

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RAYMEN, et al.

*

Plaintiffs,

*

CASE NO. 1:05-CV-00486-RBW

v.

*

**UNITED SENIORS ASSOCIATION, INC.,
et al.**

*

Defendant.

*

*

* * * * *

**DEFENDANT UNITED SENIORS ASSOCIATION, INC.’S
MOTION TO DISMISS PLAINTIFFS’ COMPLAINT**

Defendant United Seniors Association, Inc., by and through its counsel, James A. Johnson and Semmes, Bowen and Semmes, hereby moves for entry of an order:

1. dismissing with prejudice Plaintiffs’ “Count One: Libel” as to United Seniors Association, Inc. for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);
2. dismissing with prejudice Plaintiffs’ “Count Two: Invasion of Privacy (Appropriation of Likeness)” as to United Seniors Association, Inc. for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);
3. dismissing with prejudice Plaintiffs’ “Count Three: Invasion of Privacy (False Light)” as to United Seniors Association, Inc. for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);
4. dismissing with prejudice Plaintiffs’ “Count Four: Intentional Infliction of Emotional Distress” as to United Seniors Association, Inc. for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);

5. dismissing with prejudice Plaintiffs' requests for punitive damages as to United Seniors Association, Inc. for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6);

6. dismissing with prejudice Plaintiffs' lawsuit as to United Seniors Association, Inc.;

7. dissolving the Stipulated Preliminary Injunction Order entered on March 23, 2005;

and

8. granting such other further relief as this Court deems just and proper.

The grounds for this Motion are that Plaintiffs' Complaint and each count thereof fails to state a cause of action upon which relief may be granted. The grounds for this Motion are more fully set forth in Defendant United Seniors Association, Inc.'s Memorandum in Support of its Motion to Dismiss.

Request for Oral Hearing

Pursuant to LCvR 7(f), United Seniors Association, Inc. requests a hearing on its Motion to Dismiss Plaintiffs' Complaint.

Dated: April 25, 2005

SEMMES, BOWEN & SEMMES

By: /s/ James A. Johnson
James A. Johnson, D.C. Bar No. 391016
250 W. Pratt Street
Baltimore, Maryland 21201
Telephone: (410) 539-5040
Facsimile: (410) 539-5223

SPARKS & CRAIG, LLP

By: /s/ Robert R. Sparks, Jr.
Robert R. Sparks, Jr. (D.C. Bar No. 219444)
6862 Elm Street, Suite 360
McLean, Virginia 22101
Telephone: (703) 848-4700
Facsimile: (703) 893-7371

Counsel for United Seniors Association, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 25th, 2005 a copy of United Seniors Association, Inc.'s Motion to Dismiss Plaintiffs' Complaint, Memorandum in Support thereof and proposed Order was served via electronic service in accordance with LCvR 5.4(b)(6) to:

Christopher Wolf, Esquire
Proskauer Rose LLP
1233 Twentieth Street NW, Suite 800
Washington, DC 20036-2396
Telephone: (202) 416-6800
Facsimile: (202) 416-6899

Thomas E. Wilson, Esquire
Alexander C. Vincent, Esquire
Berliner, Corcoran & Rowe, L.L.P.
1101 17th Street, N.W.
Suite 1100
Washington, D.C. 20036-4798
Telephone: (202) 293-5555
Facsimile: (202) 293-9035

Attorneys for Plaintiffs

Attorneys for Defendant Mark Montini

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAYMEN, et al.

*

Plaintiffs,

*

CASE NO. 1:05-CV-00486-RBW

v.

*

UNITED SENIORS ASSOCIATION, INC., et al.*

Defendant.

*

* * * * *

**DEFENDANT UNITED SENIORS ASSOCIATION, INC.'S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES | ii |
| I. INTRODUCTION | 1 |
| II. FACTUAL ALLEGATIONS | 7 |
| III. STANDARD OF REVIEW | 8 |
| IV. ARGUMENT | 9 |
| A. Plaintiffs’ requests for punitive damages fail as a matter of law | 9 |
| B. Plaintiffs’ libel claims fail as a matter of law | 11 |
| C. Plaintiffs’ invasion of privacy (false light) claims fail as a matter of law | 13 |
| D. Plaintiffs’ intentional infliction of emotional distress claims fail as a matter of law | 15 |
| 1. Plaintiffs intentional infliction of emotional distress fails because the gravamen of the claim is libel | 16 |
| 2. "Developing, promoting and disseminating the Advertisement" (Compl. at ¶59) is not extreme and outrageous conduct | 17 |
| 3. Plaintiffs have failed to assert nothing more than conclusory allegations of severe emotional distress | 21 |
| E. Plaintiffs’ invasion of privacy (appropriation of likeness) claims fails as a matter of law | 23 |
| 1. By posing for the photograph in a public place, and publishing the photograph for public gaze, the Plaintiffs have waived any claim for invasion of privacy | 24 |
| 2. Plaintiffs have failed to allege that USA Next received an "extraordinary benefit." | 27 |
| 3. Plaintiffs have failed to allege that the alleged use of Plaintiff’s photograph was anything more than "incidental." | 31 |

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page</u> |
|--|----------------|
| <i>Anderson v. Fisher Broad. Co.</i> , 300 Or. 452, 460, 712 P.2d 803, 808 (1986) | 24, 32 |
| <i>Ann-Margaret v. High Soc’y Magazine, Inc.</i> , 498 F. Supp. 401, 403-404 (S.D.N.Y. 1980) | 27 |
| <i>Ault v. Hustler Magazine, Inc.</i> , Civ. No. 86-381-FR, 1986 WL 20896, *9 (Oct. 20, 1986 D. Or.) | 10, 16-18 |
| <i>Battaglieri v. Mackinac Ctr. For Pub. Policy</i> , 261 Mich. App. 296, 300-01, 680 N.W.2d 915, 919 (2004) | 29-31 |
| <i>Brewer v. Erwin</i> , 287 Or. 435, 600 P.2d 398 (1979) | 19 |
| <i>Brewer v. Hustler Magazine Inc.</i> , 749 F.2d 527, 529-530 (9 th Cir. 1984) | 25-27 |
| <i>Brown v. Gatti</i> , 195 Or. App. 695, 704, 99 P.3d 299, 305 (2004) | 12 |
| <i>Campbell v. Safeway Inc.</i> , 332 F. Supp. 2d 1367, 1379 (D. Or. 2004) | 22 |
| <i>Cox v. Hatch</i> , 761 P.2d 556, 564-66 (Ohio1988) | 31, 33 |
| <i>Fogel v. Forbes, Inc.</i> , 500 F. Supp. 1081, 1088-89 (E.D. Pa. 1980) | 32, 34 |
| <i>Franklin Asaph Limited Partnership v. Federal Deposit Ins. Corp.</i> , 794 F. Supp. 402, 403-04 (D. D.C. 1992) | 8, 9 |
| <i>Gill v. Hearst Pub. Co.</i> , 40 Cal. 2d 224, 228, 253 P.2d 441, 443 (1953) | 24-26 |
| <i>Hall v. May Department Stores Co.</i> , 292 Or. 131, 146, 637 P.2d 126, 135 (1982), <i>abrogated on other grounds in McGanty v. Saudenraus</i> , 321 Or. 532, 549, 901 P.2d 841, 852 (1995) | 10, 19 |
| <i>Joe Dickerson & Assoc., LLC v. Dittmar</i> , 34 P.3d 995, 1003 (Colo. 2001) | 29 |
| <i>Johnson v. Boeing Airplane Co</i> , 175 Kan. 275, 280, 262 P.2d 808, 812 (1953) | 24, 25 |
| <i>King v. Menolascino</i> , 276 Or. 501, 504, 555 P.2d 442, 443 (1976) | 12, 13 |
| <i>Kraemer v. Harding</i> , 159 Or. App. 90, 110, 976 P.2d 1160, 1173 (1999) | 15, 18, 19, 22 |

