselves and are to be taken as true for purposes of testing their legal sufficiency.

- Plaintiffs’ images “were not only used without their permission, but also for a purpose inconsistent with the perspectives on the subject (gay relationships) reflected in the photograph misappropriated by the defendants. In other words, the use of plaintiffs’ images to condemn a view they actually support as portrayed in the misappropriated photograph amounts to irreparable harm.” *Id.* at 9.
- “The public, just as the plaintiffs, has a strong interest in preventing the image and likeness of an individual from being used in a manner inconsistent with the person’s beliefs and values without their permission.” *Id.* at 9 -10.

In contesting the motion for a TRO, USA Next utterly failed when it tried to suggest that there is no case here, just as it failed to persuade the Court on the likely ultimate outcome of the case.

And both of the defendants chose not to contest the motion for a preliminary injunction but, rather, stipulated to the entry of an injunction until the conclusion of the case.

Notwithstanding this procedural history, and the fact that the Court already has studied the bona fides of the Complaint and has reached significant conclusions about its merit, the Defendants gamely seek dismissal through their motions. Understandably, the defendants wish to avoid the consequences of their actions, but as reflected in the Court’s judgment on the TRO motion, this is a legally serious and substantial case.

2. The Pending Motions are Perverse

In their overlapping motions, the Defendants advance the unsupportable proposition that if an individual happens to have his picture taken at a public event, and if that picture subsequently is published in a newspaper, then *anyone*, for *any purpose*, legally may take that person’s image without permission and use it for financial gain, even in what, as noted, the Court has labeled an “incendiary advertisement.” Mem. Op. at 6. They also assert that the picture may be used to communicate a message that is false and personally harmful to the person whose image is used, with no legal consequences whatsoever. As the Court recognized in the

injunction proceedings that started this case, neither of these propositions is correct as a matter of law. The law provides a remedy for stealing someone's image and misusing it, and that is why both motions to dismiss are wildly misguided.

Defendant Montini adds to his motion an argument that he should be dismissed for want of personal jurisdiction and on venue grounds. But Montini's argument is without foundation. Montini has failed to inform the Court that until this lawsuit was filed, his commercial website heralded his connection to Washington, D.C. with a local office address, or that he hurriedly removed that reference once the case began, to cover up his connection to the forum. He also omits the important fact that the advertisement he created was placed on a website based in Washington, D.C. Try as he might, Montini cannot avoid his substantial connection to this forum.

3. Defendants Deliberately Violated the Rules Governing 12(b)(6) Motions and Raise Extraneous Issues

In making their motions, the Defendants both attempt to distract the Court's attention with extraneous matters. Both Defendants ignore the rules governing Rule 12(b)(6) motions and resort to evidence that goes well beyond the four corners of the Complaint in order to engage in a transparent "blame-the-victim" gambit. Echoing the argument USA Next unsuccessfully advanced during the injunction hearing, both Defendants suggest that Plaintiffs have no right to proceed with their lawsuit because they complained publicly about their mistreatment before filing. That, of course, has no bearing on the sufficiency of the Complaint and, moreover, there is no rule against a victim speaking out about his mistreatment before suing the perpetrator.

Defendant Montini attempts to castigate the Plaintiffs for accurately characterizing the advertisement containing Plaintiffs' images (the "Advertisement") as homophobic and hateful.

In a dramatic but meritless gesture, Mr. Montini even goes so far as to move to strike the characterizations which are well within the bounds of permissible pleading. The homophobic, hateful nature of the Advertisement is at the heart of the matter. It is understandable why Mr. Montini would want to re-characterize his handiwork as benign, but disingenuousness will not make it so. To put it mildly, Mr. Montini is audacious (and wrong) to label this lawsuit as “mean-spirited and politically motivated,” Montini Br. at 1, when it was *his* mean-spirited and politically motivated handiwork, including the illegal use of Plaintiffs’ images, that prompted this case in the first place.

Another diversion is USA Next’s attempt to disguise itself as a victim whose First Amendment free speech rights are being threatened. This lawsuit does not challenge the right of USA Next to make whatever argument it wants about AARP and its positions on the military and gay marriage. It just cannot use the Plaintiffs’ images to make its argument. This action is focused solely on the conscription of Richard Raymen and Steven Hansen to star in an Advertisement that, as the Court correctly observed, is “inconsistent with their perspectives on the subject (gay relationships).” Mem. Op. at 9. The Plaintiffs’ stolen images were used against their will “to condemn a view they actually support.” *Id.* They are seeking redress for that behavior and nothing more. The claims they have asserted are garden-variety and routine tort claims that fit the challenged conduct to a tee. There is no basis whatsoever for dismissing any of those claims.

ARGUMENT

I. Plaintiffs Have Adequately Pled Their Causes of Action

Both Defendants misrepresent Oregon law and distort the Complaint in order to seek dismissal of the plainly applicable claims. And, tellingly, they try to sneak in evidentiary

material beyond the four corners of the Complaint in order to sway the Court and divert its attention from the clear sufficiency of each count of the Complaint.

On a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), “the Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiffs and must grant the plaintiffs the benefit of all inferences that can be derived from the alleged facts.” *New York State Bar Ass’n v. Federal Trade Comm’n*, 276 F. Supp. 2d 110, 114 (D.D.C. 2003). While the court “need not accept inferences or conclusory allegations *that are unsupported by the facts set forth in the complaint*,” *id.* (emphasis added), Rule 8 requires only that the complaint itself contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). The court will dismiss a claim only if the defendant demonstrates “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Defendants have not met that demanding standard here with respect to any of the claims alleged in Plaintiffs’ Complaint.

A. Plaintiffs Have Adequately Alleged a Claim for Defamation

1. The Advertisement Is Reasonably Susceptible of a Defamatory Meaning

Plaintiffs have alleged a clear and sustainable claim of libel in their Complaint. Under Oregon law, a statement is susceptible of a defamatory meaning if it “would subject [a plaintiff] to hatred, contempt or ridicule . . . [or] tend to diminish the esteem, respect, goodwill or confidence in which [the plaintiff] is held or to excite adverse, derogatory or unpleasant feelings or opinions against [the plaintiff].” *Beecher v. Montgomery Ward & Co.*, 517 P.2d 667,669 (Or. 1973) (quoting *Reesman v. Highfill*, 915 P.2d 1030, 1034 (Or. 1998)). When evaluating whether

a statement is susceptible of a defamatory meaning, a court must consider the context in which the statement is made, particularly where a defamatory use of a plaintiff's photograph is alleged. *See Skoog v. Clackamas County*, No. 00-1733-MO, 2004 WL 102497, at *25-*26 (D. Or. Jan. 12, 2004) (“[T]he context in which [plaintiff’s] photograph appeared is key to evaluating plaintiff’s defamation claim.”); *Bellairs v. Beaverton Sch. Dist.*, No. Civ. 04-770-JO, 2004 WL 1900417 at *2 (D. Or. Aug. 23, 2004) (“The court considers the plain meaning of the statement and reasonable inferences drawn from the context of the communication.”).

Plaintiffs here have alleged that their picture was used without authorization in the Advertisement, juxtaposed with a photograph of a U.S. soldier bearing a red “X.” *See* Compl. ¶ 13. Underneath both photographs is the caption, “The Real AARP Agenda.” *Id.* The Advertisement clearly states that the AARP’s alleged “agenda” is anti-military, and therefore wrongful and unpatriotic. *See* USA Next Br. at 1, 12-13; Montini Br. at 19. Similarly, by contrasting Plaintiffs’ picture with the photograph of a soldier with a red “X” through it, the Advertisement reasonably can be read both to state directly and to imply that Plaintiffs are anti-military and unpatriotic, to the same extent it suggests the same about the AARP. *See* Compl. ¶ 15. This statement is false; as alleged in the Complaint, Plaintiffs support U.S. troops and are patriotic Americans. *See id.* Regardless of whether Plaintiffs’ photograph, when viewed in isolation, is defamatory or not, when it is viewed in context and in juxtaposition with the photograph of the soldier, its use in the Advertisement is capable of conveying a defamatory meaning. *See Skoog*, 2004 WL 102497, at *26 (use of plaintiff’s photograph, in part due to its

placement among photographs of convicted criminals, conveyed the defamatory message that plaintiff was a danger to the community, and to police officers in particular).²

For the purposes of a motion to dismiss, it does not matter that the defendants are not convinced of a defamatory meaning attributed to the challenged statement and a court need not determine whether it *itself* affirmatively believes that an allegedly libelous statement is defamatory; rather, all a court need find to deny such a motion is that the statement is *capable* of a defamatory meaning. *See Beecher*, 517 P.2d at 669 (“If the court determines that it is, the matter is then submitted to the jury for a determination of whether a defamatory meaning was understood by the recipients.”). The statement need not be defamatory from the perspective of every potential audience member; rather, it need only be susceptible of a defamatory meaning from some portion of the specific audience to which it is directed. *See Fender v. City of Oregon City*, 811 F. Supp. 554, 558 (D. Or. 1993) (“In determining whether a statement is capable of being defamatory, we construe the statement in accordance with how the recipient would understand it.”); *Farnsworth v. Hyde*, 512 P.2d 1003, 1004 (Or. 1973) (a person is defamed if “his reputation is tarnished among a substantial and respectable minority of the community or of the defamed’s associates”) (quotations omitted). Discovery and the trial in this action are the proper forums to determine the full extent of the defamatory nature of the Advertisement here.

