UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY SHERROD, Plaintiff, v. ANDREW BREITBART, *et al*., Defendants.	Civ. A. No. 11-00477 (RJL) **ORAL ARGUMENT REQUESTED**

PLAINTIFF SHIRLEY SHERROD'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO DISMISS COMPLAINT UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT OF 2010

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INTRODUCTION

Defendants Andrew Breitbart and Larry O'Connor have filed an untimely motion to dismiss under an inapplicable, non-retroactive statute. Their motion is baseless. That Defendants would require the Court to expend time on such a motion is itself questionable, but their further failure to cite controlling and superseding authority distinguishing the principle of retroactivity on which their motion is based—or provide even a cursory explanation to justify their untimely motion—raises more fundamental questions about the manner in which they intend to defend this suit.

Defendants' attempt to dismiss the case under the District of Columbia Anti-SLAPP Act of 2010, D.C. Law 18-351 (March 31, 2011), ("D.C. Anti-SLAPP Act") fails for at least ***four*** separate and independent reasons. ***First***, the D.C. Anti-SLAPP Act did not become effective until March 31, 2011—a full month and a half ***after*** this case was filed. While Defendants try to brush by this fact with a cursory cite (in a footnote) to a 1991 D.C. Court of Appeals case, *Montgomery v. District of Columbia*, 598 A.2d 162 (D.C. 1991), to suggest that the statute is retroactive, Defendants fail to note either the limitations of the *Montgomery* case or the critical fact that, just last year, the D.C. Court of Appeals limited and distinguished its former holding. Under that 2010 case, *Bank of America, N.A., v. Griffin*, 2 A.3d 1070 (D.C. 2010), only statutes that are ***purely procedural*** and have ***no substantive consequences*** are assumed to have retroactive effect. All other "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect." *Id.* at 1076.[1] Defendants neither claim that the D.C. Anti-SLAPP Act is purely procedural nor do they point to any legislative showing that it was intended to have a retroactive

[1] Internal quotations and citations omitted unless otherwise noted.

effect. Indeed, the facts and the law fall squarely against them on both grounds. The D.C. Anti-SLAPP Act is therefore inapplicable to this case.

Second, even if Defendants could show that the D.C. Anti-SLAPP Act is purely procedural—which they cannot—the *Erie* doctrine would bar its application in this Court. *Erie v. Tompkins* requires federal courts sitting in diversity to apply state substantive law and federal procedural law. *Erie v. Tompkins*, 304 U.S. 64 (1938). For this reason, several courts that have found other states' anti-SLAPP acts to be procedural have held they are inapplicable in federal court. By bringing this motion based on an inapplicable statute, Defendants have created a Catch-22 for themselves: ***either*** the statute is partially substantive (or has substantive consequences) and is therefore not retroactive under D.C. law ***or*** it is purely procedural and inapplicable in federal court under *Erie*. Defendants cannot argue "procedure" on one hand and "substance" on the other merely to suit their convenience.

Third, even if Defendants were somehow able to thread the needle and argue that the D.C. Anti-SLAPP Act is both retroactive ***and*** applicable in federal court, they ***still*** would be barred from bringing this motion under the plain language of the statute. The statute clearly states that "[a] party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Law 18-351 § 3(a). The Complaint was served on February 12, 2011. That means that Defendants would have had to file this special motion to dismiss by March 30, 2011. They did not. Without any notice whatsoever to the Plaintiff, they filed this motion on April 18, 2011. The motion is therefore procedurally defaulted on its face.

Finally, the D.C. Anti-SLAPP Act provides that special motions to dismiss like this one shall be denied if the "responding party demonstrates that the claim is likely to succeed on the

merits." *Id*. § 3(b). The Plaintiff's claims in this case are likely to succeed. The 42-page Complaint is well-pled, specific, and supported by detailed facts—all before any discovery has even commenced. This is not a roughly thrown-together complaint based on suspicions or innuendo. Mrs. Sherrod has amassed and alleged ample evidence—much of it taken from the Defendants' own admissions—that Defendants knowingly or recklessly defamed her. As a result of Defendants' defamatory actions, Mrs. Sherrod was unwillingly thrust into the media spotlight and nationally derided as an avowed racist who discriminates against people in the performance of her federal job, a slur which the true video of her speech reveals is unquestionably false.