| | |
|---|----------------|
| <i>Langford v. Vanderbilt Univ</i> , 199 Tenn. 389, 401, 287 S.W.2d 32 (1956) | 25 |
| <i>Li v. State</i> , SC S51612, 2005 WL 852319, * 5 (2005) | 2 |
| <i>Logan v. W. Coast Benson Hotel</i> , 981 F. Supp. 1301, 1322 (D. Or. 1997) | 18 |
| <i>Madani v. Kendall Ford Inc.</i> , 312 Or. 198, 204, 818 P.2d 930, 933-34 (1991) ... | 18-20, 19-21 |
| <i>Magenis v. Fisher Broad., Inc.</i> , 103 Or. App. 555, 557-58, 798 P.2d 1106, 1108 (1990) | 14 |
| <i>Martin v. Senators, Inc.</i> , 220 Tenn. 465, 469, 418 S.W.2d 660, 662-63 (1967) | 24-26 |
| <i>Martinez v. Democrat-Herald Publ'g. Co.</i> , 64 Or. App. 690, 694, 669 P.2d 818, 820 (1983) | 24, 28, 31 |
| <i>McGanty v. Staudenraus</i> , 321 Or. 532, 543, 901 P.2d 841, 849 (1995) | 15, 16, 18, 19 |
| <i>Paulson v. Carter</i> , Civ. No. 04-1501-HV, 2005 WL 35856, at *15 (Jan. 6, 2005 D. Or.) | 18 |
| <i>Reesman v. Highfill</i> , 327 Or. 597, 603-04, 965 P.2d 1030, 1034 (1998) | 12-15 |
| <i>Reeves v. Television Network</i> , 983 F. Supp. 703, 710 (N.D. Ohio 1997) | 31-33 |
| <i>Reiman v. Pac. Dev. Soc.</i> , 132 Or. 82, 86-87, 284 P. 575, 577 (1930) | 12 |
| <i>Schifano v. Greene County Greyhound Park, Inc.</i> , 624 So.2d 178, 181 (Ala. 1993) | 31-33 |
| <i>Sizemore v. City of Madras</i> , Civ. No. 02-74-KI, 2005 WL 273006, at *7 (Feb. 2, 2005 D. Or.) | 18, 19, 21 |
| <i>Thayer v. Worcester Post Co.</i> , 284 Mass. 160, 161-62, 187 N.E. 292, 292-93 (1933) | 27 |
| <i>Turman v. Cent. Billing Bureau</i> , 279 Or. 443, 568 P.2d 1382 (1977) | 19 |
| <i>Wheeler v. Green</i> , 286 Or. 99, 118, 593 P.2d 777, 788 (1979) | 10 |
| <u>Miscellaneous</u> | |
| <i>Restatement (Second) of Torts</i> § 625C | 32 |

Restatement (Second) of Torts, §652A (1977) 14

Restatement (Second) of Torts, §652C (1977) 23

Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*
§§ 1356-1357 (1990) 8, 9

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

RAYMEN, et al.

*

Plaintiffs,

*

CASE NO. 1:05-CV-00486-RBW

v.

*

**UNITED SENIORS ASSOCIATION,
INC., et al.**

*

*

Defendant.

* * * * *

**DEFENDANT UNITED SENIORS ASSOCIATION, INC.’S
MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant United Seniors Association, Inc. (“USA Next”), by and through its counsel, James A. Johnson and Semmes, Bowen and Semmes and Robert R. Sparks, Jr. and Sparks & Craig, LLP, hereby submit this Memorandum of Law in Support of its Motion to Dismiss Plaintiffs’ Complaint.

I. INTRODUCTION

The Plaintiffs have filed a meritless Complaint long on name calling but short on substance in a blatant attempt to use this Court to forward their own political agenda. For six days in February, USA Next published a political message expressing its opinion that the AARP has actively opposed legitimate actions by various states to define marriage as the union between one man and one woman and that the AARP has not taken positions to support U.S. soldiers and veterans. Unhappy with USA Next’s message, Plaintiffs proffer spurious claims in their attempt to use this Court to suppress the free expression of opinion in public debate over important issues.

What they lack in substance Plaintiffs make up for in name calling and sheer invective. The name calling and invective stated in the very first numbered paragraph permeates every alleged

count. Plaintiffs' fundamental arguments are based on the irrational assumption that anyone who expresses an opposition to, or even a question about the legalization of gay marriages must, by definition, be launching a personal attack on the Plaintiffs themselves. Similarly, Plaintiffs assume that anyone who has the temerity to suggest that the AARP has supported the legalization of gay marriage and that the AARP has failed to take certain positions supportive of our troops and veterans must, of necessity, be trying to incite others to attack the Plaintiffs.¹ Plaintiffs' diatribe is illogical and the invective is misplaced. Stating an opposition to the legalization of gay marriages does not equate to a personal attack on or a defamation of the Plaintiffs. Similarly, commenting on positions taken by the AARP does not constitute inciting others to attack the Plaintiffs, who are not even identified in USA Next's message.

The very location of this lawsuit is a clear indication of the political underpinnings of this suit. Plaintiffs, who live in Portland, Oregon, have traveled clear across the country to bring this suit in a key political center of this country. Alleging questionable claims and non-existent damages, Plaintiffs ask this Court in the District of Columbia to apply Oregon law in a suit against one Defendant located in Virginia and another Defendant located in Georgia.² Plaintiffs themselves have argued, and this Court has agreed that:

Here, there is no conflict of laws because the District of Columbia does not have a policy that would be advanced in this case. Rather, it is Oregon's interests that are at stake since both of the plaintiffs reside in Oregon, the picture was taken in Oregon by an Oregon newspaper photographer, and the

¹ Under the Plaintiffs assumptions, the voters and Supreme Court of Oregon must also be, by definition, launching personal attacks on the Plaintiffs. *See Li v. State*, SC S51612, 2005 WL 852319, * 5 (2005)(holding that a voter-initiated amendment to the Oregon Constitution defined marriage as a relationship between one man and one woman).

² USA Next will not engage in forum shopping. USA Next is not contesting personal jurisdiction or venue. Rather, USA Next requests that this Court recognize this lawsuit for what it is and review the claims divorced from the political rhetoric.

picture was allegedly appropriated from that Oregon newspaper's website without its permission.³

If the location of this lawsuit were not enough to reveal the true political purpose of this lawsuit, the inconsistencies between the Plaintiffs' representations to this Court and the Plaintiffs' actions should bridge the gap. In this Court, Plaintiffs complain that their privacy has been invaded. In their Supplemental Memorandum of Points and Authorities in Support of Motion for a Temporary Restraining Order ("Plaintiffs' Supp. Memo."), Plaintiffs represent to this Court that:

Plaintiffs here do not seek to broadcast a commercial message that competes with Defendants' fundraising activities, but rather they wish to keep themselves removed from the advertising marketplace entirely The right of publicity therefore entails a right of "no publicity," which the Plaintiffs here seek to exercise. . . . [Plaintiffs' Supp. Memo. at pp. 4-5, citations omitted.]

In his sworn Declarations submitted to this Court, Plaintiff Raymen declares his fear of being identified as gay lest he become the target of some anti-gay group. For example, Raymen's Supplemental Declaration, at paragraph 5, states Plaintiffs' fear of being identified as gay and, in paragraph 7, contains the following statement:

In 1998 or 1999, I was assaulted by a stranger due to my sexual orientation. Even a small chance of repeating that episode causes me great fear and anxiety. I believe Defendants' advertisement greatly increases the chances that Stephen and I may be targeted for harassment or violence.

In reality, however, Plaintiffs have demonstrated no particular aversion to publicity and the public identification of themselves as a gay couple. On March 3, 2004, Plaintiffs dressed up in their tuxedos and stood in line at City Hall with more than 300 citizens of Multnomah County, Oregon.

³ See this Court's March 16, 2005 Memorandum Opinion at page 5; Plaintiffs' Memorandum in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction at page 7, note 2. Defendant reserves the right to argue that some other jurisdiction's law, and not Oregon law, may be the applicable law for purposes of Plaintiffs' claims. However, the Defendant respects this Court's prior ruling in this case and, for purposes of this motion, has analyzed the causes of action under Oregon law.

Plaintiffs availed themselves of the newly established right to same-sex marriage in that jurisdiction. Waiting in line, in public, they posed kissing in front of a photographer for the Portland Tribune. That photograph was published on or about March 4, 2004 by the Tribune and also appeared on the Tribune website. Pls.' Compl. at ¶9. A year later, both that photograph and another photograph showing Plaintiffs kissing under an umbrella were still posted as for sale on the Tribune's website.⁴ See, Exhibit 1 hereto, Declaration of William A. Brindley in Support of Defendant United Seniors Association, Inc's Motion to Dismiss at paragraph 8 and Attachment D thereto.⁵ The posting of Plaintiffs' pictures on the Tribune Website clearly identified them by name and by sexual persuasion, as did the newspaper article which featured the photograph.⁶ Apparently, Plaintiffs did not object to their pictures being taken by a newspaper photographer, did not object to one of their pictures being published with them identified by name in the newspaper in the city where they live, and did not object to their pictures, with them again clearly identified by name, being posted for a year on the Tribune's pictures-for-sale website. Clearly, before Defendant's political message was posted, the Plaintiffs had no aversion to being identified by name in their own hometown and nationally as a gay couple living in the Portland area.

⁴ In ruling on a Motion to Dismiss, the Court weighs the sufficiency of the Complaint against applicable law. However, the current record in this case is rife with materials outside the Complaint and some balance is necessary.

⁵ The existence of two photographs of the Plaintiffs kissing , one without an umbrella and one with an umbrella, indicates that Plaintiffs intentionally posed in front of the newspaper photographer in order to get their picture in the paper.

⁶ Defendant has not obtained a copy of the actual article in the Portland Tribune. However, at the March 9, 2005 hearing on Plaintiffs' Motion for Preliminary Injunction, Plaintiffs' counsel confirmed that Plaintiffs' names were used in the article that featured the photograph. *See* Transcript of March 9, 2005 proceedings, attached hereto as Exhibit 2, at p. 13, lines 11-25. Plaintiffs' counsel explains, "Their names were used. So it is well known now who they are."

