Case No. 1:21-cv-6854

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

RICK BUTLER, an individual, CHERYL BUTLER, an individual, and GLV, INC., an Illinois Corporation,

Plaintiffs,

vs.

NANCY HOGSHEAD-MAKAR, an individual, CHAMPION WOMEN, a Florida Not-For-Profit Corporation, and DEBORAH DIMATTEO,

Defendants.

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND PURSUANT TO THE FLORIDA AND NEVADA ANTI-SLAPP STATUTES

Honorable Charles P. Kocoras

Respectfully submitted,

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The defendants, **NANCY HOGSHEAD-MAKAR**, **CHAMPION WOMEN** and **DEBRA DIMATTEO** ("**Defendants**") jointly submit the following Reply in support of their Motion to Dismiss for Failure to State a Claim and pursuant to the Florida and Nevada Anti-SLAPP Statutes:

INTRODUCTION

Notwithstanding Plaintiffs' lengthy 212-paragraph Amended Complaint and the sizeable exchange of briefs pending before this Court, the core issues of this dispute are straightforward: The Plaintiffs want Defendants to cease airing decades of Butler's dirty laundry, and the Defendants want "justice" for the well-documented and proven atrocities committed by Buter against his female athlete victims. No matter what label Plaintiffs assign their claims, they all center on whether the critical speech at issue is actionable as a matter of law or preempted by statute.

At the motion to dismiss stage, a complaint shall be construed in the light most favorable to the plaintiff; however, it is equally true that "litigants may plead themselves out of court by alleging facts that defeat recovery," and "[c]omplaints also may be dismissed when they show that the defendant did no wrong." *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (cited at Doc. #30, pp. 7-8 & 24)[1]. Contrary to Plaintiffs' belief, the Defendants here do not rewrite or debate the facts alleged; they simply shine a light on Plaintiffs' hope to disguise a time-barred, constitutionally-impermissible defamation lawsuit as a genuine action for business interference.

Plaintiffs fail to address, refute or even distinguish the long line of precedent that cautions against allowing litigants to arbitrarily chill speech through creative labeling of civil claims. Defendants highlight the many allegations that take issue with their supposed "false" and "defamatory" statements identified in every cause of action. Doc. #21, pp. 4-12. Defendants are being called to answer for:

(1) **spreading awareness and republishing** public records and news articles;
(2) **advocating** for Butler's victims and for the safety of athletes; and
(3) **petitioning** for disassociation with Butler based on his well-publicized history of deplorable conduct.

[1] Unless otherwise specified, pin cites refer to the page number printed on the bottom of document.

See Doc. #15, ¶¶ 16-18, 25, 48, 50-52, 56-57, 61, 68-69, 90, 121, 128 & 146. Where the validity of offensive speech is a condition of each claim's survival, the Court must have the opportunity to balance Plaintiffs' alleged injuries against Defendants' free speech rights *at the earliest possible opportunity*. *See* Doc. #21, pp. 13-14 (quoting federal case law discussing the importance of Rule 12 as a tool to weed out unmeritorious defamation claims).

Plaintiffs' disjointed effort to avoid dismissal of their claims falls short for a number of reasons. First, Plaintiffs dedicate much of their Response brief to arguing that the exhibits attached to Defendants' Rule 12(b)(6) motion should be stricken. However, Plaintiffs cannot simultaneously sue Defendants for offending publications quoted *verbatim* in their pleading while preventing Defendants from presenting the official sources from which they were derived for evaluation by this Court. Plaintiffs want this Court to ignore that the at-issue allegations against Butler have been *highly publicized* across various sources *for decades*. Consideration of Defendants' exhibits, in what is quite obviously a free speech case, is essential to the fair application of First Amendment defenses, the Fair Report Privilege and governing Anti-SLAPP laws.