Confronted with these insurmountable procedural and substantive problems, one wonders why Defendants even chose to bring this motion. Plaintiff can only presume that the heightened and inflamed rhetoric of their "Summary of Additional Facts" is the start of what will be Defendants' larger, self-serving attempt to cloak themselves as defenders of the First Amendment.[2] But far from aiming to quash Defendants' political speech on the broad range of political topics addressed in Defendants' Summary of Additional Facts, the relief Mrs. Sherrod

[2] The suggestion in Defendants' motion that this suit is part of a larger attempt to "muzzle" Mr. Breitbart is preposterous. Indeed, even cursory attention to news programs shows that Mr. Breitbart's freedom of speech has not been "muzzled" in any way since this suit was brought. Mr. Breitbart has been conducting a well-publicized national tour to promote his own book, during the course of which he has spoken out numerous times about Mrs. Sherrod and the facts in this case. *See, e.g.*, http://rightwingnews.com/interviews/an-interview-with-andrew-breitbart/, Apr. 18, 2011 ("[Sherrod] turned 180 degrees because she is a leftist partisan who is doing the bidding of the political Left to destroy me. To try and shut up free speech, she stated that she wanted to stop my publishing empire. This is an anti-free-speech campaign and I am going to win in the court of law."); http://www.thedailybeast.com/blogs-and-stories/2011-04-18/andrew-breitbarts-righteous-indignation-toward-the-left/#, Apr. 20, 2011 ("Q: What did you mean in the book when you said, 'There is a hell of a lot more to the Shirley Sherrod story than we've heard at this point?' A: Well, you're going to see it in the lawsuit. You're going to see it in my response. You're going to see that the mainstream media, in its attempts to destroy me, using the phrase 'selectively edited,' selectively edited the reality of this. And they're going to also realize that my motivations could not have been more clear. I have been fighting the battle on behalf of the Tea Party, the mainstream media's desire to work with the Democratic Party and the NAACP and other liberal institutions to frame the Tea Party as racist. Everybody had been given the false narrative. Why? Because they wanted to draw attention away from the fact that Barack Obama not only fired her without her due process, but the president of the United States threw her under the bus."); http://thelastword.msnbc.msn.com/_news/2011/04/20/6503344-breitbart-vs-the-truth?ocid=twitter (extensive discussion about Mrs. Sherrod and facts of this case with MSNBC's Martin Bashir).

seeks in her Complaint is specific, circumscribed, and limited to the specific defamatory falsehoods that Defendants published about ***her*** individually which are the subject of the tort claims alleged in the Complaint. In addition to damages, Mrs. Sherrod requests:

- An order requiring Defendant Breitbart to remove the defamatory language and video from his blog;
- An order requiring Defendant O'Connor to remove the defamatory video clips from YouTube.com; and
- An order enjoining Defendants from engaging in future tortious conduct against Mrs. Sherrod.

In short, Mrs. Sherrod asks that Defendants stop defaming ***her***. This lawsuit is not about Mr. Breitbart's politics, Mrs. Sherrod's politics, or the politics of any other individual or group, blogger or journalist; Defendants' attempt to argue otherwise is merely a smokescreen for a weak defense on the merits of the well-pled tort claims stated in Mrs. Sherrod's Complaint. While political speech is sacrosanct in this country, it has its limits, and those limits are reached when an innocent person is maliciously and falsely defamed to further another's agenda. Defendants' Joint Special Motion to Dismiss Complaint Under the Anti-SLAPP Act of 2010 should be dismissed.

ARGUMENT

I. The D.C. Anti-SLAPP Act Was Not In Effect At The Time The Suit Was Filed And There Is No Evidence Of Legislative Intent To Give It Retroactive Effect.

Although titled the District of Columbia "Anti-SLAPP Act of 2010," it is undisputed that the statute did not become effective until ***March 31, 2011***—a month and a half after this case was filed. *See* Defs.' Anti-SLAPP Mem. at 1 [Dkt. 24]; *see also* D.C. Law 18-351 § 8 ("This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in

section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register."); Notice 1036947, D.C. Law 18-351, 58 D.C. Reg. 17 (April 29, 2011), *available at*, http://www.dcregs.dc.gov/Gateway/NoticeHome.aspx?noticeid=1036947. The statute on its face is therefore inapplicable to this case.