In *Bellairs*, the district court denied defendant’s motion to dismiss the complaint, which included a libel claim under Oregon law. The plaintiff, a former employee of the defendant, was

² While perhaps self-evident, it is worth noting that the message that Plaintiffs are unpatriotic is clearly defamatory. *See, e.g., Spanel v. Pegler*, 160 F.2d 619, 622 (7th Cir. 1947) (noting that under Illinois law, impugning someone’s patriotism is libelous *per se*); *Robertson v. McClockey*, 666 F. Supp. 241, 243 (D.D.C. 1987); *Ranous v. Hughes*, 141 N.W.2d 251, 255 (Wis. 1966); *see also Farmers Educ. & Coop. Union of Am. v. WDAY*, 89 N.W.2d 102, 106 (Neb. 1958) (statement that plaintiff supports Communism is libelous *per se*); *Ward v. League for Justice*, 93 N.E.2d 723, 726 (Ohio Ct. App. 1950) (same).

terminated from his position as a contract teacher. *Bellairs*, 2004 WL 1900417, at *1. Around the time of the plaintiff's termination, he applied to a mortgage lender for a loan to purchase property; as part of the loan process, the lender mailed an employment verification form to defendant. The defendant falsely indicated on the form that the plaintiff voluntarily resigned his position. The district court held that this statement was potentially susceptible to a defamatory meaning, and denied the defendant's motion to dismiss. *See id.* at *3. While the actual statement – that the plaintiff resigned his position with the defendant school district – was, considered in isolation, “facially innocuous,” when it was considered in connection with its intended audience – the mortgage lender – it could lead to conclusions that the plaintiff was fiscally unsound or had lied on his mortgage application, both of which would be harmful and derogatory to the plaintiff. *Id.* at *2-*3.³

Despite Defendants' assertions to the contrary, the fact that Plaintiffs were not identified by name is irrelevant as to whether they have stated a valid libel claim, since their identifiable images were published in connection with the aforementioned libelous statements. *See Peck v. Tribune Co.*, 214 U.S. 185, 188-89 (1909) (where plaintiff's picture published in connection with advertisement in which “Mrs. Schuman,” which was not plaintiff's name, endorsed drinking a brand of whisky, publication of photograph was libelous despite failure to identify plaintiff by name); *Triangle Publ'ns v. Chumley*, 317 S.E. 2d 534, 537-38 (1984) (denial of defendant's motion for summary judgment affirmed where plaintiff's photograph, but not her name, was published in connection with advertisement for television special about teenage pregnancy). Furthermore, putting aside the defamatory meaning of the Advertisement as to these Plaintiffs

³ This was despite the fact that the statement the defendant made (that the plaintiff voluntarily resigned) was likely less derogatory than the truth (that the plaintiff had been fired).

specifically, the Advertisement also conveys the message that gay people, or people who engage in or support same-sex marriages, are anti-military and unpatriotic. While Oregon law appears not to address the issue definitively, a number of courts have held that where a plaintiff is singled out in some way as a member of a group about which defamatory statements are made, that plaintiff can assert a claim of individual defamation to a jury. *See, e.g., Peay v. Curtis Publ'g Co.*, 78 F. Supp. 305, 306-07 (D.D.C. 1948) (holding that where photograph of plaintiff, a D.C. taxicab driver, was published in connection with an article containing allegedly defamatory statements about D.C. taxicab drivers, it was “for the jury to determine whether the man in the street in reading the story and seeing its illustrations, would be justified in inferring that the text of the article applied to the plaintiff, in light of the fact that her photograph was one of the illustrations”); *Jackson v. Consumer Pubs.*, 256 A.D. 708, 709-10 (N.Y. App. Div. 1939) (holding, in connection with article about dishonest auctioneers illustrated by a picture of plaintiff, an auctioneer, that “[w]hile it is true the article does not use the plaintiff’s name or otherwise identify him except by the picture, one may be libeled by having his picture printed in such a fashion as to expose him to public ridicule and contempt as effectively as one may be libeled by words directly referring to him by name”); *Sweet v. Ken*, 169 Misc. 407, 409 (Supreme Ct. N.Y. County 1938) (holding that where plaintiff’s business address was printed in connection with article alleging fraudulent conduct by those in her profession, it was jury question whether the libelous statements are applicable to her, despite fact that she was not identified by name).

Finally, the Advertisement must be evaluated in connection with its intended audience. The Advertisement was published on the website of *The American Spectator*, a magazine that admittedly caters to a politically conservative audience. This conservative-minded readership is

more likely to view gay marriage with disdain than the public at large. By using a picture of these specific plaintiffs, rather than a generic image or a picture of, *e.g.*, hired models, Defendants clearly conveyed that these specific men shared the alleged positions of the AARP, and therefore were anti-military and unpatriotic. For all the above reasons, Plaintiffs have sufficiently pled that the Advertisement is reasonably capable of a defamatory meaning, and Defendants' motions to dismiss on this issue should be denied.

2. Plaintiffs Need Not Plead Special Damages

In his Motion to Dismiss, Montini argues, without the benefit of supporting case law, that Plaintiffs' libel claim should be dismissed because they have not "shown that the Advertisement actually defamed them." Montini Br. ¶ 23. Of course, for purposes of a Rule 12(b)(6) motion, Plaintiffs need not prove their claims at this time; all that is necessary is that they make sufficient allegations to support them. *See Saylab v. Hartford Mut. Ins. Co.*, 271 F. Supp. 2d 112, 115 (D.D.C. 2003) (recognizing that "[t]he complaint must set forth sufficient information to suggest that there exists some recognized legal theory upon which relief can be granted") (quoting *Caudle v. Thomason*, 942 F. Supp. 635, 638 (D.D.C. 1996)). As Montini acknowledges, *see* Montini Br. at 23-24, Plaintiffs have alleged injury resulting from the Advertisement, such as "embarrassment" and injury to their reputations. *See* Compl. ¶¶ 20, 30, 31. These allegations comprise a "short and plain statement of the claim" sufficient for purposes of the Federal Rules of Civil Procedure; any further detail is more appropriately developed through discovery and at trial. *See* Fed. R. Civ. P. 8(a).

To the extent Montini is arguing that Plaintiffs have failed to allege special damages, his argument is misguided. Oregon, in contrast to some other states, does not require a plaintiff to allege special damages for libel in any circumstances, whether the libel was *per se* or not. *See*

Hinkle v. Alexander, 417 P.2d 586, 589 (Or. 1966). “If [a] communication [is] capable of a defamatory meaning and was so understood by the recipients, damage is assumed although no special harm or loss of reputation results therefrom.” *Beecher*, 517 P.2d at 670; *see also C.A.R. Yew, Inc. v. Corwin*, 708 P.2d 644, 646 (Or. Ct. App. 1985). Plaintiffs’ allegations that they have suffered emotional and reputational harm from Defendants’ defamatory statements are therefore sufficient to sustain their claim for libel.

B. Plaintiffs Have Adequately Alleged Appropriation of Their Likenesses

1. The Advertisement Was Sufficiently Commercial in Nature to Subject USA Next and Montini to Liability

Under Oregon law, “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.” Restatement (Second) of Torts § 652C; *see also Anderson v. Fisher Broadcasting Cos.*, 712 P.2d 803, 808 (Or. 1986) (following Section 652C). Defendants do not challenge whether all of the elements of the cause of action have been pled; rather, Defendants claim that several purported heightened standards or defenses bar Plaintiffs’ claim as a matter of law. Defendants’ arguments are without merit, however, and their motions to dismiss the appropriation claim should be denied.

The appropriation tort applies with full force when another’s name or likeness is used in a commercial communication. Use of a plaintiff’s image in connection with news or discussions of matters in the public interest, however, is more rigorously protected by the First Amendment and may therefore be excepted from liability. The Defendants attempt to argue that their Advertisement lacked a “primarily commercial purpose,” and was instead a “newsworthy” article or a discussion of matters in the “public interest” subject to First Amendment protections. *See USA Next Br. at 27-30; Montini Br. at 25-28.* However, Defendants have misstated what the

Complaint alleges, what the obvious purpose of the Advertisement was, and the law on this issue.

First, Defendants ignore the fact that their Advertisement barely discusses anything, whether “newsworthy,” “public interest,” or otherwise. The cases they cite are therefore largely inapposite. For example, in *Martinez v. Democrat-Herald Pub. Co.*, 699 P.2d 818 (1983), the plaintiff’s image was used to illustrate a news story on student drug use. In *Anderson*, the defendant used the plaintiff’s image in a promotion for a news program on emergency medical services. *See Anderson*, 712 P.2d at 804. In *Battaglieri v. Mackinac Center for Public Policy*, 261 Mich. App. 296, 302 (2004), the defendant used a quotation from the plaintiff in a fundraising letter that “conveyed a great deal of information about public policy questions facing Michigan in education and other areas of general interest.” Here, the Advertisement is devoid of content except for Plaintiffs’ image, one other image, two symbols, and a four-word slogan. Plaintiffs’ image is not being used for illustration, as in the other “newsworthiness” or “public interest” cases cited by Defendants; rather, it is the bulk of the content of the Advertisement itself. The primary purpose is to provoke web surfers to visit USA Next’s website and thereby increase membership and contributions, particularly from AARP members. *See Compl.* ¶¶ 17-18.

Although Defendants’ Advertisement employs images intended to evoke the military and same-sex marriage, it does not report on a newsworthy event or discuss a matter of public interest. Rather, its fundamental purpose is to serve as a commercial message intended to attract members and contributions and promote Defendants’ organization and economic activities, such as providing lobbying services and promoting the sale of goods and services by affiliates. *See Mem. Op.* at 6-7 (“[I]t can hardly be said that the use of the photograph in the advertisement is

reporting on a newsworthy event.”); *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 n.2 (9th Cir. 2001) (use of plaintiffs’ images “to promote its clothing” commercial in nature). Even though USA Next is a nonprofit organization, Defendants’ fundraising activities are clearly “use or benefit” that falls within the ambit of the appropriation tort. *See Bowling v. Missionary Servants of the Most Holy Trinity*, No. 91-5920, 1992 WL 181427 (6th Cir. July 30, 1992) (church liable for use of image in charitable solicitation).