The Defendant's political message was posted on the American Spectator website for only six days, from February 15, 2005 to February 21, 2005. Pls.' Compl. at ¶10. By contrast with the Tribune article and website, the Defendant's political message did not identify the Plaintiffs by name, did not identify Plaintiffs as living in the Portland area, and did not even identify the Plaintiffs as living on the West Coast.⁷ See, Exhibit 1 hereto, Brindley Declaration at paragraph 4.

After the posting of Defendants' political statement, the Plaintiffs still exhibited no particular fear about being identified as the gay couple in the picture. On February 22, 2005, the day after the end of the six-day run of Defendant's political message, the Plaintiffs posted Defendant's message on Plaintiff Raymen's own website, identified themselves as the individuals in the picture and solicited contributions to the Democratic Party. See, Exhibit 1 hereto, Brindley Declaration at paragraph 5 and Attachment A thereto.

On February 28, 2005, seven days after the Defendant's political message had been removed from The American Spectator's website, Plaintiffs' attorney sent to Defendant a demand letter in which he identified the Plaintiffs as being the gay couple in the picture, and he immediately released that letter to the press. See, Exhibit 1 hereto, Brindley Declaration at paragraph 6 and Attachment B thereto, Mr. Towle's February 28, 2005 posting in which Mr. Towle identifies the Plaintiffs and quotes from counsel's demand letter. Continuing their political agenda, Plaintiffs, on March 9, 2005, issued a Press Release through their spokesman in which they again identified themselves as a gay couple living in Portland. Incredibly, Plaintiffs included in their Press Release a link to the very political message which they now claim is defamatory. See, Exhibit 1 hereto, Brindley Declaration at paragraph 7 and Attachment C thereto. The March 8, 2005, newspaper article from

⁷ The political message at issue is depicted in an article filed in this Court by the Plaintiffs as Exhibit E to Plaintiffs' Memorandum in Support of Their Motion for a Temporary Restraining Order and Preliminary Injunction.

the Portland Tribune which has already been submitted to this Court by the Plaintiffs as Exhibit A to their Memorandum in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction states:

On one hand, USA Next used the photo as part of its campaign to alienate American Association of Retired Persons members and others by saying the group supports gay marriage.

On the other hand, the men in the photo, Rick Raymen and Steven Hansen of Portland, are angry about their image being used for conservative causes and, in turn, are using the ad to raise money for Democrats.

Throughout this entire process, USA Next's political message was the only one of these publications which did not identify who the Plaintiffs are and in what city they live. Plaintiffs' newly found concern for their privacy is nothing more than a blatant attempt to stifle free speech and to gain political leverage from what appears to be a simple mistake by a vendor hired by USA Next.⁸

It is difficult to describe this lawsuit without realizing that the driving force is political. However, when the political overtones are removed and the Plaintiffs' claims are viewed in the harsh light of reality, it is clear that there are no genuine grounds for Plaintiffs' causes of action and no basis for Plaintiffs' assertions that they have been damaged.

II. FACTUAL ALLEGATIONS

Plaintiffs' Complaint asserts four counts against Defendant USA Next and Defendant Mark Montini ("Montini"). As alleged in their Complaint, Plaintiffs' claims "arise[] out of . . . illegal use of the plaintiffs' image." Pls.' Compl. at ¶ 1. Plaintiffs' allege they suffered "an extreme invasion of privacy, have been libeled and have suffered a violation of their rights to control how their image

⁸ Prior to publication of its political statement, USA Next was informed and believed that all necessary rights to the picture had been obtained. The newspaper articles submitted by Plaintiffs suggest that the vendor may have made a mistake. See, Exhibit 1 hereto, Brindley Declaration at paragraphs 2-4.

is used.” Pls.’ Comp. at ¶ 3. The counts asserted against the Defendants include the following: “Count One: Libel”; “Count II: Invasion of Privacy (Appropriation of Likeness)”; “Count Three: Invasion of Privacy (False Light)”; and “Count Four: Intentional Infliction of Emotional Distress.” Plaintiffs also request punitive damages. USA Next moves for the dismissal of Plaintiffs’ claims asserted against it, including Plaintiffs’ claims for punitive damages.

Plaintiffs, Richard M. Raymen and Steven P. Hansen, “are individuals residing and domiciled in Portland, Oregon.” Pls.’ Compl. at ¶ 6. On March 3, 2004, Plaintiffs were among more than 300 other citizens of Multnomah County, Oregon “who availed themselves of the newly established right to same-sex marriage in that jurisdiction.” Pls.’ Compl. at ¶ 9. Waiting in line to be married, the Plaintiffs, while kissing, were photographed by a photographer for the Portland Tribune. Pls.’ Compl. at ¶ 9. The photograph was published in the Tribune on or about March 4, 2004. Pls.’ Compl. at ¶ 9. The photograph also appeared on the Tribune’s website. Pls.’ Compl. at ¶ 9. Plaintiffs’ claims against USA Next derive from this photograph.

Plaintiffs allege that USA Next used the photograph as part of an online “advertisement” from February 15, 2005 to February 21, 2005 carried on a website operated by *The American Spectator*.⁹ Pls.’ Compl. at ¶ 10. Plaintiffs assert that USA Next used the photograph in the following manner:

The Advertisement uses the photo containing the plaintiffs’ image as part of a graphic montage. The [P]laintiffs’ image has a green checkmark superimposed over it. To the left of that image appears an image of an American soldier with a red “X” mark superimposed over it. Underneath both images is the caption, “The Real AARP Agenda.”

⁹ The publication at issue was a political message designed to convey information about USA Next’s understanding of the AARP’s positions. Plaintiffs try to avoid the free speech implications of their lawsuit by calling the message an advertisement.

Pls.’ Compl. at ¶ 13. Plaintiffs allege that USA Next developed its message through “defendant Montini’s media consulting business with offices in Washington, DC” Pls.’ Compl. at ¶ 2. The purpose of the message, Plaintiffs allege, “is to incite viewer passions against the AARP because of its alleged support of equal marriage rights for same-sex couples and its alleged lack of support of American troops.” Pls.’ Compl. at ¶ 14. The Plaintiffs further contend that the advertisement “also conveys the message that the plaintiffs (whose image was checked) are against American troops (as signified by an “X” through the soldier’s picture), and are unpatriotic.” Pls.’ Compl. at ¶ 15.

III. STANDARD OF REVIEW

“On a motion to dismiss under Rule 12(b)(6), the Court’s inquiry essentially is limited to the content of the complaint, although items appearing in the record of the case also may be taken into account.” *Franklin Asaph Limited Partnership v. Federal Deposit Ins. Corp.*, 794 F. Supp. 402, 403-04 (D. D.C. 1992). “While the Court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory, as a practical matter, a dismissal under Rule 12(b)(6) is appropriate in cases ‘in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *Id.* at 404 (quoting Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1356-1357 (1990)). The “court will not accept *conclusory allegations* concerning the legal effect of the events plaintiff has set out if these allegations do not *reasonably follow* from his description of what happened, or if these allegations are *contradicted* by the description itself.” *Id.* (emphasis added)(quoting Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1356-1357 (1990)).

IV. ARGUMENT

Plaintiffs' claims should be dismissed because they are unsupported under Oregon law. Plaintiffs mere conclusory allegations should not allow them to proceed further with this politically driven lawsuit.

A. Plaintiffs' requests for punitive damages fail as a matter of law.

In each of the four counts in Plaintiffs' Complaint, they demand punitive damages. See Pls.' Compl. at ¶¶ 38, 46, 57 and 62. All of Plaintiffs' counts arise out of a purported "illegal use of the plaintiffs' image." Pls.' Compl. at ¶ 1. Plaintiffs allege that "Defendant USA Next has embarked on a homophobic smear campaign to advocate a position on Social Security." Pls.' Compl. at ¶ 1. Plaintiffs contend that to carry out this "campaign," USA Next developed an "advertisement" that "suggests that the American Association of Retired Persons (AARP) is anti-military and pro-gay-marriage, and therefore not credible on the issue of Social Security reform, an issue pending before the U.S. Congress." Pls.' Compl. at ¶ 1. According to the Plaintiffs, "The purpose of the Advertisement is to incite viewer passions against the AARP because of its alleged support of equal marriage rights for same-sex couples and its alleged lack of support of American troops." Pls.' Compl. at ¶ 14. At the core of Plaintiffs' allegations is this political message, from which Plaintiffs assert their claims arise by an implication drawn from the identification of the Plaintiffs as a gay couple and the purported message that the Plaintiffs are anti-military. See Pls.' Compl. at ¶ 15. Oregon law, which this Court has applied in this diversity action,¹⁰ prohibits the imposition of punitive damages in claims arising from alleged abusive speech. *See Wheeler v. Green*, 286 Or. 99, 118, 593 P.2d 777, 788 (1979); *Hall v. May Department Stores Co.*, 292 Or. 131, 146, 637 P.2d 126, 135 (1982), *abrogated on other grounds in McGanty v. Saudenraus*, 321 Or. 532, 549, 901 P.2d 841,

¹⁰ *See supra* n. 3. By recognizing the choice of law determination made by this Court, USA Next is not waiving any right to later contest this determination.