In a footnote, Defendants summarily brush off this fatal defect by conclusorily stating that "[the statute] is retroactive and applies to cases pending at the time of its enactment." Defs.' Anti-SLAPP Mem. at 1 n.1. Defendants then cite one 1991 D.C. Court of Appeals case—*Montgomery v. District of Columbia*, 598 A.2d 162 (D.C. 1991)—and two cases outside the jurisdiction, for the proposition that the D.C. Anti-SLAPP Act is retroactive. It goes without saying that neither the D.C. Court of Appeals case (decided twenty years before the passage of the D.C. Anti-SLAPP Act), nor the cases from the other two jurisdictions (also decided before the passage of the D.C. Anti-SLAPP Act), hold that the D.C. Anti-SLAPP Act of 2010 is retroactive.

To the contrary, *Montgomery*, the only D.C. case Defendants cite, involved the retroactivity of a statute that established a new tribunal for administrative appeals. There, the D.C. Court of Appeals explained: "A statute providing for a different tribunal is deemed procedural in nature, for it merely alters the remedy and does not impair vested rights …. Unless a contrary legislative intent appears, changes in statute law ***which pertain only to procedure*** are generally held to apply to pending cases." *Montgomery*, 598 A.2d at 166 .[3] *Montgomery* itself therefore limited the assumption of retroactivity to statutes that were purely procedural.

[3] Emphasis added unless otherwise noted.

Although Defendants failed to cite it, the D.C. Court of Appeals had the opportunity to reconsider *Montgomery* in 2010 and chose to further limit and distinguish it. In *Bank of America*, the court was faced with the question of whether a *lis pendens* statute was retroactive. The appellant in that case argued that the new statute was "procedural, rather than substantive" and therefore, according to *Montgomery*, should apply to pending cases. *Bank of Am.*, 2 A.3d at 1075. In rejecting that argument, the D.C. Court of Appeals explained that *Montgomery* was distinguishable "because the statute in that case was clearly procedural—it established a new tribunal for administrative appeals. In contrast, [the *lis pendens* statute] is not so easily categorized as either a 'procedural' or 'substantive' law." *Id.* at 1076. The D.C. Court of Appeals made clear that when a statute is not readily categorized as either procedural or substantive, or when it would have substantive consequences, the *Montgomery* rule does ***not*** apply:

> In sum, because D.C. Code § 42-1207 is not easily categorized as either procedural or substantive, and because its retroactive application would certainly have substantive consequences, we decline to follow the reasoning outlined in *Montgomery, supra*, that laws "which pertain ***only to procedure*** are generally held to apply to pending cases." … Instead, we find it more appropriate here to apply the *Wolf* presumption that "statutes are to be construed as having only a prospective operation, unless there is a clear legislative showing that they are to be given a retroactive or retrospective effect."

Id. (emphasis in original). Thus, the D.C. Court of Appeals held that a clear legislative showing of retroactive intent is required where the statute is substantive, is not easily categorized as either procedural or substantive, or has substantive consequences. This is in accord with the "general rule" that statutes are construed to be prospective unless there is a clear legislative showing of an intent to give them retroactive effect. *See Wolf v. District of Columbia Rental Accommodations Comm'n*, 414 A.2d 878, 880 n.8 (D.C. 1980); *accord Windsor v. State Farm Ins. Co.*, 509 F. Supp. 342, 344 (D.D.C. 1981) ("[S]tatutes are not to be applied retroactively unless the words

used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot otherwise be satisfied.").

Here, there is little question that the D.C. Anti-SLAPP Act is substantive. Indeed, the Court need look no further than Defendants' own brief and exhibits to support this point. In attempting to make the argument that the D.C. Anti-SLAPP Act was intended to apply to this type of action, Defendants quote from the report of the Council on the District of Columbia Committee on Public Safety and the Judiciary, Report on Bill 18-893, Anti-SLAPP Act of 2010 (Nov. 18, 2010) (the "Committee Report") stating that the D.C. Anti-SLAPP Act is designed, among other things, to "***incorporat[e] substantive rights*** that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP." Defs.' Anti-SLAPP Mem. at 6; Committee Report at 1 (Defs.' Anti-SLAPP Mem. Ex. 7 [Dkt. 24-7]). Thus, Defendants' very own brief makes plain that the D.C. Anti-SLAPP Act was described as "incorporating substantive rights."