Defendants’ Advertisement is similar to the calendar in *Beverley v. Choices Women’s Medical Center, Inc.*, 78 N.Y.2d 745 (1991), which promoted the activities of the medical center. “[I]ts calendar was an advertisement of its only business – providing medical services.” *Id.* at 752. Although the calendar touched on matters of public interest, the court held that “a commercial advertiser such as Choices may not unilaterally neutralize or override the long-standing and significant statutory privacy protection by wrapping its advertising message in the cloak of public interest, however commendable the educational and informational value.” *Id.*; *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68, 103 S. Ct. 2875, 2881 (1983) (“[A]dvertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”).

The mere inclusion of political elements in the Advertisement does not insulate it from liability for appropriation. Rather, as some courts have held, the inclusion of political elements in a message that also has commercial aspects can create a “hybrid” situation. *See New York Magazine v. Metro. Transp. Auth.*, 987 F. Supp. 254, 262 (S.D.N.Y. 1997), *rev’d in part on other grounds*, 136 F.3d 123 (2d Cir. 1998). In such situations, the court must determine where on the continuum between commercial and political the message most comfortably fits. *See id.* The Advertisement at issue here is a paid advertisement, and its primary purpose is commercial – i.e.,

soliciting contributions and members and promoting USA Next’s lobbying services. Although the Advertisement has political aspects, those aspects are in service of the overall commercial purpose. In addition, Plaintiffs’ image was not in any way “essential or important” to the ostensible political content of the message. 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 4:27, at 230 (2d ed. 2005). Under these circumstances, the use of Plaintiffs’ image must be held to be more commercial than political.

Caraway v. L.S. Agency, No. 85 Civ. 1855-CSH, 1986 WL 12529 (S.D.N.Y. Oct. 27, 1986), is directly on point. In *Caraway*, the plaintiff permitted the United States Navy to take his photograph and to use it for promotional purposes in the plaintiff’s hometown during the Vietnam war. The defendant obtained the plaintiff’s photograph and used it to illustrate the cover of its magazine, which contained discussions of the military and mercenaries. The *Caraway* court held that the defendant was liable for appropriation.⁴ “The fact that Mr. Caraway was participating in a newsworthy event at the time the picture was taken is irrelevant to the question of the newsworthiness of its use by defendants, absent a meaningful reference to that newsworthy event in one of the magazine’s articles” or to the newsworthiness of the articles themselves. *Id.* at *4. Rather, the court found the cover to be a use for the purpose of trade. *Id.* at *3 n.5. Similarly here, the Advertisement contained no newsworthy content, nor did the image relate to any newsworthy content elsewhere.

The lack of newsworthiness in the Advertisement obviates any need to allege that Defendants received an “extraordinary commercial benefit” from it. *See* USA Next Br. at 27-30; Montini Br. at 25-26. The Oregon Court of Appeals in *Martinez*, 669 P.2d at 819, suggested, but

⁴ Although *Caraway* concerns New York statutory protections against appropriation of name or likeness, Oregon courts look to New York decisions, among others, for guidance on the appropriation tort. *See Anderson*, 712 P.2d at 811-813 (reviewing New York law).

did not hold, that a showing of “extraordinary commercial benefit” *might* be able to overcome the newsworthiness exception. *Id.* at 694. But that suggestion is of no help to the Defendants here. Since, as demonstrated above, the Advertisement was not newsworthy, there is no need to consider whether an “extraordinary commercial benefit” existed.

2. Appearing in Public Does Not Waive an Appropriation Claim

As it did at the prior hearing, USA Next alleges that Plaintiffs posed in public for the photograph published in the *Tribune*, and argues strenuously that Plaintiffs are thereby estopped from claiming appropriation of their likenesses. *See* USA Next Br. at 23-27. USA Next’s argument is simply based on a misunderstanding of the law of appropriation. USA Next wanders astray by relying almost entirely on cases that predate the Second Restatement of Torts. The first Restatement of Torts did not clearly distinguish between appropriation of name or likeness and the other privacy torts; rather, it offered only one tort, for “interference with privacy.” Restatement of Torts § 867.⁵ A defendant was liable under the tort “only if the defendant’s conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities.” *Id.* cmt. d. Section 867 thus combined concepts that today would be classified under the torts of intrusion upon seclusion or disclosure of true private facts, both of which are inapplicable if the activity at issue is public. *See* Restatement (Second) of Torts §§ 652B, 652D.

Nearly all of the cases cited by USA Next relied upon the first Restatement and are therefore inapposite. *See Gill v. Hearst Pub. Co.*, 253 P.2d 441 (Cal. Ct. App. 1953); *Martin v.*

⁵ Relatedly, USA Next continues to assert that the appropriation tort is limited to the “right to privacy.” *See* USA Next Br. at 23. However, as one commentator has noted, “[w]hile it bears some family resemblances” to trademark, copyright, false advertising, and right of privacy, “the right of publicity has its own unique legal dimensions and reasons for being.” 1 McCarthy § 3:1; *see also* Restatement (Second) of Torts § 652C cmt. a (“Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right.”).

Senators, Inc., 418 S.W.2d 660, 663-64 (Tenn. 1967); *Thayer v. Worcester Post Co.*, 187 N.E. 292, 293 (Mass. 1933). Neither of the other two cases relied on by USA Next involved use of a plaintiff's image in an advertisement, a fact noted by both courts. *See Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 530 (9th Cir. 1984); *Ann-Margret v. High Society Magazine, Inc.*, 498 F. Supp. 401, 406 (S.D.N.Y. 1980). In any event, Defendants' theory of the tort of appropriation is plainly inconsistent with the majority of appropriation cases, which involve celebrities claiming use of their name or image to endorse a product or service. Celebrities by definition appear in public frequently, yet they do not thereby waive their rights. *See Anderson*, 712 P.2d at 812 (noting claims by celebrities).

3. **Oregon Law Allows Non-Celebrities to Sue for Appropriation of Name or Likeness**

Somewhat inconsistently, USA Next also argues that *non-celebrities* are not entitled to protection against appropriation, because the tort requires a showing of "pre-existing commercial value" to one's name or likeness. USA Next Br. at 30. Again, however, Oregon courts have held otherwise. The Supreme Court of Oregon resolved this question definitively in *Anderson*, 712 P.2d at 812: "When a person who neither has nor wants a marketable public identity demands damages for unauthorized publicity, such a person may claim injury to a noneconomic rather than an economic interest in his or her privacy." *See also Condit v. Star Editorial, Inc.*, 259 F. Supp. 2d 1046, 1054 (E.D. Cal. 2003). Similarly, in *Hinish v. Meier & Frank Co.*, 113 P.2d 438 (Or. 1941), in which the Supreme Court of Oregon recognized the availability of a tort claim for invasion of privacy in Oregon for the first time, the plaintiff's name had been signed on a political message without his permission. As here, the plaintiff was no celebrity. Nevertheless, the Supreme Court of Oregon held that plaintiff stated a cause of action for defendants'

“appropriat[ing] to themselves for their own purposes, without the plaintiff’s consent and against his will, his name, his personality and whatever influence he may have possessed, and injected them into a political controversy in which, as far as appears, he had no interest.” *Id.* at 448.

Defendants have committed exactly the same wrong here.

4. The Use of Plaintiffs’ Image Was Hardly “Incidental” to the Advertisement as a Whole

Defendants also argue, absurdly, that the use of Plaintiffs’ images was “incidental” to the Advertisement. USA Next Br. at 31-33; Montini Br. at 27. Admittedly, a fleeting or background use of a person’s name or image is not actionable. *See Preston v. Martin Bregman Productions*, 765 F. Supp. 116 (S.D.N.Y. 1991) (display of woman for nine seconds during opening credits of feature-length film held incidental). As alleged in the Complaint, however, Plaintiff’s image comprises a significant portion of the Advertisement and is central to its meaning and importance. *See* Compl. ¶¶ 13-14. It is thus similar to the advertisement at issue in *Caraway*, 1986 WL 12529 at *5, where a photograph of the plaintiff, used on the cover of the magazine, was clearly recognizable in a montage of nine such covers; the court held that such use was not incidental.

5. Montini Is Liable Both Directly and as USA Next’s Agent

Montini claims that he is not responsible for any appropriation of Plaintiffs’ image because the Advertisement did not promote his services, and thus he received no commercial benefit from it. *See* Montini Br. at 25, 28-29. As alleged in the Complaint, however, Montini received a direct commercial benefit specifically related to the Advertisement in the form of fees for designing the Advertisement. Compl. ¶¶ 42-43. While Montini analogizes this benefit to the profit a newspaper makes from subscriptions and advertising revenue, *see* Montini Br. at 25,

Montini's situation is significantly different. It is not simply that Montini was receiving a paycheck while appropriating the Plaintiffs' image; rather, as alleged in the Complaint, he was specifically compensated for his creation and distribution of the Advertisement.

In any event, Montini misappropriated Plaintiffs' image and used it for the commercial benefit of USA Next as its agent. *See* Compl. ¶ 10. The law in Oregon is clear that “[a]n agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal” *Wood v. Miller*, 76 P.2d 963, 966 (Or. 1938) (quoting 2 Am. Jur. 256 (Agency) § 326).

C. Plaintiffs Have Stated a Claim for Invasion of Privacy (False Light) Under Oregon Law

1. Plaintiffs Have Alleged Both a Direct and an Implied False Statement

Defendants Montini and USA Next move to dismiss Plaintiffs' invasion of privacy (false light) claim on the ground that the Advertisement did not actually place Plaintiffs in a false light. Montini Br. at 31-32; USA Next Br. at 14. The Defendants incorrectly characterize Plaintiffs' false light claim as relying only on an implication, which requires a “reasonable link” or “nexus” between the communication and the implied statement. *See* USA Next Br. at 14; Montini Br. at 31. However, Plaintiffs have alleged that the Advertisement either “*directly* or by implication” states that “the plaintiffs are unpatriotic American citizens who do not support the United States military.” Compl. ¶ 48 (emphasis added). In any event, as discussed below, Plaintiffs have adequately alleged the necessary “reasonable link” to establish that the Advertisement *indirectly* places them in a false light. On either basis, therefore, Plaintiffs' false light claim stands.