852 (1995); *Ault v. Hustler Magazine, Inc.*, Civ. No. 86-381-FR, 1986 WL 20896, *9 (Oct. 20, 1986 D. Or.).

The law in Oregon is 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*, 286 Or. at 118. “When the cause of defendant’s liability is his ‘abuse’ of speech and expression, as in the case of defamation, *Wheeler v. Green* holds that the ‘responsibility for the abuse’ is confined to civil liability for compensation only.” *Hall*, 292 Or. at 146 (quoting *Wheeler*). “The principle of the holding . . . was that punitive damages by definition go beyond whatever financial recompense is proper to compensate a plaintiff for the injury suffered by the plaintiff personally.” *Id.* Further, “[i]n the sensitive area of free expression . . . the threat of large damage recoveries can easily inhibit the exercise of freedom of constitutionally protected expression, as well as its abuse.” *Wheeler*, 286 Or. at 119. Thus, where a plaintiff’s claims arise from allegations of abusive speech, punitive damages are unavailable under Oregon law. *Id.*

Each of the counts asserted against USA Next derive from the group’s asserted dissemination of the “Advertisement.”¹¹ Under Plaintiffs’ claim for libel, it is asserted that “[t]he Advertisement . . . contains a defamatory statement about the [P]laintiffs, stating directly or by implication that the [P]laintiffs are unpatriotic American citizens who do not support the United States military while our nation is at war.” Pls.’ Compl. at ¶ 28. Under the appropriation of likeness count, it is alleged that Plaintiffs are entitled to damages, including punitive damages, because “[t]he Advertisement resulted in commercial benefit to USA Next through promotion of the organization’s purported

¹¹ As is noted above, the publication at issue was a political message which Plaintiffs insist on calling an “Advertisement.”

message” Pls.’ Compl. at ¶ 44 With regard to the false light count, punitive damages are requested because “[t]he Advertisement . . . contains a statement about the [P]laintiffs, stating directly or by implication that the [P]laintiffs are unpatriotic American citizens who do not support the United States military.” Pls.’ Compl. at ¶ 48. Finally, the count for intentional infliction of emotional distress likewise seeks punitive damages because “[i]n developing, promoting, and disseminating the Advertisement . . . USA Next . . . engaged in outrageous conduct that grossly exceeded the bounds of socially tolerable behavior.” Pls.’ Compl. at ¶ 60.

Each of Plaintiffs’ claims ask this Court to punish USA Next for promoting alleged abusive speech in a political debate. Oregon law prohibits the imposition of punitive damages for claims arising from abusive speech. Therefore, Plaintiffs’ requests for punitive damages fail as a matter of law.

B. Plaintiffs’ libel claims fail as a matter of law.

A defamation claim can either be for libel, slander or both. Typically, an action for libel is predicated upon “written words,” which includes printing, painting, writing, signs or pictures, whereas a claim for slander is based upon oral utterance. *Reiman v. Pac. Dev. Soc.*, 132 Or. 82, 86-87, 284 P. 575, 577 (1930). Under Oregon law, to establish an actionable defamation claim, plaintiff must prove that defendant’s statements were defamatory, false, and communicated to a third party. *Reesman v. Highfill*, 327 Or. 597, 603-04, 965 P.2d 1030, 1034 (1998); *Brown v. Gatti*, 195 Or. App. 695, 704, 99 P.3d 299, 305 (2004).

A “defamatory statement” is one that would subject another to “hatred, contempt or ridicule, or tend to diminish the esteem, respect, goodwill or confidence in which the other is held, or to excite adverse, derogatory or unpleasant feelings or opinions against the other.” *Reesman*, 327 Or. at 603, 965 P.2d at 1034. Opinions are not actionable defamation because opinions can neither be

true or false, and are constitutionally protected free speech. *Brown*, 195 Or. App. at 704, 99 P.3d at 305. Whether a particular statement is capable of a defamatory meaning is a legal question for the court, rather than a factual question for the jury. *Id.*; *see also King v. Menolascino*, 276 Or. 501, 504, 555 P.2d 442, 443 (1976). The Supreme Court of Oregon has repeatedly emphasized, “The court, as distinguished from the jury, determines whether a communication is capable of a defamatory meaning.” *King*, 276 Or. at 504, 555 P.2d at 443; *see also Brown* 195 Or. App. at 704, 99 P.3d at 305; *Reesman*, 327 Or. at 603, 965 P.2d at 1034.

A statement can be either facially defamatory or “defamatory by implication,” that is, a statement from which a reasonable person could conclude a defamatory inference. *Brown* 195 Or. App. at 704, 99 P.3d at 305. In a defamation by implication case, the link between the communication and the defamatory inference must not be “too tenuous.” *Reesman*, 327 Or. at 604, 965 P.2d at 1034-35; *King*, 276 Or. at 504, 555 P.2d at 443. Additionally, the connection between the statement and defamatory inference from the facially nondefamatory communication should be reasonable. *Reesman*, 327 Or. at 604, 965 P.2d at 1034-35; *King*, 276 Or. at 504, 555 P.2d at 443.

In the instant action, USA Next’s alleged “Advertisement” in its entirety includes Plaintiffs’ image with a green checkmark on it, an image of an American soldier with a red “X” on it and a caption underneath both images stating “The Real AARP Agenda.” Pls.’ Compl. at ¶ 13. There is nothing alleged to be expressly defamatory against the Plaintiffs. Nothing on the face of the communication explicitly or directly states that the Plaintiffs are “unpatriotic American citizens who do not support the United States military while our nation is at war.” Pls.’ Compl. at ¶ 9. The message does not even identify the Plaintiffs by name or by location. The communication portrays only that two men are kissing, which is a true depiction of the Plaintiffs. The express words in the communication relate to the AARP, not the Plaintiffs. Thus, Plaintiffs’ allegations that the

communication depicts them as anti-military exist only through an outrageous inference drawn by the Plaintiffs.

In a defamation by implication situation, the nexus between the communication and the defamatory inference must not be “too tenuous” and the inference drawn from the communication must be reasonable. *Reesman*, 327 Or. at 604, 965 P.2d at 1034-35; *King*, 276 Or. at 504, 555 P.2d at 443. Plaintiffs’ inference that the communication suggests that they are anti-military is unreasonable and too tenuous. Nothing in the Communication supports the inference that the Plaintiffs are unpatriotic or unsupportive of the United States military. For these reasons, Plaintiffs’ libel count should be dismissed as a matter of law.

C. Plaintiffs’ invasion of privacy (false light) claims fail as a matter of law.

For a claim of invasion of privacy by false light, the State of Oregon has adopted the elements as stated in *Restatement (Second) of Torts*, §652A (1977):

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which other would be placed.

Reesman, 327 Or. at 607-08, 965 P.2d at 1036; see also *Magenis v. Fisher Broad., Inc.*, 103 Or. App. 555, 557-58, 798 P.2d 1106, 1108 (1990).

“The tort of invasion of privacy by false light is similar to the tort of defamation, in that it leads others to believe something about a person that is not true.” *Reesman*, 327 Or. at 608, 965 P.2d at 1037; see also *Magenis*, 103 Or. App. at 557-58, 798 P.2d at 1108. Nonetheless, these two torts are theoretically different, in that a defamation claim is mainly concerned with damages to reputation, whereas with a false light claim, the primary injury is mental distress or anguish that a

person suffers as a result of the “false light” that is cast by a highly offensive communication. *Reesman*, 327 Or. at 607-08, 965 P.2d at 1036-37; *Magenis*, 103 Or. App. at 557-58, 798 P.2d at 1108-09.

In *Reesman*, the Supreme Court of Oregon held that the plaintiff’s alleged defamatory inferences drawn from the defendant’s statement were not reasonable, thereby affirming the dismissal of plaintiff’s defamation claim. *Reesman*, 327 Or. at 607-08, 965 P.2d at 1036-37. In the context of the false light claim, the *Reesman* Court opined that while implied statements from a defendant’s communication could form the basis for a claim of invasion of privacy by false light, there must be a reasonable nexus between the communication and the implied statements that plaintiff contends place him in a false light. *Id.* Because the *Reesman* Court found no reasonable link between the plaintiff’s inferences and the defendant’s statements, the Court affirmed the dismissal of the false light claim stating that the “reasons for rejecting the defamation claim provide a basis for also rejecting the false light claim.” *Id.*

In the instant matter, the alleged false light is that “. . . [P]laintiffs are unpatriotic American citizens who do not support the United States military.” Pls.’ Compl. at ¶ 12. Again, this “false light” is not expressly or directly stated in the communication. Rather, Plaintiffs attempt to imply it from the communication. There is not a reasonable connection between the communication and Plaintiffs’ proffered implication. Because it is unreasonable to infer from the communication that Plaintiffs are unpatriotic and do not support the United States military, the Plaintiffs have failed to state an actionable claim for invasion of privacy by false light and the claim should be dismissed as a matter of law.