This language is echoed in the ***very first sentence*** of the Committee Report. In describing the "Background and Need" of the new statute, the Council states: "Bill 18-893, the Anti-SLAPP Act of 2010, ***incorporates substantive rights*** with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." Committee Report at 1. Far from being a minor procedural fix, the legislative intent here was clearly and unequivocally to create new substantive rights for defendants sued in such lawsuits.

Even putting aside the admissions in Defendants' own brief and exhibits, it is plain from the statutory text itself that the D.C. Anti-SLAPP Act is substantive in nature and effect. To begin with, the statute re-allocates the burden of proof at the motion to dismiss stage in a manner

fundamentally different than Federal Rule of Civil Procedure 12(b)(6). Section 3(b) of the statute provides: "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Law 18-351 § 3(b). As Defendants themselves admit, this reallocates the burden. *See* Defs.' Anti-SLAPP Mem. at 7 ("Unlike in the Rule 12(b)(6) Motion—where Sherrod is entitled to certain inferences—here, Sherrod bears the burden of demonstrating that her claims are likely to succeed."). Courts have found that the allocation of the burden of proof is substantive. *See, e.g.*, *Godin v. Schencks*, 629 F.3d 79, 89 (1st Cir. 2010) ("And it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law.").

Moreover, the D.C. Anti-SLAPP Act provides provisions for attorneys' fees and costs for the prevailing party on a special motion. Numerous courts have held that the statutory provision of attorneys' fees is a substantive, not procedural, right. *See id.* at 85 n.10 ("We have held that a nominally procedural state rule authorizing an award of attorney's fees as a sanction for obstinate litigation is substantive for purposes of *Erie* analysis."); *CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007) ("We have held that when state statutes authorize fee awards to litigants in a particular class of cases, the statutes are substantive for *Erie* purposes if there is no 'direct collision' with the Federal Rules."); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 971-73 (9th Cir. 1999) (concluding that California anti-SLAPP statute's provision allowing attorneys' fees to party successfully striking suit under statute was substantive and could be applied in diversity cases).

Finally, although the cases clearly involved different anti-SLAPP acts of other states, other courts have recognized those statutes to be substantive. California in particular, which Defendants admit has a "well-developed Anti-SLAPP statute," Defs.' Anti-SLAPP Mem. at 2, recognizes their act to be mostly substantive. *See Batzel v. Smith*, 333 F.3d 1018, 1025-26 (9th Cir. 2003) ("Because California law recognizes the protection of the anti-SLAPP statute as a substantive immunity from suit, this Court, sitting in diversity, will do so as well."); *Whitty v. First Nationwide Mortg. Corp.*, No. 05-CV-1021 H(BLM), 2007 WL 628033, at *11 (S.D. Cal. Feb. 26, 2007) ("California's anti-SLAPP law is substantive in nature, and therefore a federal court exercising diversity jurisdiction follows California's law."). Similarly, other federal courts—in choosing to apply state anti-SLAPP acts under *Erie*—have found those acts to be substantive. *See Containment Techs. Grp., Inc. v. American Soc'y of Health Sys. Pharms.*, No. 1:07-cv-0997-DFH-TAB, 2009 WL 838549, at *8 (S.D. Ind. Mar. 26, 2009) ("[T]he anti-SLAPP statute has a distinctly substantive flavor. The anti-SLAPP statute provides a complete defense to defamation and also provides the remedy of attorney fees to a victorious defendant. These are substantive provisions of Indiana law that govern in this diversity jurisdiction case."); *Godin*, 629 F.3d at 86 (Maine anti-SLAPP statute "governs both procedure and substance in the state courts").

Because the D.C. Anti-SLAPP Act is substantive in nature and effect, under D.C. law, Defendants must point to "a clear legislative showing that [it is] to be given a retroactive or retrospective effect." *Bank of Am.*, 2 A.3d at 1076. Defendants point to nothing in either the statute or legislative history to support such a showing. That is because none exists. Indeed, there is nothing in the D.C. Anti-SLAPP Act that would in any way indicate a retroactive intent

with its passage. For these reasons, there is simply no basis to support any presumption of retroactivity.

II. Even If The D.C. Anti-SLAPP Act Were Purely Procedural And Thus Retroactive, It Would Nevertheless Be Inapplicable In Federal Court Under *Erie*.