2. The Advertisement Directly Places Plaintiffs in a False Light

Plaintiffs base their false light claim on the fact that use of their image in this context to convey the unpatriotic, anti-military message directly attributes that message to them as individuals. *See* Compl. ¶¶ 15, 48. It requires no inference to attribute the direct visual message conveyed by the superimposed red “X” over the American soldier to the Plaintiffs when it is their very image, over which Defendants have superimposed a green check mark, that Defendants placed immediately next to the picture of the soldier. Arguably, it requires more of an inferential leap to attribute such a view to the AARP, because that organization’s image is not involved. Accordingly, in order to assist the reasonable viewer in making that inferential leap, the Advertisement contains written text with the words “The Real AARP Agenda.” Defendants themselves appear to recognize this fact when describing the Advertisement. *See* Montini Br. at 31; USA Next Br. at 12.

In support of their claim that the Advertisement could not reasonably be interpreted as directly conveying a false statement about the Plaintiffs, the Defendants offer merely conclusory reasoning. *See* Montini Br. at 31; USA Next Br. at 14. Defendant Montini states that “the graphic montage could only reasonably be interpreted as making a political statement about AARP (which Montini believes to be true), not about plaintiffs.” Montini Br. at 31. USA Next argues that “it is unreasonable to infer from the communication that the Plaintiffs are unpatriotic and do not support the United States military.” USA Next Br. at 14. Defendants offer no explanation as to why a reasonable person viewing the statement could not associate the anti-military statement contained on the face of the Advertisement with Plaintiffs themselves.

3. **The Advertisement Additionally Could Reasonably Be Interpreted as Placing Plaintiffs in a False Light by Implication**

Notwithstanding the above analysis, Plaintiffs have sufficiently alleged that the Advertisement places them in a false light by implication. Here, the reasonable link is far less tenuous than in *Reesman*, and the alleged statement is far less innocuous. *See Reesman*, 965 P.2d at 1030. Naturally, one need not draw as many inferences when a statement *visually* depicts the plaintiff in a false light. In *Reesman*, the court was asked to determine whether statements in the text of a newspaper article about an airplane pilot's questionable aerobatic maneuvers could reasonably place the plaintiff in a false light. *See id.* at 1036. The court determined that none of the alleged statements in text of the article could reasonably be interpreted in such a manner, and that some of the statements were protected expressions of opinion. *See id.* at 1035-36.

In contrast, a reasonable person viewing this Advertisement would see the plaintiffs, an American soldier, and a stark visual depiction of "support" (for same-sex marriage) placed directly next to a visual depiction of "rejection" (of a soldier in the United States military). In context, a reasonable person could, and likely would, draw the inference that the plaintiffs' support of their own lifestyle entails the unpatriotic stance against the United States military clearly stated in the Advertisement. Compl. ¶¶ 14, 15, 48. To claim, as the defendants do, that the statement could only reasonably be read to impose that viewpoint on the AARP, and that the plaintiffs are mere "symbols" of a certain lifestyle that the AARP supports, cursorily ignores the benefit that defendants gained from falsely attributing negative individual views to the plaintiffs as an integral part of a symbolic campaign. The Advertisement therefore contains at least an implied false statement about their views on the United States military.

4. **Because False Light Must be Viewed in Context, the Advertisement is Highly Offensive to a Reasonable Person**

Defendant Montini claims “[e]ven if the Advertisement placed plaintiffs in the false light of being unpatriotic, this would not be highly offensive to a reasonable person in the context of the ongoing political debate about gay marriage, the war in Iraq, or Social Security reform.” Montini Br. at 32-33. Montini cites cases from jurisdictions outside of Oregon for the unsupported conclusion that “[n]umerous courts have determined that acts far worse than those complained of here did not meet” the “highly offensive” threshold. Montini Br. at 33. Montini concedes that a false or defamatory statement must be considered in its entirety and improper context under Oregon law. See Montini Br. at 33; *King v. Mensolascino*, 965 P.2d 442, 443 (Or. 1976). Despite this, the cases that Montini relies upon to support his assertion that the Advertisement is not highly offensive to a reasonable person arise in distinctly different contexts than that of the Advertisement.

In *O’Hilderbrant v. Columbia Broad. Sys., Inc.*, Civ. No. 42729, 1974 Cal. App. LEXIS 860 (Cal. Ct. App. June 28, 1974), the plaintiff’s images appeared incidentally in the context of a television broadcast addressing a high profile murder. *Id.* at *2. Further, plaintiff was a public figure at the time of the murder, and the murder itself was considered a newsworthy event, thereby entitling publication of the event to some degree of constitutional protection. *Id.* at *21. In *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761 (D.N.J. 1981), the plaintiff’s photograph appeared in a sociology text book discussing criminal deviance. *Id.* at 763. The court found that no claim for defamation or false light could lie for the picture and caption in question because they were “utilized solely in an educational context.” *Id.* at 765. Finally, the plaintiff’s false light claim in *Arrington v. New York Times Co.*, 434 N.E.2d 1318, 1320 (N.Y. 1982) dealt with the use of an individual’s photograph to illustrate a news article published in the *New York Times*

Magazine about the rise of the African-American middle class. None of the preceding authority provides analogous factual context to the Advertisement in this case.

The image created by Montini using the Plaintiffs' likenesses does not itself report on a newsworthy event as part of a television broadcast or news article. As the Court noted in its opinion regarding Plaintiffs' motion for a Temporary Restraining Order, "it can hardly be said that the use of the photograph in the advertisement is reporting on a newsworthy event." Mem. Op. at 6-7. Further, the Advertisement does not involve public figures, nor do plaintiffs' images in this case appear in conjunction with an educational discussion. Rather, Plaintiffs' images were "used as part of [defendants'] advertising campaign . . . for their own financial gain." Mem. Op. at 6-7. Plaintiffs' images were misappropriated and used in a commercial context to directly convey a false and highly provocative message about their lack of support for the United States military. *See* Compl. ¶¶ 15, 48. Accordingly, when considered in the appropriate context of a commercial advertising campaign, this particular Advertisement would be highly offensive to a reasonable person.

5. There Is No Heightened Pleading Standard for False Light Claims

With respect to Plaintiffs' false light claim, Defendant Montini argues that "under Oregon law, a plaintiff must at minimum allege facts showing that the defendant knew the publication complained of resulted in a particular inference, or acted in reckless disregard of the likelihood that the inference would be made." Montini Br. at 33. The Oregon case relied upon by Montini for this proposition, however, concerned a grant of summary judgment based on failure to demonstrate tortious intent in the evidentiary record. *See Phillips v. Lincoln County School District*, 984 P.2d 947, 950-51 (Or. Ct. App. 1999). At no point does the *Phillips* decision or other precedent relied upon by Montini require that Plaintiffs plead specific facts

proving that the Defendants acted with a certain intent. *See Phillips*, 984 P.2d at 950-51.

Adducing the specific facts that demonstrate intent requires a subjective inquiry that can only be conducted after a full opportunity for discovery.

Plaintiffs have alleged here that “Defendants had no basis at all for the suggestion that the plaintiffs do not support American troops. Defendants made their assertion about the plaintiffs knowing it to be false or with reckless disregard for the truth.” Compl. ¶ 15. Further, Plaintiffs allege that “USA Next and Montini published the statement contained in the Advertisement maliciously, with knowledge of its falsity and with reckless disregard to the falsity of the statement and the false light in which the plaintiffs would be placed.” Comp. ¶ 55. These allegations sufficiently address the pleading requirement that “the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.” *Muresan v. Philadelphia Romanian Pentecostal Church*, 962 P.2d 711, 716 (Or. Ct. App. 1998).

D. Plaintiffs Have Sufficiently Pled Intentional Infliction of Emotional Distress

1. The Plaintiffs Have Alleged Acts That, in Context, Constitute Intentional Infliction of Emotional Distress

Defendant Montini argues that Plaintiffs’ intentional infliction of emotional distress claim fails because they cannot prove that Montini acted with tortious intent, in that Plaintiffs’ claim does not constitute “sufficiently outrageous conduct such that Montini knew with substantial certainty that displaying the Advertisement on the Internet would cause plaintiffs to suffer severe emotional distress.” Montini Br. at 35-36.⁶ Similarly, Defendant USA Next argues that

⁶ Montini again inappropriately cites what he refers to as “circumstantial evidence,” which cannot be considered at the motion to dismiss stage. *See* Montini Br. at 35 (citing Montini Decl. ¶ 9).

“‘[d]eveloping, promoting and disseminating the Advertisement’ is not extreme and outrageous conduct.” USA Next Br. at 17-21. Both defendants have mischaracterized the pleading requirements for intentional infliction of emotional distress under Oregon law.

As USA Next observes in its brief, the Supreme Court of Oregon has held that where the plaintiff alleges multiple torts based on common facts, the failure to plead an act beyond the underlying tort is insufficient to state a claim for intentional infliction of emotional distress. *See Madani v. Kendall Ford, Inc.*, 818 P.2d 930, 933-34 (Or. 1991); *see also Sizemore v. City of Madras*, Civ. No. 04-1501-HV, 2005 WL 35856, at *7 (D. Or. Feb. 2, 2005). Plaintiffs here, however, have sufficiently alleged acts that go beyond their other claims for libel, false light, and appropriation of likeness. In contrast to the acts forming the basis for those claims, Plaintiffs have alleged that the *development and promotion* of the Advertisement constituted outrageous acts resulting in severe emotional distress. *See* Compl. ¶¶ 59-62. Indeed, the Defendants’ strategy to place the Advertisement online in a conservative journal in the hope that it would be picked up and republished by mainstream media because of its outrageous nature – as it was – is a significant additional element justifying the claim.