D. Plaintiffs’ intentional infliction of emotional distress claims fail as a matter of law.

Under Oregon law, a claim for intentional infliction of emotional distress must contain the following elements:

- (1) the defendant intended to inflict severe emotional distress on the plaintiff,
- (2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and
- (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct.

McGanty v. Staudenraus, 321 Or. 532, 543, 901 P.2d 841, 849 (1995); see also *Kraemer v. Harding*, 159 Or. App. 90, 110, 976 P.2d 1160, 1173 (1999).

The element of intent for the tort of intentional infliction of emotional distress is satisfied where the actor “desires to inflict severe emotional distress by his act or where the actor knows that such distress is certain or substantially certain to result from his conduct.” *McGanty*, 321 Or. at 550-51, 901 P.2d at 852-53. USA Next moves to dismiss Plaintiffs’ intentional infliction of emotional distress claim as a matter of law on the following three grounds: (1) First and foremost, when the gravamen of the claim is libel, Plaintiffs cannot reshape the allegations of their libel claim in order to support a claim for intentional infliction of emotional distress; (2) Defendant’s acts of developing, promoting and disseminating the Communication as pleaded in the Complaint do not constitute extreme and outrageous conduct as a matter of law; and (3) Plaintiffs have failed to sufficiently plead that they suffered severe emotional distress as a result of the Communication.

1. Plaintiffs intentional infliction of emotional distress fails because the gravamen of the claim is libel.

The United States District Court for the District of Oregon in *Ault* dismissed the Plaintiff’s claim for intentional infliction of emotional distress because the action was based on the same facts alleged in the plaintiff’s defamation claim. *Ault*, 1986 WL 20896, at *7-8. In *Ault*, the defendant (Hustler Magazine) published an article with the plaintiff’s photograph naming plaintiff as Hustler’s “A**** of the Month.” *Id.*, 1986 WL 20896, at *1. Subsequently, plaintiff filed an action alleging

several tortious claims against the defendant, including libel and intentional infliction of emotional distress. *Id.* In the context of the intentional infliction of emotional distress claim, the Court held that in a situation where a plaintiff maintains a libel or slander case, any personal distress suffered may be taken into account in ascertaining the damages to which the plaintiff is entitled under the libel cause of action.¹² *Id.*, 1986 WL 20896, at *7-8. Such distress suffered, however, does not give rise to an independent cause of action on the theory of intentional infliction of emotional distress. *Id.*, 1986 WL 20896, at *7-8. The Court reasoned:

It is elementary that, although the gravamen of a defamation action is injury to reputation, libel or slander also visits upon a plaintiff humiliation, mortification and emotional distress. In circumstances where a plaintiff states a case of libel or slander, such personal distress is a matter which may be taken into account in determining the amount of damages to which the plaintiff is entitled, *but it does not give rise to an independent cause of action on the theory of a separate tort.* To accede to the contentions of the plaintiff in this case would be, in the words of Prosser, a step toward ‘swallowing up and engulfing the whole law of public defamation.’

Id. (emphasis added).

The facts in the instant case parallel those in *Ault*. Plaintiffs have alleged several tort claims, including libel, against USA Next for using Plaintiffs’ photograph in the “Advertisement” that allegedly defamed the Plaintiffs. For the libel claim, Plaintiffs allege that “The *Advertisement* . . . contains defamatory statement about the plaintiffs . . . directly or by implication that the plaintiffs are unpatriotic . . . who do not support the United States military” Pls.’ Compl. at ¶ 27 - 37 (“Count One: Libel”)(emphasis added). Under the intentional infliction of emotional distress claim, Plaintiffs contend that the “developing, promoting and disseminating of the *Advertisement* . . . was

¹² In *Ault*, the libel claim was struck down because it was barred by the statute of limitations. Irrespective of the fact that there was no actionable libel claim, the intentional infliction of emotional distress claim was also dismissed on the grounds that the plaintiff cannot recover for such a claim when the gravamen of the claim is libel. *Ault*, 1986 WL 20896, at *4-5 and *7-8.

outrageous conduct . . . that caused the plaintiffs to suffer severe emotional distress” Pls.’ Compl. at ¶ 58 - 62 (“Count Two: Intentional Infliction of Emotional Distress”). By alleging an intentional infliction of emotional distress action grounded on the same facts that support the libel claim, “the Advertisement,” the Plaintiffs are reshaping their libel allegations to fit the tort of intentional infliction of emotional distress. Essentially, the Plaintiffs are attempting to evade the requisites for maintaining a libel action, i.e., the need for a defamatory statement. The *Ault* case prohibits Plaintiffs’ attempt, because to allow it would “swallow[] up and engulf[] the whole law of public defamation.” 1986 WL 20896, at *7-8. Plaintiffs’ intentional infliction of emotional distress claims fail for this reason alone, though other reasons also support its dismissal.

2. “*Developing, promoting and disseminating the Advertisement*” (Compl. at ¶59) is not extreme and outrageous conduct.

Under Oregon law, a claim for intentional infliction of emotional distress is actionable only where the defendant intended to inflict severe emotional distress on the plaintiff by acts that were “an extraordinary transgression of the bounds of socially tolerable conduct.” *McGanty*, 321 Or. at 543, 901 P.2d at 849; *Kraemer*, 159 Or. App. at 110, 976 P.2d at 1173. It is a question of law for the court to determine whether a defendants’ acts constitute “extraordinary conduct.” *Kraemer*, 159 Or. App. at 110, 976 P.2d at 1173. In the past, Oregon courts have held that conduct that is merely “rude, boorish, tyrannical, churlish and mean” does not satisfy an intentional infliction of emotional distress claim. *Id.*; see also *Paulson v. Carter*, Civ. No. 04-1501-HV, 2005 WL 35856, at *15 (Jan. 6, 2005 D. Or.); *Sizemore v. City of Madras*, Civ. No. 02-74-KI, 2005 WL 273006, at *7 (Feb. 2, 2005 D. Or.). Only such acts that are regarded as “atrocious and utterly intolerable in a civilized community” satisfies the extraordinary conduct requirement of an intentional infliction of emotional distress claim. *Logan v. W. Coast Benson Hotel*, 981 F. Supp. 1301, 1322 (D. Or. 1997).

Additionally, a defendant's "motive" for the act is irrelevant to whether the act exceeded the bounds of social behavior; the act itself must be intolerable. *Madani v. Kendall Ford Inc.*, 312 Or. 198, 204, 818 P.2d 930, 933-34 (1991), *overruled on other grounds by McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841 (1995).

In the past, Oregon courts have found extreme and outrageous conduct where: (1) the defendant made abusive and threatening calls in an attempt to disgrace and frighten the plaintiff into paying a medical bill, in spite of defendant's awareness that plaintiff had made settlement arrangements with the creditor (*see Turman v. Cent. Billing Bureau*, 279 Or. 443, 568 P.2d 1382 (1977)); (2) a landlord disconnected utilities, used physical force and threats of physical violence against the plaintiff and her friends and demolished a portion of the building in which the plaintiff was residing in order to bully and scare the plaintiff out of the apartment (*see Brewer v. Erwin*, 287 Or. 435, 600 P.2d 398 (1979)); (3) a defendant deliberately attempted to threaten and frighten the plaintiff into admitting that she committed a crime when there was no proof of plaintiff's guilt (*see Hall v. The May Dept. Stores*, 292 Or. 131, 637 P.2d 126 (1981), *abrogated on other grounds by McGanty v. Staudenraus*, 321 Or. 532, 901 P.2d 841 (1995)); and (4) the defendant accused plaintiff before the school board and the school community of being a child sex abuser without believing or having reasonable grounds to believe that accusation to be true (*see Kraemer*, 159 Or. App. at 111, 976 P.2d at 1173-74). Thus, in Oregon, typically only outrageous and utterly intolerable acts of psychological and physical intimidation, racism, or sexual harassment constitute extreme and outrageous conduct. *Sizemore*, 2005 WL 273006, at *7.

In *Madani*, plaintiff's amended complaint pleaded two tort claims, wrongful discharge and intentional infliction of emotional distress against the defendants. *Madani*, 312 Or. at 200, 818 P.2d at 931. The claim for wrongful discharge alleged that plaintiff's refusal to cooperate with defendant's

abusive requests¹³ lead to his wrongful termination. *Id.* The claim for intentional infliction of emotional distress incorporated all allegations of wrongful discharge and added that the conduct of wrongful termination was outrageous and shocking that exceeded the bounds of tolerable behavior intended to cause and did cause the plaintiff severe emotional distress. *Id.* at 201, 818 P.2d at 931.