The *Erie* doctrine requires federal courts sitting in diversity to apply state substantive law and federal procedural law. For all the reasons stated above, the D.C. Anti-SLAPP Act is substantive in nature and effect, is not retroactive under D.C. law, and is therefore inapplicable to this case. But even if Defendants were able to able to argue that the D.C. Anti-SLAPP Act is somehow purely procedural, it would then nevertheless be rendered inapplicable in this Court under *Erie*.

Federal courts that have found other states' anti-SLAPP statutes to be purely procedural have generally refused to apply them when sitting in diversity. *See Turkowitz v. Town of Provincetown*, No. 10-10634-NMG, 2010 WL 5583119, at *2 (D. Mass. Dec. 1, 2010) (holding that a purely procedural act does not apply in federal courts); *The Saint Consulting Group, Inc. v. Litz*, No. 10-10990-RGS, 2010 WL 2836792, at *1 (D. Mass. July 19, 2010) ("[T]he Anti-SLAPP Statute is procedural in nature and therefore does not apply in a federal court proceeding").

Other federal courts that have gone a step farther and examined the conflict between other states' anti-SLAPP procedures and federal procedure have generally declined to apply the state statutes when they conflict with the Federal Rules of Civil Procedure. In *Adventure Outdoors, Inc. v. Bloomberg*, for example, the Court ruled that the Georgia anti-SLAPP statute, which required verification of the complaint, "is contrary to the Federal Rules of Civil Procedure and does not apply in this case." *Adventure Outdoors, Inc. v. Bloomberg*, 519 F. Supp. 2d 1258, 1278 (N.D. Ga. 2007), *rev'd on other grounds*, 552 F.3d 1290 (11th Cir. 2008). The court

explained that the Georgia anti-SLAPP statute "applies a heightened pleading requirement on plaintiffs in a defamation action, such that it conflicts with Federal Rule of Civil Procedure 8(a) which requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id*. (quoting Fed. R. Civ. P. 8(a)(2)). Accordingly, the court declined to apply the procedural aspects of Georgia's anti-SLAPP statute to the litigation. Similarly, the District of Massachusetts has at least twice declined to apply the Massachusetts anti-SLAPP statute in federal court, ruling that its burden-shifting directly conflicts with Federal Rule of Civil Procedure 12(b)(6). *See South Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 WL 4595369, at *10 (D. Mass. Sept. 30, 2008); *Stuborn Ltd. P'ship v. Bernstein*, 245 F. Supp. 2d 312, 316 (D. Mass. 2003). Even the Ninth Circuit, which has repeatedly held that the California anti-SLAPP statute has substantive components and is therefore applicable in federal diversity cases, has held that certain procedural portions of the statute directly conflict with federal law and therefore cannot be applied. *See Metabolife Int'l., Inc. v. Wornick*, 264 F.3d 832, 845-46 (9th Cir. 2001) (provisions of California's anti-SLAPP statute that permitted filing of anti-SLAPP motion within 60 days of filing of complaint and that automatically stayed all further discovery until the court ruled on the motion conflicted with federal summary judgment rule's procedure requiring discovery).

Here, the D.C. Anti-SLAPP Act—to the extent it is partly procedural—directly conflicts with the Federal Rules of Civil Procedure. As Defendants recognize, the statute shifts and reallocates the burden on the plaintiff in a way entirely at odds with Federal Rule of Civil Procedure 12(b)(6). Unlike Rule 12(b)(6), where plaintiff at the earliest stage of litigation need only state a claim upon which relief may be granted, the D.C. Anti-SLAPP Act places on

plaintiff the burden of demonstrating that her claims are likely to succeed before discovery even begins.

Moreover, like the parts of the California anti-SLAPP act that have been ruled inapplicable in federal court, the D.C. Anti-SLAPP Act permits the filing of an anti-SLAPP motion within a set period of time after service of the complaint (60 days after filing for California; 45 days after service for D.C.) and automatically stays all further discovery until the court rules on that motion. *See* D.C. Law 18-351 § 3(c)(1). The Ninth Circuit has held that such provisions "directly collide" with federal law,[4] rendering them inapplicable. *See Metabolife*, 264 F.3d at 846.[5] For these reasons, even the parts of the D.C. Anti-SLAPP Act that could arguably be deemed "procedural,"[6] would nevertheless be inapplicable in this Court.

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[4] "The Court must first determine whether the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law …. If the federal rule does not apply or can operate alongside the state rule, then there is no Act of Congress governing that particular question … and the court must engage in the traditional Rules of Decision Act inquiry under *Erie* and its progeny." *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1451 (2000) (Stevens, J., concurring).