The Defendants argue that the particular conduct complained of by the Plaintiffs in this case is not extreme and outrageous as a matter of law. *See* Montini Br. at 36-37; USA Next Br. at 17-21. Oregon law, however, provides that “[w]hether conduct is an extraordinary transgression [beyond the bounds of what is socially tolerable] is a fact specific inquiry, to be considered on a case-by-case basis, considering the totality of the circumstances.” *Hetfield v. Bostwick*, 901 P.2d 986, 988 (Or. Ct. App. 1995). Accordingly, Oregon courts have concluded that conduct *surrounding the public dissemination of a defamatory or otherwise significantly stigmatizing statement* can, when considered under the totality of the circumstances, rise to the

level of extreme and outrageous conduct. *See Checkley v. Boyd*, 14 P.3d 81, 86 (Or. Ct. App. 2000). For example, facts showing that the conduct surrounding the “defamation allegedly was to serve an ulterior purpose or take advantage of an unusually vulnerable individual” can give rise to a claim for intentional infliction of emotional distress. *Checkley*, 14 P.3d at 86. In this case, the Plaintiffs have pled facts sufficient to demonstrate that they would be particularly vulnerable to being offended by the use of their images for an advertising campaign that opposes same-sex marriage. As the Court previously concluded, the Plaintiffs’ image was used “for a purpose inconsistent with their perspectives on the subject (gay relationships)” and such “use of the plaintiffs’ images to condemn a view they actually support . . . amounts to irreparable harm.” Mem. Op. at 9. Furthermore, Defendants used the Plaintiffs’ image not only to tarnish them, but for the ulterior purpose of engaging in an advertising campaign to increase USA Next’s membership and attack the AARP.

In addition, the Complaint sufficiently alleges that, contrary to Defendant Montini’s argument, the defendants acted with tortious intent. *See Montini Br.* at 35-36. Defendants have purposefully designed a provocative Advertisement using a purloined copy of a photograph taken on Plaintiffs’ wedding day, and knowingly widely distributed that Advertisement. *See Compl.* ¶¶ 12, 16. Defendants knew or should have known that Plaintiffs would find use of their image in such a campaign to be highly objectionable. *See Compl.* ¶ 19. Plaintiffs allege, on information and belief, that “millions of people” have seen the Advertisement. *Compl.* ¶ 16. These facts demonstrate that Montini and USA Next “intended to cause or knew with substantial certainty that [their] conduct would cause severe emotional distress.” *Checkley*, 14 P.3d at 86.

2. Plaintiffs Have Alleged Conduct Distinct From Their Libel Claim

Relying on *Ault v. Hustler Magazine, Inc.*, Civ. No. 86-381-FR, 1986 WL 20896 (D. Or. Oct. 20, 1986), USA Next argues that Plaintiffs cannot state a claim for intentional infliction of emotional distress because “the gravamen of the claim is libel.” USA Next Br. at 15-17. In *Ault*, the District Court reasoned that “in cases where the plaintiff states a case for libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which plaintiff is entitled but it does not give rise to an independent cause of action on the theory of a separate tort.” *Ault*, 1986 WL 20896 at *8.⁷ However, as previously noted, Oregon law *does* allow an intentional infliction of emotional distress claim to proceed when a defamatory statement is at issue, so long as non-expressive conduct surrounding the statement forms the basis of the claim. *See Checkley*, 14 P.3d at 86; *Hall v. May Dep’t Stores Co.*, 637 P.2d 126 (Or. 1981), *overruled on other grounds by McGanty v. Staudenraus*, 901 P.2d 841, 851-52 (Or. 1995) (recognizing that “of course infliction of emotional distress, unlike defamation, can be committed by other means than expression or communication”). Defendants’ actions here in stealing Plaintiffs’ image and using it in their homophobic advertising campaign without permission, in a manner designed to gain free and widespread republication in mainstream media, is the gravamen of the intentional infliction of emotional distress claim. *See* Compl. ¶¶ 10-14, 20-23, 59-61.

⁷ The *Ault* court did not reach this conclusion based on Oregon precedent, but rather relied on treatises and case law from New York and California. The *Ault* decision, issued by a sister federal district court not applying Oregon law to the issue of emotional distress, is not binding on this Court.

3. Plaintiffs Have Alleged Sufficient Facts Demonstrating Severe Emotional Distress

Both Defendants argue that Plaintiffs' Complaint fails to allege sufficient facts demonstrating emotional distress. *See* Montini Br. at 37-38; USA Next Br. at 21-22. However, the authority relied upon by each of the defendants addresses issues of factual and evidentiary proof of emotional distress at trial or summary judgment, not the legal sufficiency of a claim for emotional distress on a motion to dismiss. *See, e.g., Kraemer v. Harding*, 976 P.2d 1160, 1173 (Or. Ct. App. 1999) (addressing sufficiency of evidence of emotional distress presented to jury); *Harris v. Pameco Corp.*, 12 P.3d 524, 529 (Or. Ct. App. 2000) (addressing sufficiency of evidence of emotional distress following presentation of plaintiff's case and issuance of directed verdict by the court); *Campbell v. Safeway, Inc.*, 332 F. Supp. 2d 1367, 1379 (D. Or. 2004) (addressing sufficiency of plaintiff's testimony regarding emotional distress following a motion for summary judgment). In fact, for pleading purposes, a plaintiff need only allege the element that "the defendant's acts were the cause of the plaintiff's severe emotional distress." *McGanty*, 901 P.2d at 849 (quoting *Sheets v. Knight*, 779 P. 2d 1000 (1989)). Plaintiffs here have sufficiently alleged that defendants "did in fact cause [them] to suffer severe emotional distress, in the form of continuing public humiliation and severe fear for their personal safety, as well as psychological harm." Compl. ¶¶ 20, 61. Further development of the facts underlying the claim must await later discovery and testimony.

E. Plaintiffs Are Entitled to Punitive Damages Under Oregon Law

Both Defendants argue that Plaintiffs have no legal basis to pursue punitive damages in this action under Oregon law. Montini Br. at 39; USA Next Br. at 9-11. The Supreme Court of Oregon has held that "in a common-law civil action for damages, the defendant who has abused

the right of free expression by defamatory statements may be held responsible only to the extent of permitting the injured party to recover for the resulting injury to reputation – that is, to recover compensatory damages.” *Wheeler v. Green*, 593 P.2d 777, 788-89 (Or. 1979). Defendants’ motions to dismiss and strike the plaintiffs’ demands for punitive damages are based on the fact that plaintiffs have pled a claim for defamation. Defendant USA Next further attempts to obtain blanket protection from punitive damages arising out of the Advertisement under the rubric of free political expression. *See* USA Next Br. at 10-11. However, these arguments fail to acknowledge Plaintiffs’ three other claims that can support a punitive damages award under Oregon law. *See* Compl. ¶¶ 39-46, 58-62; *Lewis v. Oregon Beauty Supply Co.*, 733 P.2d 430, 438 (Or. 1987); *Leggett v. First Interstate Bank*, 739 P.2d 1083, 1087 (Or. Ct. App. 1987) (recognizing that punitive damages are available under Oregon law when the conduct complained of does not exclusively involve expression).

Contrary to Defendants’ assertions, the Oregon Supreme Court has recognized that a defendant’s non-expressive tortious conduct could form the basis for a punitive damages award, even if some of the conduct involved expression. For example, in *Hall v. May Department Stores Co.*, the Supreme Court of Oregon held that punitive damages were available where “infliction of emotional distress [is] committed by other means than expression or communication.” 637 P.2d at 136, *overruled on other grounds by McGanty*, 901 P.2d at 851-52 (Or. 1995); *see also Leggett*, 739 P.2d at 1087 (“Because defendant's actions included nonexpressive conduct, we uphold the punitive damages award”). It is only where no nonexpressive conduct is at issue that punitive damages are unavailable. *Hall*, 637 P.2d at 136. Throughout their Complaint, Plaintiffs have alleged non-expressive conduct related to their

various claims, such as obtaining the Plaintiffs' image without their permission and exploiting it for commercial gain. *See* Compl. ¶¶ 11, 12, 41, 42.

When both expressive and nonexpressive conduct are at issue, the proper solution under Oregon law is not to dismiss a punitive damages claim, but to provide the jury with a limiting instruction as to the expressive conduct. *Cf. Lewis*, 733 P.2d at 438 (finding that “[b]ecause Scott failed to ask for a punitive damages instruction limiting the jury’s consideration to non-expressive conduct, we uphold the punitive damages award”). Defendants’ motions to dismiss or strike Plaintiffs’ punitive damages demands should therefore be denied.

F. The Extra-Record Material Relied On By the Defendants Is Improper, Should Be Stricken and Costs Should Be Imposed

Both Defendants have submitted voluminous extra-record material in support of their motions to dismiss, disregarding the ubiquitous and unambiguous rule that district courts cannot consider such material when ruling on a defendant’s motion under Fed. R. Civ. P. 12(b)(6). *See, e.g., Paley v. Estate of Ogus*, 20 F. Supp. 2d 83, 89 (D.D.C. 1998); *Robbins v. Bureau of Nat’l Affairs*, 896 F. Supp. 18, 20 n.3 (D.D.C. 1995); *Thomas v. District of Columbia*, 887 F. Supp. 1, 5 n.1 (D.D.C. 1995). Defendants have done so without offering even a perfunctory justification or explanation.⁸ The vast majority of the material – consisting mainly of unsubstantiated internet web page printouts – appears to be submitted in an attempt to portray Defendants as the victims

⁸ USA Next and Montini assert that their behavior is justified by the fact that materials were submitted in connection with Plaintiff’s Motion for a Preliminary Injunction and the subsequent hearings on the issue. *See* USA Next Br. at 4; Montini Br. at 20 & n.14, 32 n.17. However, extra-record materials submitted in connection with a preliminary injunction motion are still extra-record materials, and cannot be considered by a court on a motion to dismiss. *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1335 (D.C. Cir. 1985) (allowing consideration of materials submitted in connection with motion for preliminary injunction “would allow circumvention of the Rule 12/Rule 56 constraints whenever a claim was joined with a request for preliminary relief. This is not a result allowable under the Federal Rules”).