The Supreme Court of Oregon affirmed the trial court's grant of the motion to dismiss for failure to state a claim for intentional infliction of emotional distress, concluding that the act of wrongful termination, by itself does not exceed the bounds of socially acceptable behavior. *Id.* at 200, 206, 818 P.2d at 931, 934. The Court explained that in order to state a claim for intentional infliction of emotional distress, the plaintiff must plead that "the defendant's *act* constituted an extraordinary transgression of the bounds of socially tolerable conduct." *Id.* at 204, 818 P.2d at 933. A defendant's motive for the act is irrelevant in determining whether the act exceeded the bounds of socially tolerable conduct; the act itself must be outrageous. *Id.* at 204, 818 P.2d at 933-34. Next, the *Madani* Court noted that in the complaint, plaintiff failed to allege that the abusive acts of the employer during the course of firing or the method of firing were extreme and outrageous, but simply stated that the act of wrongful "firing" exceeded the bounds of socially tolerable behavior causing him emotional distress. *Id.* at 205, 818 P.2d at 934. Thereafter, the Court reasoned that the act of terminating an employee, even if wrongfully motivated, does not surpass the bounds of socially tolerable behavior. *Id.* at 204-05, 818 P.2d at 934. Thus, because the act of firing was asserted in the pleadings as the only act to constitute an extraordinary transgression beyond the bounds of socially

¹³ The wrongful discharge section of the plaintiff's amended complaint described defendant's abusive requests as follows: "defendant (employer) instructed plaintiff to pull down his pants, and expose his buttocks, testicles and penis parts to Defendant . . . and others. At the time of said instruction, plaintiff was on duty, at work, and was standing in a public place which was in the open view of members of the public including fellow employees, children, women and customers." *Madani* 312 Or. at 200, 818 P.2d at 931.

tolerable conduct, the Court concluded that the complaint failed to state an actionable claim for intentional infliction of emotional distress. *Id.* at 205, 818 P.2d at 934.

In *Sizemore*, plaintiff brought several claims, including an intentional infliction of emotional distress claim against the City of Madras (“City”) arising out of his termination as the City Administrator. *Sizemore*, 2005 WL 273006, *1-2. The plaintiff contended that during the course of plaintiff’s termination, the City’s Mayor published a letter in the Open Session consisting of several false allegations against the plaintiff such as, “the plaintiff defrauded the City of Madras, lied to the City of Madras, maligned the professionalism of the City administrators and overreached his authority,” thereby causing plaintiff severe emotional distress. *Id.*, 2005 WL 273006, *7. Conforming to the ruling of the *Madani* Court, the District Court of Oregon in *Sizemore* concluded that both the letter and the publication of the letter failed to rise to the level of the outrageous conduct needed to sustain an intentional infliction of emotional distress claim. *Id.* Therefore, the *Sizemore* Court granted defendant’s motion for summary judgment on plaintiff’s intentional infliction of emotional distress claim. *Id.*

In the instant case, Plaintiffs’ Complaint did not plead an “extraordinary act.” The claim for intentional infliction of emotional distress in the Complaint alleges that “in developing, promoting and disseminating the Advertisement ... USA Next engaged in outrageous conduct that grossly exceeded the bounds of socially tolerable behavior.” Pls.’ Compl. at ¶ 60. In the next paragraph, the Complaint alleges that “the outrageous conduct did in fact cause the plaintiffs to suffer severe emotional distress,....” Pls.’ Compl. at ¶ 61. If the defendant’s act of firing the plaintiff in *Madani*, and the defendant’s act of publishing a letter with false allegations in *Sizemore* do not rise to the level of outrageous conduct, USA Next’s alleged act’s of “developing, promoting, and disseminating the Advertisement” cannot even be considered to rise to the level of outrageous conduct needed to

maintain an intentional infliction of emotional distress claim. Pls.' Compl. at ¶ 60. The acts of "developing, promoting and disseminating" a political message are to be encouraged in our country and cannot exceed the bounds of socially acceptable behavior. For these reasons, the Complaint fails to state a claim for intentional infliction of emotional distress.

3. *Plaintiffs have failed to assert anything more than conclusory allegations of severe emotional distress.*

To maintain an actionable intentional infliction of emotional distress claim, the plaintiff must show that he suffered severe emotional distress as a result of the defendant's conduct. *Kraemer*, 159 Or. App. at 110, 976 P.2d at 1173. While the plaintiff need not prove the existence of severe emotional distress through objective medical, economic or social evidence, the intensity and the duration of the distress should be considered in ascertaining its severity. *Campbell v. Safeway Inc.*, 332 F. Supp. 2d 1367, 1379 (D. Or. 2004). The law intervenes only where the distress inflicted is so extreme that no reasonable person could be expected to sustain it. *Id.* A plaintiff cannot recover "for the kind of temporary annoyance or injured feelings that can result from friction and rudeness among people in day-to-day life." *Id.*

In *Kraemer*, evidence showing plaintiff was depressed and consulted a physician as a result of the defendant's actions, a physician's diagnosis that the plaintiff suffered with acute adjustment reaction with characteristics of anxiety and depression, and plaintiff's intake of anti-depressants were satisfactory to warrant a finding that the plaintiff suffered severe emotional distress. *Kraemer*, 159 Or. App. at 111-12, 976 P.2d at 1173-74. In *Campbell*, there was sufficient evidence of severe emotional distress where plaintiff cried a lot, could not sleep for several days after the incident, stopped eating as much as usual, did not change her clothes for weeks and felt depressed. *Campbell*, 332 F. Supp. 2d at 1379-80.

In the instant case, Plaintiffs' pleadings have failed to adequately demonstrate the intensity or the duration of the emotional distress allegedly caused by USA Next, required to determine the severity of the distress. The Complaint, with mere conclusory allegations, asserts that "[t]he outrageous conduct did in fact cause the plaintiffs to suffer severe emotional distress, in the form of continuing public humiliation and severe fear for their personal safety, as well as psychological harm." Pls.' Compl. at ¶ 61. The Complaint fails to present any specific symptoms necessary to establish the intensity of the distress suffered. For instance, there is no indication of any lack of sleep, depression, anxiety, loss of self-esteem, embarrassment, eating disorder, visits to a psychiatrist or a doctor, nervousness, intake of anti-depressants or other medicines, etc. as a result of the distress allegedly suffered. Instead, Plaintiffs, whose photograph was published in the Oregon Tribune well before the alleged use of it by USA Next, and who themselves published the photograph subsequent to USA Next's political message, assert only conclusory allegations in an attempt support their politically motivated case.¹⁴ For these reasons, again Plaintiffs' intentional infliction of emotional distress count should be dismissed as a matter of law.

E. Plaintiffs' invasion of privacy (appropriation of likeness) claims fail as a matter of law.

In Oregon, the tort of invasion of privacy by appropriation of likeness is premised on the elements as stated in *Restatement (Second) of Torts*, §652C (1977),

“One 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.”

¹⁴ Plaintiffs claim that Defendant's political message exposed them to hatred by identifying them as a gay couple. However, Plaintiffs posed, kissing, for a newspaper, allowed the newspaper to publish their photo identifying them as a gay couple, allowed the newspaper to sell and publish their picture identifying them on the Internet for a year, and, they themselves, published the picture on the Internet with their identification. It is incomprehensible for Plaintiffs to claim that Defendant's political message, which ran for only six days and did not identify them, has given them any greater exposure as a potential target for violence than their own actions have already given them.

Martinez v. Democrat-Herald Publ'g. Co., 64 Or. App. 690, 694, 669 P.2d 818, 820 (1983).

While the claim is characterized as an appropriation of likeness claim, the underlying right that the claim redresses is the common law right of privacy. The Supreme Court of Oregon in *Anderson* noted that the “invasion of right of privacy mixed four distinct wrongs related not by similarity of defendants’ acts but only by the interests of the individual in leading, to some reasonable extent, a secluded and private life, free from the prying eyes, ears and publications of others.” *Anderson v. Fisher Broad. Co.*, 300 Or. 452, 460, 712 P.2d 803, 808 (1986). The distinct wrongs as defined by Restatement are “(1) intrusion upon seclusion, (2) appropriation of name or likeness, (3) publicity given to private life and (4) publicity placing person in false light.” *Id.* The *Anderson* Court further pointed out that the distinct classifications of the tort of invasion of privacy are accepted as a matter of convenience only and are “not necessarily authoritative statements of the law of this state.” *Id.* Thus, even though the Restatement has separate definitions for the four categories of an invasion of privacy claim, the sole purpose of each category, including the category of appropriation of likeness, is to redress any harm caused by an invasion of one’s right to privacy.

1. By posing for the photograph in a public place, and publishing the photograph for public gaze, the Plaintiffs have waived any claim for invasion of privacy.

The doctrine of right of privacy is defined as the right to be let alone and to be protected from undesired publicity. *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 228, 253 P.2d 441, 443 (1953); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 280, 262 P.2d 808, 812 (1953); *Martin v. Senators, Inc.*, 220 Tenn. 465, 469, 418 S.W.2d 660, 662-63 (1967). A right to privacy has been defined “as the right of a person to be free from unwarranted publicity, and as the right to live without unwarranted interference by the public in matters in which the public is not necessarily concerned.” *Johnson*, 175 Kan. at 280, 262 P.2d at 812.