[5] The *Metabolife* court found:

> "Subsection 425.16(f) provides that the anti-SLAPP motion may be filed within sixty days of the filing of the complaint or, at the court's discretion, at any later date. Subsection 425.16(g) provides that the filing of an anti-SLAPP motion automatically stays all further discovery until the court rules on the motion. However, '[t]he court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.' § 425.16(g). Together, these two subsections 'create a default rule that allows the defendant served with a complaint to immediately put the plaintiff to his or her proof before the plaintiff can conduct discovery.'
>
> We have not previously considered whether subsections 425.16(f) and (g) 'directly collide' with the Federal Rules or are contrary to *Erie*'s purposes. However, a district court in our circuit addressed exactly this issue in *Rogers*, holding that '[i]f this expedited procedure were used in federal court to test the plaintiff's evidence before the plaintiff has completed discovery, it would collide with Federal Rule of Civil Procedure 56.'
>
> Although Rule 56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.' *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). Taking note of this, the district court in *Rogers* held: 'Section 425.16 limits discovery and makes further discovery an exception,

III. Defendants' Motion Is Defaulted In Any Case Because Defendants Have Failed To File On Time.

Even if Defendants were able to convince this Court that the D.C. Anti-SLAPP Act is purely procedural, retroactive, ***and*** applicable in federal court—a seemingly insurmountable burden—Defendants would ***still*** be unable to succeed on their motion because they have failed to abide by the filing requirements of the statute. The plain text of D.C. Anti-SLAPP Act section 3(a) states that a party has forty-five days after service of the claim to file a special motion to dismiss under the Act: "A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim." D.C. Law 18-351 § 3(a). The Complaint in this case was filed on February 11, 2011 and served on February 12, 2011. Forty-five days from service would have made their special motion to dismiss due on March 30, 2011. But Defendants did ***not*** file this motion by that date. Instead, they waited until April 18, 2011—nearly three weeks later—to file.[7]

> rather than the rule. Rule 56 does not limit discovery. On the contrary, it ensures that adequate discovery will occur before summary judgment is considered.'
>
> Because the discovery-limiting aspects of § 425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56, these aspects of subsections (f) and (g) cannot apply in federal court. We agree."

Id.

[6] For the reasons stated above, even if parts of the D.C. Anti-SLAPP Act are deemed procedural, that would not make the statute effective. Under D.C. law the statute must be ***purely*** procedural to have retroactive effect in the absence of a clear legislative showing to so intend.

[7] At no point in time did Defendants ask for an extension of the ***statutory*** deadline for this motion, nor would Plaintiff have consented if asked. Although the parties met and conferred about an extension for deadlines for a standard motion to dismiss or answer, and Plaintiff agreed to that extension, Defendants never notified Plaintiff that they intended to file—or sought additional time for—this "special motion." The filing of this motion came as a complete surprise to Plaintiff. Although Plaintiff requested in writing a list of the motions Defendants planned to file, Defendants never provided one.

This Court takes such filing requirements seriously.[8] In *Blumenthal v. Drudge*, the Court ruled defendant Drudge's special motion to dismiss under the California anti-SLAPP statute to be procedurally defaulted because it was filed well after the 60-day deadline provided in the statute. *Blumenthal v. Drudge*, Civ.A. 97-1968(PLF), 2001 WL 587860 (D.D.C. Feb. 13, 2001). The Court ruled that "[a]lthough the statute states that the special motion 'may' be filed within 60 days and not that it 'must' be filed within that time, [that provision] has been interpreted by both federal and state courts in California to require filing within 60 days of the complaint or amended complaint unless otherwise permitted by the court in its discretion." *Id.* at *2. The court saw no reason to exercise its discretion and permit filing out of time. It reasoned, among other things, that the "requirement that the motion to strike be filed soon after the filing of the complaint best serves the purpose of the Anti-SLAPP statute—to provide for the early dismissal of meritless First Amendment-chilling lawsuits." *Id.*[9]

Here, as in *Drudge*, Defendants plainly violated the statute and, if the statute is effective and applicable, their motion is procedurally defaulted.