of a politically motivated attack by Plaintiffs.⁹ This extra-record material should be stricken and not considered by the Court in ruling upon the 12(b)(6) motions, and costs should be awarded to Plaintiffs for having to address material that every litigator knows is out-of-bounds. Defendants' gambit should not go unsanctioned.¹⁰

Even if the Court were inclined to convert Defendants' motions into motions for summary judgment under Fed. R. Civ. P. 56, *see, e.g., Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993) (“[W]hen a . . . district judge looks outside the complaint to factual matters [on a 12(b)(6) motion], he or she *must* convert a motion to dismiss into a motion for summary judgment.”) (emphasis added), their motions must be denied. First, the Defendants raise material issues of fact in support of their motion that are disputed, precluding summary judgment. *See El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 72 n.3 (D.D.C. 1999) (refusal to consider extra-record materials is particularly appropriate “where the proffered material and the conversion from a motion to dismiss to one for summary judgment will not facilitate the disposition of the action”), *rev'd in part on other*

⁹ Even though not germane to the motions, we must respond briefly to the claim that the *Defendants* somehow are victims. *See* USA Next Br. at 1; Montini Br. at 4. That claim is preposterous. Defendants – who enjoy both significant funding from business interests and the patronage of high-level political figures (*see* Compl. ¶¶ 7-8) – are disingenuous when they claim they are being “bullied” by two citizens of modest means who lived a quiet, private life before being dragged into the public sphere by Defendants' Advertisement.

¹⁰ Plaintiffs acknowledge that in limited circumstances, a court is able to consider extra-record materials on a 12(b) motion; these circumstances include when the motion is made for lack of personal jurisdiction. *Herron*, 305 F. Supp. 2d 64, 70 (D.D.C. 2004). Therefore, Plaintiffs do not object to the Court's consideration of paragraphs 2, 3, 5 through 7, and 10 through 13 of the Montini Declaration to the extent they address issues of personal jurisdiction; Plaintiffs have similarly submitted extra-record materials in their opposition to this portion of Montini's motion. Plaintiffs continue to object, however, to consideration of information contained in any paragraph of the Montini Declaration to the extent it does not concern purely jurisdictional issues.

grounds, 216 F.3d 29 (D.C. Cir. 2000).¹¹ Second, much of Defendants’ factual assertions in support of their motions is in their briefs rather than in admissible evidence. *See Herron v. Veneman*, 305 F. Supp. 2d 64, 70 (D.D.C. 2004). In any event, Plaintiffs would have to be afforded the opportunity to pursue reasonable discovery, *see* Fed. R. Civ. P. 56(f); *Taylor v. Fed. Deposit Ins. Corp.*, 132 F.3d 753, 765-66 (D.C. Cir. 1997); and to present evidence obtained through such discovery in opposition to Defendants’ motion, *see Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003).

II. Jurisdiction Over Montini and Venue Are Proper in This District

A. Montini Is Subject to Personal Jurisdiction in This District

Defendant Montini challenges this Court’s jurisdiction over him. However, this Court has personal jurisdiction over Montini, for several reasons. Montini is subject to general personal jurisdiction because on the day this lawsuit was filed and for years before, he held himself out to the world as someone with a principal place of business in Washington, D.C. – a fact he then tried to cover up by eliminating a reference to his Washington, D.C. office from his website shortly after this case was filed. Montini also is subject to specific personal jurisdiction given his role in creating and placing an Advertisement in an online periodical whose domain is registered to an address in Washington, D.C. and that was intended to affect USA Next’s Washington, D.C. competitor (AARP) and influence Washington, D.C. policymakers.

¹¹ As just two examples, Defendants allege that the Advertisement was intended merely to “convey information about USA Next’s understanding of the AARP’s positions,” and not to lure and incite AARP members to discontinue their membership in that organization and instead become paying members of USA Next (*see* USA Next Br. at 7 n.9; Montini Br. at 35-36); and that Montini had no control over *The American Spectator*’s publication of the Advertisement (Montini Br. at 9; Montini Decl. ¶ 12).

The legal framework for analysis is straightforward: Personal jurisdiction over Montini, a nonresident defendant, is dependent on the application of District of Columbia law, subject to the constraints of constitutional due process. *See, e.g., Helmer v. Doletskaya*, 393 F.3d 201, 205 (D.C. Cir. 2004); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 509 (D.C. Cir. 2002).¹² A plaintiff need only establish a prima facie case that personal jurisdiction exists consistent with D.C. law and the Constitution in order to survive a motion to dismiss, *see Jung v. Assoc. of Am. Medical Colleges*, 300 F. Supp. 2d 119, 128 (D.D.C. 2004), a burden that has been more than satisfied in this case.

1. Montini Is Subject to General Personal Jurisdiction in This District Under D.C. Law

Under D.C. Code § 13-422, general personal jurisdiction can be exerted over a person if the person is (1) domiciled in, (2) organized under, or (3) maintains his or its principal place of business in the District. D.C. Code § 13-422. The statute is meant to recognize situations where there is an “enduring relationship” between a person and the District, whether or not the specifics of such relationship gave rise to the claim at issue. *Dickson v. United States*, 831 F. Supp. 893, 897 (D.D.C. 1993). Additionally, the D.C. Circuit has indicated that this language requires only that a defendant have a principal place of business in D.C., rather than *the* principal place of its business. *See Zhu v. Federal Housing Fin. Bd.*, No. 03-5297, 2004 WL 1249788, at *2 (D.C. Cir. June 7, 2004).

¹² Due process is satisfied when a nonresident defendant has minimum contacts with the forum “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Helmer*, 393 F.3d at 205 (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted); *Gorman*, 293 F.3d at 509 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

Here, Montini deliberately has maintained at least the appearance of an office in D.C. for the last three years. Montini has conceded that he has in the recent past maintained office space within the District, as alleged in Plaintiff's Complaint. *See* Montini Decl. ¶ 5; Compl. ¶ 8. However, while he claims to have abandoned this office before the events giving rise to this lawsuit, he has not been entirely candid with the Court. Montini neglected to inform the Court that, up to and including the date the Complaint in this action was filed, he held himself out to the public on his website as having an office in Washington, D.C, open for business here.¹³ *See* Exh. A.¹⁴ Montini did not advertise this office address lightly or accidentally: On his own website, Montini tells readers that one of the five basic "Web Site Mistakes to Avoid" is "Hiding," and he advises business proprietors to "[m]ake it easy for people to contact you via *snail mail*, telephone and fax, *not just email*. List your basic contact information on every page and have even more details under a 'contact us' link." *See* Exh. B at 1. (emphasis added.) Montini continues to receive mail at his Washington, D.C. address from numerous parties. *See* Exh. C (Jones Decl.) ¶ 6. He also still owes the owner of the property back rent. *See id.* ¶ 4.

Whether Montini ever actually held meetings in his D.C. office, or created the Advertisement there, he has undoubtedly reaped the benefits from his representations concerning the office. Montini holds himself out as a political consultant who has worked with, *inter alia*, members of Congress and leaders of foreign nations. (Compl. ¶ 8; Montini Decl. ¶ 3.) The cachet of having an office in the District, especially for a self-proclaimed political consultant, is

¹³ Since this lawsuit has been filed, Montini's website has eliminated all reference to any physical addresses and telephone numbers, and only lists an email address on the "Contact" page. *See* Exh. D. Montini should not be allowed to rely on this self-serving alteration of his website to deny that he was holding himself out as having a place of business in D.C. at all relevant times, including at the time this lawsuit was filed.

¹⁴ As noted above at 30 n.10, the Court's consideration of extra-record materials is proper in the limited context of Montini's motion to dismiss for lack of personal jurisdiction.

undeniable; a political consultant with a D.C. office surely is more impressive to a potential customer than one who works out of his own home in Decatur, Georgia. At the very least, since he held himself out as having a D.C. address, and attempted to reap the benefits therefrom, Montini should now be estopped from denying the existence of that office for the purposes of personal jurisdiction, whether or not he physically utilized it at any specific time. *See Turpin v. Mori Seki Co.*, 56 F. Supp. 2d 121, 127 (D. Mass. 1999) (even where defendant denied having actual corporate office in Boston, exertion of personal jurisdiction satisfied due process concerns where it “was explicitly holding itself out to the public” as having an office there in its marketing materials); *Regency Capital, LLC v. Corpfinance Int’l, Inc.*, No. 02 Civ. 5615, 2003 WL 22400200, at *2 (S.D.N.Y. Oct. 20, 2003) (finding sufficient contacts with forum for personal jurisdiction where defendant’s letterhead and website indicated it was present and doing business in the district). *Cf. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05, 102 S. Ct. 2099, 2105 (1982) (“[T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue.”).¹⁵

2. Montini Is Also Subject to Specific Personal Jurisdiction in D.C.

Under the D.C. “long-arm” statute, a court can exercise specific jurisdiction over a nonresident defendant for claims arising from the defendant’s transaction of business in the District of Columbia. *See* D.C. Code § 13-423(a)(1); *Gorman*, 293 F.3d at 509. The reach of this statutory provision is coextensive with the reach of constitutional due process, and requires

¹⁵ To the extent the Court finds there are outstanding unresolved questions on the jurisdictional issue that prevent it from ruling in Plaintiffs’ favor, the contradictory factual allegations regarding Montini’s presence in the District warrant granting Plaintiffs permission to take limited discovery on the jurisdictional issue. *See* Section II.A.4.

“purposeful availment” of the benefits of the forum. *See Jung*, 300 F. Supp. 2d at 128-29; *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 329 (D.C. 2000) (contacts should be voluntary and deliberate rather than random, fortuitous, tenuous, and accidental). To establish jurisdiction under Section 13-423(a)(1), a plaintiff must show: (1) that the defendant transacted business in the District; (2) that the plaintiff’s claim arose from the business transacted in the District; (3) that the defendant had “minimum contacts” with the District; and (4) that the court’s exercise of personal jurisdiction would not offend “traditional notions of fair play and substantial justice.” *Jung*, 300 F. Supp. 2d at 128.