However, the “right to undesired publicity is not absolute and must be balanced against the public interest in dissemination of news and information consistent with the democratic processes under the constitutional guarantees of freedom of speech and of the press.” *Gill*, 40 Cal. 2d at 228, 253 P.2d at 443. Further, the “right to privacy, like other rights that rest in an individual, may be waived by him.” *Johnson*, 175 Kan. at 282, 262 P.2d at 814; *Gill*, 40 Cal. 2d at 230, 253 P.2d at 444; *Martin*, 220 Tenn. at 470, 418 S.W.2d at 663. “A waiver or relinquishment of this right may be implied from the conduct of the parties and the surrounding circumstances.” *Johnson*, 175 Kan. at 282, 262 P.2d at 814; *Martin*, 220 Tenn. at 470, 418 S.W.2d at 663.

While there are no cases on point in Oregon on the issue of waiver of one’s right to privacy with regard to a matter that is made public, courts in other jurisdictions have held that there can be no invasion of privacy in a subject matter which has already been made public by volitional acts of the plaintiff himself. *Gill*, 40 Cal. 2d at 230-31, 253 P.2d at 444-45; *Martin*, 220 Tenn. at 472-73, 418 S.W.2d at 664; *Brewer v. Hustler Magazine Inc.*, 749 F.2d 527, 529-530 (9th Cir. 1984). In that regard, the Supreme Court of Tennessee in *Martin* commented as follows:

From a practical standpoint, ... it is unrealistic and illogical to hold that there has been an invasion of this common law right of privacy of an individual by publishing a matter which that individual has already made a matter of public record available to the eyes, ears and curiosity of all who care to look, listen or read. *Martin*, 220 Tenn. at 469-70, 418 S.W.2d at 662-63 (Citing *Langford v. Vanderbilt Univ*, 199 Tenn. 389, 401, 287 S.W.2d 32 (1956)).

In *Gill*, plaintiffs (husband and wife) initiated an invasion of privacy claim against the defendant resulting from an unauthorized and unconsented publication of the plaintiffs’ photograph in the defendant’s magazine. *Gill*, 40 Cal. 2d at 226-28, 253 P.2d at 442-43. The Supreme Court of California in *Gill* rejected the plaintiffs’ invasion of privacy claim, concluding that plaintiffs’ right

to privacy had ceased in the photographed incident as a consequence of them voluntarily posing and consenting to the taking of the photograph in a public place. *Id.* at 230-31, 253 P.2d at 444-45.

In *Martin*, plaintiff, an employee of the defendant (Senators, Inc.), allowed the defendant's agent to take her pictures on an understanding that the pictures would only be used in the defendant's bulletin board for its members. *Martin*, 220 Tenn. at 469-70, 418 S.W.2d at 662-63. However, defendant used one of the pictures for advertisement in the community to solicit membership for Senators Club. *Id.* Plaintiff instituted an invasion of privacy claim against the defendant alleging that the use of her picture in the community newspaper made her "common talk of the people," causing her humiliation and severe mental pain. *Id.* The Supreme Court in Tennessee denied plaintiff's invasion of privacy claim on the grounds that by consenting to the publication of the picture on a bulletin board which could have been viewed by members as well as non-members,¹⁵ the plaintiff had waived her right to privacy with respect to the pictures. *Id.* at 472-73, 418 S.W.2d at 663-64. Therefore, subsequent use of the plaintiff's picture by the defendant in an advertisement was not an actionable invasion of plaintiff's privacy. *Id.*

In *Brewer*, plaintiff created his own photograph with the use of special effects that simulated plaintiff shooting himself in the head. *Brewer*, 749 F.2d at 528. Subsequently, he incorporated the photograph into a postcard, on his business cards and entered into an agreement with American Creations, Inc. for commercial sale of the photograph. *Id.* Defendant, Hustler Magazine, Inc., reproduced the photograph in a sexually explicit magazine without the plaintiff's consent and a claim for violation of plaintiff's right to privacy ensued. *Id.* The Ninth Circuit concluded that the plaintiff

¹⁵ The *Martin* Court reasoned that since the club was a public club, that is, membership was open to all who would pay a small amount charged for annual membership, the bulletin cannot be concluded to be exclusively for the eyes of the members. *Martin*, 220 Tenn. at 472-73, 418 S.W.2d at 663-64.

had failed to state a cause of action for an invasion of privacy claim as a result of the plaintiff's voluntary act of prior publication of the photograph before the public. *Id.* at 529-30.

In *Thayer*, plaintiff sought to recover damages from the defendant (Worcester Post Co.) who without her consent published her picture in a newspaper article relating to her divorce suit. *Thayer v. Worcester Post Co.*, 284 Mass. 160, 161-62, 187 N.E. 292, 292-93 (1933). The Supreme Judicial Court of Massachusetts held that plaintiff had no right to prevent the picture's publication for which she voluntarily posed in a public place such as an airport. *Id.* at 163-64, 187 N.E. at 293-94.

In *Ann-Margaret*, the plaintiff (an actress) chose to appear partially nude during one scene in a motion picture which was widely distributed. *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F. Supp. 401, 403-404 (S.D.N.Y. 1980). Defendants reproduced plaintiff's nude photograph without her permission in a magazine which specialized in printing photographs of well-known women caught in revealing situations or positions. *Id.* An invasion of right to privacy claim with regard to the photograph ensued. The District Court for the Southern Division of New York held that "when an individual consents to be viewed in a certain manner during a course of public performance, such as in a movie, it cannot then be argued that a subsequent faithful reproduction (without any alteration) of that appearance constitutes an invasion of privacy." *Id.* at 405.

In accord with the case law of these jurisdictions, Plaintiffs' invasion of privacy claim (characterized as appropriation of likeness) must fail on the grounds that Plaintiffs waived any privacy rights relating to the photograph by voluntarily publishing the photograph for the public. On March 3, 2004, Plaintiffs, dressed up in their tuxedos, and, in order to avail themselves of a newly established right to same-sex marriage, stood in a line at City Hall with more than 300 citizens of Multnomah County, Oregon. Waiting in line, in public, they posed kissing in front of a photographer for the Portland Tribune. The photograph was published on or about March 4, 2004 by the Tribune

and also appeared on the Tribune website. For a year since March 4, 2004, both that photograph and another photograph showing the Plaintiffs kissing under an umbrella were posted for sale on the Tribune's website. See, Exhibit 1 hereto, Declaration of William A. Brindley, Attachment D thereto. Plaintiffs consented to their pictures being taken in a public place by a newspaper photographer, consented to the pictures being published in the city newspaper and permitted sale of their picture for a year on the Tribune. Thus, by voluntarily posing for the photograph in a public place and exposing the photograph to public gaze, the Plaintiffs waived any rights to privacy relating to the photograph. Plaintiffs should not now be heard to argue "invasion of privacy" simply because they disagree with the views of USA Next.

2. Plaintiffs have failed to allege that USA Next received an "extraordinary commercial benefit" as result of its political message, and USA Next's message is protected under the First Amendment.

In Oregon, to maintain an actionable claim for invasion of privacy by appropriation of likeness where a plaintiff's likeness is used in connection with a newsworthy or a noncommercial message, the plaintiff must allege and prove that the message conveyed an "extraordinary commercial benefit" to the defendant. *Martinez*, 64 Or. App. at 694, 669 P.2d at 821 *Martinez*. In *Martinez*, the Oregon Court of Appeals determined that a communication that discussed a "timely subject of interest in the community" was a noncommercial communication. *Martinez*, 64 Or. App. at 694, 669 P.2d at 821. The mere fact that a defendant seeks to make some profit out of its message is not sufficient to show that an "extraordinary commercial benefit" was derived from the message. *Id.*

Also, while there are no Oregon cases that discuss the issue of a First Amendment privilege in the context of an appropriation of name or likeness claim, courts in other jurisdictions have held that a First Amendment privilege bars an appropriation of likeness claim when the use touches upon

a matter of public concern. See *Joe Dickerson & Assoc., LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001); *Battaglieri v. Mackinac Ctr. For Pub. Policy*, 261 Mich. App. 296, 300-01, 680 N.W.2d 915, 919 (2004).

The United States Supreme Court defines commercial speech as “speech that proposes a commercial transaction.” *Dittmar*, 34 P.3d at 1004 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993)). Commercial speech is communication “mainly for purposes of trade, without redeeming public interest, news, or historical value.” *Battaglieri*, 261 Mich. App. at 302, 680 N.W.2d at 920. “It is the content of the speech, not motivation of the speaker, which determines whether particular speech is commercial.” *Dittmar*, 34 P.3d at 1004 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993)). “An article that has commercial undertones may still be protected if it concerns a legitimate matter of public concern.” *Battaglieri*, 261 Mich. App. at 302-03, 680 N.W.2d at 920. Further, “a profit motive does not transform a publication regarding a legitimate matter of public concern into commercial speech.” *Dittmar*, 34 P.3d at 1004 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993)).