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[8] Indeed, prompt filing and adjudication is a necessary component of anti-SLAPP statutes. The D.C. Anti-SLAPP Act specially provides that "[t]he court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing." D.C. Law 18-351 § 3(d). Such expedited treatment is necessary because the Act has a default procedure to stay all discovery proceedings on the claim until the motion is disposed of. *Id.* § 3(c)(1). As such, it is especially important that the "special motion to dismiss" that is permitted be filed on time and disposed of quickly. Defendants' oblique statement in its brief that "[t]he Court does not … have to adjudicate this motion at this stage of the proceedings and indeed, it would be in the interests of the orderly disposition and administration of this case to defer the adjudication of this motion until a later time," Defs.' Anti-SLAPP Mem. at 1-2, is therefore utterly at odds with the text and purpose of the statute.

[9] While it is crucial, for the reasons stated above, that special motions to dismiss under the Anti-SLAPP Act be filed and adjudicated promptly, here, as in *Drudge*, Plaintiff's suit is hardly meritless or "First Amendment-chilling." Indeed, the *Drudge* court pointed out that the suit "does not appear to have chilled defendant's exercise of his free speech rights as he continues to publish stories on his website in much the same manner as he did before the lawsuit was filed." *Id.* at *4. So too here, where Mr. Breitbart continues to maintain and publish stories on his website in exactly the same way as before, has continued to speak and publish regarding Mrs. Sherrod, the Tea Party, and the NAACP, and has even embarked on a book tour to garner further publicity.

IV. Plaintiff Is Likely To Succeed On The Merits.

If Defendants are somehow able to show retroactivity, applicability in federal court, ***and*** explain away their failure to file on time, their motion to dismiss would still fail because Plaintiff's claim is likely to succeed. D.C. Anti-SLAPP Act section 3(b) provides: "If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied." D.C. Law 18-351 § 3(b). For all the reasons stated in Plaintiff's Opposition to Defendants' Motion to Dismiss Pursuant to Rules 12(b)(3) and (6), the claims at issue here clearly meet that test at this stage of the litigation.

Unlike some other defamation claims, Plaintiff's Complaint is specific, well-pled, and replete with actionable facts—all compiled before discovery has even begun. This case is therefore entirely distinguishable from the type of action the District of Columbia had in mind when it enacted the D.C. Anti-SLAPP Act. As this Court has described them, "SLAPP suits are often brought for 'purely political purposes' in order to obtain 'an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff.'" *Drudge*, 2001 WL 587860, at *3.

> [O]ne of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished. … Thus, while SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPPs are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal right or to punish them for doing so. Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPPs.

Id.

The Committee Report attached to Defendants' Motion as Exhibit 7 supports this view of SLAPPs. In commenting on the reasons behind the adoption of the D.C. Anti-SLAPP Act, the Committee Report points to "SLAPPs in the District of Columbia." Committee Report at 3. As its primary example, the Committee Report focuses on "the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer." *Id*. According to the Committee Report, "[w]hen the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they 'conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of … signs and gave statements and interviews to various media." *Id*. The Committee noted that "[s]uch activism … was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend." *Id*. The Committee concluded: "Though the actions of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation." *Id*. at 3-4.

The view of SLAPPs described in the Committee Report is thus exactly in line with the definition offered by this Court in *Drudge*—and completely different from the case Mrs. Sherrod has brought. Much like this case, the Court in *Drudge* reasoned that the suit "[bore] little resemblance" to a SLAPP action and concluded that it could not "characterize the suit as meritless … or conclude at this stage that plaintiffs have not been injured in their reputations or that 'winning is not [their] primary motivation', so far as it appears, they have brought this suit to 'vindicate a legally cognizable right.'" *Drudge*, 2001 WL 587860, at *4 (second alteration in original). Unlike a traditional SLAPP suit, there is no economic bullying here, and Mrs. Sherrod

is certainly not a "large private interest[] [aiming] to deter common citizens from exercising their political or legal right[s]." *Id*. at *3. To the contrary, Mrs. Sherrod is a lone individual who is meritoriously seeking legal recourse for damage to her personal reputation after Defendants published false and misleading statements of fact about her to a national audience. Nor does Mr. Breitbart show any signs of having his First Amendment rights "muzzled," as his persistent blog postings and national tour to garner publicity for his new book evidence. For all these reasons and the reasons stated in Plaintiff's concurrently filed opposition to Defendants' motion to dismiss, Plaintiff's claims are not appropriately deemed a SLAPP suit and are likely to succeed on the merits.