Montini’s placement of the Advertisement is sufficient to establish personal jurisdiction over him here. *The American Spectator*’s website resides at a domain name, “spectator.org,” that is registered to The American Alternative Foundation, Inc., which is located in Washington, D.C. *See* Exh. E at 1. Montini admits that he transmitted the Advertisement to *The American Spectator* for placement on the website. The publication of the Advertisement on the website of *The American Spectator* was the primary act that injured Plaintiffs. That initial publication predictably spawned the subsequent republication of their photograph in the national media and on the Internet, further increasing the injury they suffered. The publication of the Advertisement on *The American Spectator*’s website, www.spectator.org, was clearly and concededly facilitated by Montini in connection with his professional retention by USA Next.¹⁶ *See* Compl. ¶ 10; Montini Decl. ¶ 11.

Both Defendants have conceded that the Advertisement was aimed at the AARP, which is an organization headquartered in Washington, D.C.; the Advertisement also had as part of its

¹⁶ Montini’s argument that his facilitation of the creation and subsequent publication of the Advertisement “were not substantial factors in bringing about” Plaintiffs’ injuries is specious. (*See* Montini Br. at 12.)

intended audience federal politicians and policymakers, many of whom are located in D.C.¹⁷ See Compl. ¶ 1; USA Next Br. at 1, 12-13; Montini Br. at 21. The fact that Montini’s business activities may not have been directed at the Plaintiffs is irrelevant. See *Jacobsen v. Oliver*, 201 F. Supp. 2d 93, 106 (D.D.C. 2002). In entering a business transaction with a website registered to an address in D.C., aimed in part at a D.C. audience and a D.C. competitor, and clearly related to the claims at issue in the instant litigation, Montini satisfies the first two requirements of § 13-423(a)(1). The third and fourth requirements of this statutory section – that the defendant have “minimum contacts” with the forum and that the exertion of personal jurisdiction not offend traditional notions of “fair play and substantial justice” – are satisfied by a showing that the exertion of personal jurisdiction over Montini is constitutionally proper, discussed below. See *United States v. Ferrara*, 54 F.3d 825, 828 (D.C. Cir. 1995) (under § 13-423, “the statutory and constitutional jurisdictional questions, which are usually distinct, merge into a single inquiry”).

3. Exerting Personal Jurisdiction Over Montini Comports With Due Process

Beyond the specific requirements of the general and long-arm jurisdiction statutes in the District, any exertion of personal jurisdiction over Montini must also comport with the requirements of the Due Process Clause of the Fourteenth Amendment. See *Manifold v. Wolf Coach, Inc.*, 231 F. Supp. 2d 58, 60 (D.D.C. 2002). The exercise of personal jurisdiction therefore requires a finding that the defendant “purposefully established minimum contacts in the

¹⁷ While the exertion of personal jurisdiction by D.C. courts is subject to the “government contacts” rule, which states that entry into the District by nonresidents for the purpose of contacting the federal government, or agencies thereof, cannot serve as a basis for personal jurisdiction, this principle does not apply when the nonresident defendant appears in the District not as an exercise of its own rights, but on behalf of another, particularly where the defendant is paid to do so. See *Lex Tex Ltd. v. Skillman*, 579 A.2d 244, 250 (D.C. 1990). Therefore, the government contacts rule does not protect any such activity here by Montini, who was advancing USA Next’s agenda as a paid consultant.

forum state.” *Id.* at 61 (quoting *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108-09, 107 S. Ct. 1026, 1030-31 (1987)). Even a single act by a defendant can create the “‘substantial connection’ between the defendant and the forum state” necessary for such a finding. *Id.* at 61-62 (quoting *Asahi Metal Industry*, 480 U.S. at 112, 107 S. Ct. at 1032).

As discussed above, Montini has maintained an office in the District of Columbia in the past, and until this suit was filed held himself out as having a D.C. office. This alone is enough to satisfy the requirements of due process. *See Turpin*, 56 F. Supp. 2d at 127; *Shoppers Food Warehouse*, 746 A.2d at 332 (finding personal jurisdiction over grocery store chain that had no stores in D.C., concerning injury that took place in Maryland, when grocery store directed advertisement to D.C. residents that conveyed the message that D.C. residents should come to its stores in Maryland to shop). Furthermore, Montini’s specific business activity underlying this lawsuit – the creation of the Advertisement – was aimed at his client’s competitor in D.C., and also was in part targeted toward an audience of politicians and policymakers located in D.C. Thus, Montini has purposefully directed the business activities conferring jurisdiction over him toward residents of the District. *See Holder v. Haarmann & Reimer Corp.*, 799 A.2d 264, 270-71 (D.C. 2001).

Additionally, even cursory research reveals that Montini has many other, unrelated professional contacts in the District, such that the exertion of jurisdiction over him would comport with due process. *See, e.g.*, Exh. F (stating Montini has worked on the staff of a U.S. Congressman and on successful campaigns for the U.S. House and Senate); Exh. G at 2, 4 (noting Montini gave speech to Heritage Foundation’s Young Leadership Network in Washington, D.C., and accompanying article noting that Montini is “under contract” to Heritage Foundation, which is based in Washington, D.C.); Exh. H at 3 (noting Montini was featured

speaker at the Campaign Management Institute at American University in Washington, D.C.); Exh. I at 2 (noting that Montini was a featured speaker at the GOPUSA Conservative Conference in Washington, D.C.). Undoubtedly, discovery (if necessary) would uncover numerous additional business contacts between Montini and the District, showing conclusively that he has instituted regular and systematic contacts directed toward the District such that it is fair and foreseeable that he could be subject to suit in this jurisdiction.¹⁸ *See Holder*, 779 A.2d at 269-70 (jurisdiction proper if business contacts meet minimum).

Therefore, for all the reasons stated above, both the third and fourth “prongs” of the specific jurisdiction test under D.C. Code § 13-423(a), and the requirements of the Due Process Clause of the Fourteenth Amendment, are satisfied.

4. If Necessary, Plaintiffs Should Be Permitted Jurisdictional Discovery

Plaintiffs have made a *prima facie* showing that Montini has extensive contacts with the District and is subject to both general and specific personal jurisdiction under D.C. law. Furthermore, those contacts are voluntary, systematic, and continuous, such that the assertion of jurisdiction over him is both foreseeable and in accordance with traditional notions of fair play and substantial justice. Montini’s arguments and factual assertions to the contrary are both disingenuous and deceptive. However, to the extent this Court finds that Plaintiffs have not

¹⁸ While these business activities are not directly related to Plaintiffs’ claims, even unrelated contacts can satisfy the third and fourth prongs of the § 13-423(a)(1) test. *See Holder*, 779 A.2d at 270 (“[T]o satisfy the due process requirements associated with the . . . exercise of personal jurisdiction over a nonresident defendant under section 13-423(a)(1), the plaintiff must show that the defendant has purposefully engaged in some type of commercial or business-related activity directed a business resident.”). In any event, they are relevant to a finding of general personal jurisdiction over Montini, because they show an “enduring relationship” between Montini and the District, as well as a systematic and continuous business presence. *See Dickson*, 831 F. Supp. at 897. They similarly speak to whether the maintenance of Plaintiff’s suit offends “traditional notions of fair play and substantial justice.” *See Holder*, 779 A.2d at 269.

shown a *prima facie* case of personal jurisdiction over Montini, they should be granted the opportunity to take limited jurisdictional discovery. “A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.” *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996); *see also Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001).

Indeed, USA Next’s own insurer in this case, Selective Insurance Company of America, which freely shared its April 14, 2005 coverage letter with counsel for Plaintiffs, has indicated that it “need[s] to know the relationship between [USA Next] and codefendant Mark Montini” and has asked for “all contracts, agreements and any other documents detailing the relationship between these two entities.” *See* Exh. J at 5. Just as USA Next’s insurer has reason to believe that such material will shed light on the true nature of the relationship, Plaintiffs (and the Court) also are entitled to such information.

B. Venue Is Proper in This District

Montini also argues in his motion to dismiss that this case should be dismissed for lack of venue, or in the alternative transferred to another, unspecified district court. Montini’s arguments are unavailing, however, because it is clear that Plaintiffs have alleged sufficient facts to support venue in this district, and Montini has failed to demonstrate otherwise. Furthermore, Montini has not carried his burden to show that another district would be significantly more convenient to all parties such that transfer of venue is appropriate.

In responding to a motion to dismiss for improper venue, a plaintiff need only put forth facts that, taken as true, would establish venue. *See McCaskey v. Continental Airlines, Inc.*, 133 F. Supp. 2d 514, 523 (S.D. Tex. 2001). A plaintiff’s choice of venue is to be accorded

substantial deference, *see South Utah Wilderness Alliance v. Norton*, 315 F. Supp. 2d 82, 86 (D.D.C. 2004), and a court should accept uncontroverted facts contained in a plaintiff's complaint as true, resolving any conflict in the parties' factual allegations in the plaintiff's favor. *See Neufeld v. Neufeld*, 910 F. Supp. 977, 986 (S.D.N.Y. 1996). "To prevail on a motion to dismiss for improper venue, the defendant must present facts that will defeat the assertion of venue." *Smith v. U.S. Investigations Servs.*, No. 04-0711, 2004 U.S. Dist. LEXIS 23504, at *7 (D.D.C. Nov. 18, 2004).

Here, a substantial part of the events and omissions giving rise to Plaintiffs' claims took place in, or were directed toward, the District of Columbia. Therefore, venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(a)(2), since the Court's jurisdiction is premised on diversity of citizenship. Furthermore, if this Court should find that venue is not proper under that statute, venue is still proper here under 28 U.S.C. § 1391(a)(3), since both defendants are subject to personal jurisdiction in this district. Finally, to the extent that Montini moves for a transfer of venue, he has not borne his burden of establishing an adequate alternative venue that is significantly more convenient to all the parties so as to warrant such transfer.