In *Battaglieri*, the plaintiff sued the defendant, who frequently advanced public policy positions adverse to those of the plaintiff, for using plaintiff’s comments in a letter distributed to solicit donations. *Battaglieri*, 261 Mich. App. at 297-98, 680 N.W.2d at 917-18. The comments included in the defendant’s letter were made by the plaintiff’s president at a press conference commending defendant’s research on education policy in Michigan and around the nation. *Id.* The Michigan Court of Appeals asserted that while the purpose of the letter was “pecuniary” or “commercial” to the extent that it was a request for contributions, the publication also attempted to educate the readers on several public policy issues and was effectively advocating solutions thereto.

Id. at 302-303, 680 N.W.2d at 920. As a result, the Court concluded that the publication was newsworthy, thereby falling “within the protection of the First Amendment for discourse on matters of public interest.” *Id.* at 303, 680 N.W.2d at 920.

In the instant case, Plaintiffs have failed to demonstrate in their Complaint that USA Next’s message was primarily for commercial purposes, bereft of redeeming public interest, news or historical value, or that it did not touch upon a legitimate matter of public concern. Pls.’ Compl. ¶¶ 39-46. To the contrary, Plaintiffs unambiguously assert that the message *is* related to a matter of public concern, namely Social Security reform. Pls.’ Compl. at ¶ 1. The Complaint alleges that the political message suggests “that the American Association of Retired Persons (AARP) is anti-military and pro-gay-marriage, and therefore not credible on the issue of Social Security reform, an issue pending before the U.S. Congress.” Pls.’ Compl. at ¶ 1. Most strikingly, Plaintiffs allege that the political message “*was directed at the Congress and those who may influence its decision-making.*” Pls.’ Compl. at ¶ 1 (emphasis added). Therefore, Plaintiffs’ appropriation of likeness claim, if not completely barred by the First Amendment, fails for the simple reason that Plaintiffs do not allege that USA Next derived an “extraordinary commercial benefit” in promoting its message.

In the Complaint, Plaintiffs merely allege that “USA Next ... *benefitted commercially* from the use of plaintiff’s likeness through incorporation of their likeness in a[] public advertisement,” and that “[t]he Advertisement resulted in *commercial benefit* to USA Next through promotion of the organization’s purported message and new membership dues and contributions.” Pls.’ Compl. at ¶¶ 42, 45 (emphasis added). Plaintiffs’ Complaint has failed to allege any “extraordinary” commercial benefit enjoyed by USA Next as a result of its political message, nor could they to save their claim. Any allegations of new membership contributions, by themselves, cannot demonstrate an

extraordinary commercial benefit. See *Martinez*, 64 Or. App. at 694, 669 P.2d 818 (allegations that the use of the plaintiff’s photograph with story that was primarily intended to arouse reader’s interest, thereby increasing circulation and defendant’s profit, was not sufficient to prove that the story had an “extraordinary” commercial benefit to defendants). Moreover, USA Next’s political message is protected by the first Amendment. See *Battaglieri*, 261 Mich. App. at 302-03, 680 N.W.2d at 920 (the First Amendment privilege to an action for invasion of privacy by appropriation of likeness applies to matters of public concern even though they are published to make a profit); see *Dittmar*, 34 P.3d at 1004. (A defendant’s profit motive does not affect the application of the First Amendment privilege to the invasion of privacy by appropriation of likeness claim if that article relates to matters of legitimate public concern). For these reasons, Plaintiffs fail to state an actionable appropriation of likeness claim.

3. *Plaintiffs have failed to allege that the alleged use of Plaintiffs’ photograph was anything more than “incidental.”*

Some jurisdictions that adopt the *Restatement (Second) of Torts*, §652C elements for the tort of invasion of privacy by appropriation of likeness have “explicitly required that one element of the tort is that the plaintiff’s identity must have had pre-existing commercial value.” *Dittmar*, 34 P.3d at 1001-1002, *Reeves v. Television Network*, 983 F. Supp. 703, 710 (N.D. Ohio 1997); *Cox v. Hatch*, 761 P.2d 556, 564-66 (Ohio 1988); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So.2d 178, 181 (Ala. 1993); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1088-89 (E.D. Pa. 1980). In particular, these courts point to Comment c and d of *Restatement (Second) of Torts* § 625C:

In order that there may be liability under the rule stated in this Section, the defendant must have appropriated to his own use or benefit the reputation, prestige, social, or commercial standing, public interest or other values of the plaintiff’s name or likeness.

. . . No one has the right to object merely because his name or his appearance is brought before the public since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.

For an actionable invasion of privacy claim by appropriation of likeness, plaintiff must allege and support "something more than the incidental publication of his name or likeness." *Reeves*, 983 F. Supp. at 710; *Cox*, 761 P.2d at 564-66; *Fogel*, 500 F. Supp. at 1088-89; *Schifano*, 624 So.2d at 181; *see also Anderson*, 300 Or. at 468, 712 P.2d at 813 (the invasion of privacy by appropriation of likeness claim is "not available, however, to a person whose image, with no established public familiarity, appears in a commercial context only incidentally, perhaps as one of several persons in a public scene, or otherwise under circumstances that plainly are not presented so as to convey any endorsement by that person."). The Complaint must state that plaintiff's name or likeness has some intrinsic value, which was taken by the defendant for its own benefit, commercial or otherwise. *Reeves*, 983 F. Supp. at 710; *Cox*, 761 P.2d at 564-66; *Fogel*, 500 F. Supp. at 1088-89; *Schifano*, 624 So.2d at 181.

In *Reeves*, an arrestee was videotaped during the arrestee's encounter with the police. Some parts of the videotape were aired on a television show and the arrestee sued the broadcasting company for invasion of privacy, appropriation of likeness. *Reeves*, 983 F. Supp. at 707-08. The United States District Court of Ohio dismissed the claim concluding that the plaintiff's name or likeness had no "intrinsic value" to the defendant's television show. *Id.* at 710. Simply, the plaintiff was not included in the defendant's television show because of the plaintiff's "name, personality or prestige." *Id.* at 710.

In *Schifano*, the plaintiffs, frequent visitors of the defendant's Park, were photographed while they sat in "Winner's Circle," a section of the park reserved by interested groups. *Schifano*, 624 So.2d at 179-80. Subsequently, the photograph was used by the defendant in an advertisement brochure for the Park and an action for invasion of privacy by appropriation of likeness ensued. *Id.* The Supreme Court of Alabama rejected plaintiff's invasion of privacy by appropriation of likeness claim stating that "there is no unique quality or value in [plaintiffs'] likeness that would result in commercial profit to the Park simply from using a photograph that included them-unidentified and seated in a group." *Id.* at 181.

In *Cox*, postal employees brought an appropriation of likeness claim against Senator Hatch based on the defendant's publication of a photograph of the plaintiffs together with Senator Hatch, which was used in a political advertisement. *Cox*, 761 P.2d at 557-58. The Supreme Court of Utah denied the invasion of privacy claim on the grounds that the complaint failed to allege that the plaintiff's names or likenesses had some "intrinsic value" that was used or appropriated for defendant's benefit. *Id.* at 564-66. The Court reasoned that the use of plaintiff's names or likenesses was "incidental" to the purpose of depicting Senator Hatch in the company of the workers. *Id.* The plaintiffs' pictures were "wholly fungible" with those of any other persons working at the post office. *Id.*

In *Fogel*, plaintiffs were photographed while standing at an airline counter in the Miami International Airport and the photograph was published by the defendant to illustrate an article dealing with investments and purchases by Latin Americans in the Miami area. *Fogel*, 500 F. Supp. at 1083-84. The United States District Court of Pennsylvania concluded that the use of the photograph was "merely incidental" to illustrate the newsworthy article and not an appropriation of the value of plaintiffs' names. *Id.* at 1088-89.

In the instant case, USA Next's political message was posted on the American Spectator website for only six days, as alleged by Plaintiffs. The political message did not identify the Plaintiffs by name, did not identify Plaintiffs as living in the Portland area and did not even identify the Plaintiffs as living on the West Coast. Plaintiffs do not allege that there was any pre-existing unique quality or value in the Plaintiffs' likenesses. Thus, the use of Plaintiffs' photograph in USA Next's message was an "incidental" use. For these reasons, the claim for invasion of privacy by appropriation of likeness fails.

V. CONCLUSION

For the reasons stated above, Plaintiffs have failed to state any claim upon which relief may be granted. Therefore, USA Next respectfully requests that the Complaint, and each count therein, be dismissed with prejudice as against USA Next.

Dated: April 25, 2005

SEMMES, BOWEN & SEMMES

By: /s/ James A. Johnson
James A. Johnson, D.C. Bar No. 391016
250 W. Pratt Street
Baltimore, Maryland 21201
Telephone: (410) 539-5040
Facsimile: (410) 539-5223

SPARKS & CRAIG, LLP

By: /s/ Robert R. Sparks, Jr.
Robert R. Sparks, Jr. (D.C. Bar No. 219444)
6862 Elm Street, Suite 360
McLean, Virginia 22101
Telephone: (703) 848-4700
Facsimile: (703) 893-7371
Counsel for United Seniors Association, Inc.