V. Plaintiff Is Entitled To Attorneys' Fees.

For all the reasons stated above, the D.C. Anti-SLAPP Act is ineffective for purposes of this case, is not retroactive, is inapplicable in federal court, and is rendered moot by reason of Defendants' untimely filing. But if the Court does find the statute applicable, the Plaintiff is entitled to attorneys' fees and costs for all of these reasons. Section 5(b) of the statute provides: "The court may award reasonable attorney fees and costs to the responding party only if the court finds that a motion brought under sections 3 or 4 is frivolous or is solely intended to cause unnecessary delay." D.C. Law 18-351 § 5(b). Given the numerous, significant, and obvious procedural and substantive barriers to success on this motion, Plaintiff can only assume that this motion was intended either to inject irrelevant accusations against Mrs. Sherrod into court filings, *see* Defs.' Anti-SLAPP Mem. at 4 & n.4,[10] or to further delay discovery in this case, *see*

[10] To add insult to injury, Defendants further smear Mrs. Sherrod by suggesting that she is suing to cover up the "millions of dollars in taxpayer money [] improperly being awarded to claimants, including Sherrod, in the controversial *Pigford* class action litigation." Defs.' Anti-SLAPP Mem. at 4. Defendants' claim is false. Although irrelevant to this case, the basic facts of New Communities' *Pigford* claim are these. On April 14, 1999, Judge Friedman of this Court approved a settlement agreement and consent decree providing for "a two-track dispute resolution mechanism" for black farmers' discrimination claims against the USDA: adjudication

id. at 1-2. Indeed, Plaintiff can imagine no other reason for Defendants' suggestion that the Court decline to promptly adjudicate this motion when such delay would be both contrary to the plain requirements of the statute and would result in an indefinite stay of discovery.

Moreover, should the Court (appropriately) hold that the D.C. Anti-SLAPP Act is inapplicable to this case, attorneys' fees are also proper under well-settled D.C. common law. *See Hundley v. Johnston*, No. 09-CV-1457, 2011 WL 1584772, at *2 (D.C. April 28, 2011) ("[A] party may recover attorneys' fees from an opposing party by demonstrating that the party acted in bad faith either by filing a frivolous action, or by litigating a properly filed action in a frivolous manner."); D.C. Super. Ct. Civ. R. 54(d).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants' Special Motion To Dismiss Under The District of Columbia Anti-SLAPP Act of 2010 be denied and reasonable attorneys' fees and costs be awarded.

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under Track A, for those with "'substantial evidence' … demonstrating race discrimination"; and arbitration under Track B, for "those who believe they can prove their cases with documentary or other evidence by a preponderance of the evidence—the traditional burden of proof in civil litigation." *See Pigford v. Glickman*, 185 F.R.D. 82, 95-96 (D.D.C. 1999). Years before Mrs. Sherrod joined the USDA, New Communities timely filed a claim and selected Track B, along with its more rigorous burden of proof. The USDA opposed the claim through arbitration in 2002, through court-appointed monitor review, and through further review by the court-appointed chief arbitrator—all in accordance with the appeal mechanism Judge Friedman painstakingly approved. *See generally id*.; Consent Decree, *Pigford v. Glickman*, No. 97-1978 (D.D.C. Apr. 14, 1999), *available at*, http://www.pigfordmonitor.org/orders/19990414consent.pdf. After years of litigation and review, the chief arbitrator concluded in July 2009 that the USDA ***had discriminated*** against New Communities and thus awarded damages to compensate for the lost income, thousands of acres of lost farmland (the bulk of the damages award), and other injuries New Communities had proven by a preponderance of the evidence.

The foregoing facts should not come as a surprise to Mr. Breitbart, who explained just last December: "Let me be clear, our investigation convincingly leads us to believe the USDA practiced discrimination against black farmers. Those wrongs must be rectified." *See* http://biggovernment.com/abreitbart/2010/12/06/me-mrs-sherrod-and-the-pigford-ii-black-farmers-settlement/. Mr. Breitbart should be glad to know that for New Communities, "those wrongs" were "rectified." But none of that has anything to do with this case. Although Defendants hope this Court will allow them to put *Pigford* on trial—falsely smearing Mrs. Sherrod in the process—the Court should reject their efforts at the outset. *Pigford* is irrelevant to this defamation case.

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Respectfully submitted,

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