1. Venue Is Proper Because This District Has Substantial Contacts With the Underlying Claims

Venue is proper in a "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(a)(2). This statute does not require that venue be placed in the district with the greatest number of contacts to the underlying litigation. Rather, venue is proper so long as substantial events related to the lawsuit took place in the district in question, regardless of whether another district has a "greater" or "more

substantial” connection to the litigation.¹⁹ *See, e.g., Pecoraro v. Sky Ranch for Boys*, 340 F.3d 558, 563 (8th Cir. 2003) (“[W]e do not ask which district among two or more potential forums is the ‘best’ venue, rather, we ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts.”); *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 263 (6th Cir. 1998) (same). The occurrence of a “key event” giving rise to a claim in a particular district can be enough to make it a proper venue for that claim. *See Bates v. C&S Adjusters*, 980 F.2d 865, 867-68 (2d Cir. 1992) (fact that dunning letter arrived at plaintiff’s home made plaintiff’s home district a proper venue for debt collection proceeding); *Reilly v. Chambers*, 215 F. Supp. 2d 759, 764 (S.D. W. Va. 2002).

Here, Plaintiffs have put forth numerous facts that support a finding that this district is an appropriate venue for this action. The main event causing Plaintiffs’ injuries was the placement of the Advertisement on the website of *The American Spectator*, located at www.spectator.org, which then resulted in the Advertisement being reprinted on the internet and in various media outlets. *See* Compl. ¶ 10. Montini himself concedes that he initiated that placement by sending the Advertisement to *The American Spectator*. *See* Montini Decl. ¶ 11. The domain “spectator.org,” which encompasses *The American Spectator*’s website, is registered to The American Alternative Foundation, an organization located in Washington, D.C. *See* Exh. E at 1. Therefore, since the Advertisement was placed (with Montini’s assistance and consent) on a website registered in D.C., a substantial event leading up to Plaintiffs’ claims – indeed, *the* central event leading to their injury – occurred here.

¹⁹ As a result, there frequently will be two or more judicial districts that are proper venues for a claim. *E.g., In re Office Prods. Co. Sec. Litig.*, 251 F. Supp. 2d 58, 65 (D.D.C. 2003).

Furthermore, by Defendants' own admission, and as alleged in Plaintiffs' complaint, the Advertisement was intended (1) to attack the AARP – an organization headquartered in Washington, D.C. – and siphon away its members, and (2) to influence political figures and operatives, many of which are located in Washington, D.C. *See* Compl. ¶¶ 1, 13-14; Montini Decl. ¶ 4; Montini Br. at 21; USA Next Br. at 1, 12-13. Due to Defendants' intentional direction of their defamatory and injurious Advertisement toward this district, and due to their publication of that Advertisement on a website registered in this district, venue is proper here under Section 1391(a)(2).

2. Venue Is Proper Because Both Defendants Are Subject to Personal Jurisdiction in This District

Alternatively, if this Court finds that this district is not a proper venue under § 1391(a)(2), then this Court can find venue under § 1391(a)(3), which provides that venue is appropriate in “a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.” To the extent that this Court finds that the publication of an Advertisement on a D.C. website, which is aimed at both a target and an audience located in D.C., and which is the main event causing the Plaintiffs' injuries, does not give rise to jurisdiction under § 1391(a)(2), then it similarly should find there is *no* district with enough contacts to support a finding of proper venue under that section since, as Montini himself has conceded, the actions leading up to Plaintiffs' claims were dispersed throughout the country. (Montini Br. at 16-17.)

If there is no district in which venue would be proper under § 1391(a)(2), this Court can find venue proper here under § 1391(a)(3), because both defendants are subject to personal jurisdiction here. USA Next does not contest that it is subject to personal jurisdiction in the

District of Columbia. (USA Next Br. at 2 n.2.) This alone would be enough to satisfy the requirements of § 1391(a)(3). Plaintiffs have also shown that Montini is subject to personal jurisdiction in the district as well. *See supra* Section II.A. Therefore, venue is proper in this district.

Montini makes a misguided argument that venue is not proper under § 1391(a)(3) because there are other venues in which Plaintiffs' claims potentially could have been brought. *See* Montini Br. at 17. Montini is clearly misreading the statute. "The phrase 'if there is not a district in which the action may otherwise be brought,'" on which Montini relies, "indicates that venue may be based on § 1391(a)(3) only if neither § 1391(a)(1) or (2) can be satisfied. . . . It does *not* mean that venue is improper in one district merely because there is another equally appropriate district in which the defendants are subject to personal jurisdiction at the time the action is commenced." *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996) (citations and quotation marks omitted).²⁰ Indeed, adopting the rule advanced by Montini would lead to an absurd result; since venue can be appropriate in multiple districts, Montini's rule would require that in such cases, *no* venue would be found appropriate. It is clear that, in the instant case, venue in this district is proper, and Montini's motion to dismiss for improper venue should be denied.

3. Montini Has Not Carried His Burden to Justify Transfer

To the extent Montini intended to move to transfer venue to a "more appropriate" forum, *see* Montini Br. at 16, the balance of the relevant factors weighs in favor of leaving venue in this district, and Montini has failed to carry his burden of showing that an alternate forum would be

²⁰ The venue chosen by a plaintiff need not even be the most objectively "convenient" one, so long as it is proper. *See, e.g., Sussman v. Bank of Israel*, 56 F.3d 450, 457 (2d Cir. 1995).

considerably more convenient to all parties. *See South Utah Wilderness Alliance*, 315 F. Supp. 2d at 86 (noting moving party’s “heavy burden to establish that plaintiff’s choice of forum is inadequate and another forum is more convenient to all parties and witnesses”).

Montini has not identified a single forum to which he believes this action should be transferred. That alone should result in a rejection of his apparent motion to transfer for improper venue. Furthermore, he has advanced no arguments and given no reasons why this Court should transfer an action with which it has already become familiar, and about which it has already issued rulings. *See Precept Med. Prods., Inc. v. Klus*, 282 F. Supp. 2d 381, 388-89 (W.D.N.C. 2003) (motion to transfer denied when defendant gave no reasons why court should transfer action from North Carolina to Minnesota). Therefore, his motion to transfer should be denied, and his opportunity to raise the issue should be considered waived. 28 U.S.C. § 1406(b) (failure to raise “timely and sufficient” objection to venue waives the right to do so); *McCaskey*, 133 F. Supp. 2d at 522 (failure to cite any case authority in venue argument can constitute waiver of the argument).

III. Defendant Montini’s Rule 12(f) Motion to Strike Should Be Denied

Defendant Montini moves to strike from Plaintiffs’ Complaint all references to “homophobia,” “hate mongering,” and copyright issues. Montini Br. at 39-44. As Montini concedes, motions to strike under Fed. R. Civ. P. 12(f) are drastic remedies and heavily disfavored by federal courts in various jurisdictions. *See Montini Br. at 40; Aftergood v. CIA*, 355 F. Supp. 2d 557, 565 (D.D.C. 2005). Therefore, “absent a ‘strong reason for so doing,’ courts will generally ‘not tamper with pleadings.’” *Aftergood*, 355 F. Supp. 2d at 565 (quoting *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976), and *Lennon v. Seaman*, 63 F. Supp. 2d 428, 447 (S.D.N.Y. 1999)).

Montini has failed to meet this heavy burden in his motion to strike, because Plaintiffs are entitled to place their allegations in proper context for the Court, and should be afforded some degree of latitude in characterizing Defendants' conduct in this case. As Montini admits, courts should only grant motions to strike material as "impertinent or immaterial" under Rule 12(f) when it is "not relevant to the resolution of the issue at hand." Montini Br. at 40. *See Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 224 F.R.D. 261, 263 (D.D.C. 2004). However, contrary to Montini's argument that these references have "no bearing" to the issues in this case, the references provide acceptable and valuable context for Plaintiffs' claims and allegations. Montini Br. at 41.²¹ Indeed, Montini himself argues throughout his brief that his actions forming the basis of Plaintiffs' claims and allegations must be viewed in context. *See* Montini Br. at 18, 19, 25, 31, 32, 36. Further, Plaintiffs' references in their Complaint are permissible and appropriate, in that they are relevant, among other things, to Plaintiffs' claim for emotional distress as well as their overall demand for compensatory and punitive damages. *See* Compl. ¶¶ 58-62.

The same relevancy standard applies to Montini's arguments that the references should be stricken as "scandalous" or "prejudicial." Montini Br. at 43-44. Montini concedes that "[a]s with impertinent or immaterial matters, those that are deemed scandalous are usually assessed according to their relevancy and their prejudicial effect." Montini Br. at 43. Thus, only "if allegations in a complaint are irrelevant and prejudicial to the defendant" will a motion to strike

²¹ Montini's reliance on *Johnson v. U.S. Capitol Police Board*, No. 1:03-cv-00614, 2005 U.S. Dist. LEXIS 3589 (D.D.C. Mar. 2, 2005), is further misplaced. In that case, the court granted the defendant's motion to strike a declaration because the declarant lacked personal knowledge as required under Fed. R. Civ. P. 56(e). *Id.* at *8. Plaintiffs in this case need not have direct personal knowledge of events to properly state allegations in a *complaint*, nor does Montini attempt to argue that they must.

be granted. *Wiggins v. Phillip Morris, Inc.*, 853 F. Supp. 457, 457 (D.D.C. 1994). As discussed, Montini has failed to establish that the references he seeks to strike lack relevancy to the issues in this case and that they will prejudice him. Because the references defendant Montini moves to strike are well within the bounds of permissible pleading, the Court should deny his motion to strike under Rule 12(f).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that Defendants' Motions to Dismiss be denied, or in the alternative, that Plaintiffs be notified of the conversion of Defendants' motions to motions for summary judgment, and be allowed to conduct discovery in connection therewith.

Respectfully submitted,

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