Second, Plaintiffs cannot escape the applicable statute of limitations, heightened pleading standards and constitutional protections afforded to the Defendants' speech at the center of every cause of action asserted. Plaintiffs' repetitive, improper introduction of new facts throughout their brief is a telling sign of desperation. It does not require years of expensive, intrusive discovery to determine that the information disseminated involved matters of public concern about public figures. Importantly, any attempt to amend their pleading would be futile where Defendants' at-issue speech is protected *as a matter of law*.

Third, Plaintiffs haphazardly respond to Defendants' arguments under the Fair Report Privilege. They fail to account for the broad reach of this privilege, which cannot be overcome by boilerplate allegations of "malice" and "ill will." As Defendants' offending publications constitute a

"fair abridgment" of the public records, reports and proceedings upon which they were based, the Fair Report Privilege fully insulates the Defendants in this matter.

Fourth, Plaintiffs' improper motives for suing Defendants for a quarter of a billion dollars under meritless claims is unmistakable. Similar to their pleading, the Response brief reads like an effort to exonerate Butler. Plaintiffs cite Illinois' "age of consent" laws in place in the 1980s, discuss the results of Butler's psychiatric evaluation during a 1995 adoption proceeding, and attempt to minimize the seriousness (and extraordinary nature) of being banned by the National Governing Body of the sport of volleyball. *See, e.g.,* Doc. #30, pp. 3-5. Plaintiffs reiterate this narrative to paint Butler as the victim and to punish and silence Defendants who joined (and warn other critics against joining) the already-public discourse about Butler's transgressions. Plaintiffs' bullying tactics must end once and for all starting with the dismissal of this lawsuit brought against carefully selected scapegoats. To that end, Defendants should be awarded their attorneys' fees and costs under applicable Anti-SLAPP laws.

LEGAL ANALYSIS ON REPLY

I. THIS COURT SHOULD TAKE JUDICIAL NOTICE OF DEFENDANTS' EXTRINSIC MATERIALS

Plaintiffs provide no legal basis to strike the exhibits submitted with Defendants' Motion to Dismiss, declaring the "proffered documents [are] subject to reasonable dispute," absent any further explanation. Doc. #30, p. 21. In contrast, Defendants rely upon sound Seventh Circuit precedent -- which Plaintiffs fail to distinguish or discredit -- that permits a Court to take judicial notice of certain documents without converting a Rule 12(b)(6) motion to one for summary judgment. Doc. #21, pp. 5-6, n. 4. Most of the exhibits Defendants submit are referred to in the Amended Complaint and are central to Plaintiffs' claims; they should be subject to the "incorporation by reference" doctrine. *Id.* (citing supporting case law); Doc. #21-1. The balance of materials constitutes matters of public record or published news reports that are properly considered with judicial notice. *Id.*

It is within this Court's sound discretion to determine how extrinsic documents should be treated, and Defendants' opening brief lays the proper foundation for consideration of each of their submitted materials. *See Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009). Below, Defendants specifically address and discredit each objection raised by Plaintiffs:

A. Defendants' Exhibits Have A Justified Purpose.

Plaintiffs spin out of whole cloth arguments that Defendants improperly submit exhibits to prove the truth of their offending statements. This demonstrates a serious misunderstanding of the law or deliberate ignorance of Defendants' stated purpose. Defendants make clear, their "[e]xhibits are not submitted for the truth of the matter contained therein or to refute any allegation, but for the Court to properly take notice that these publications exist and say what they say." Doc. #21, pp. 5-6, n. 4. The extrinsic materials support findings that: (1) Plaintiffs constitute "public figures" who must prove actual malice before they can hold Defendants' liable for their critical speech *under any of Plaintiffs' alleged theories*, and (2) the Fair Report Privilege cloaks Defendants with immunity for such speech. Not once did the Movants impermissibly cite an exhibit hoping to dispute a fact Plaintiffs allege.

Rather, it seems Plaintiffs comingle the mechanism for application of the "fair abridgment" analysis under the Fair Report Privilege with the concept of substantial truth. *See* Doc. #30, pp. 14-15;[2] *but cf.* Doc. #21, pp. 25-27. The Fair Report Privilege is a comprehensive, stand-alone immunity defense that serves to protect offending publications *regardless* of whether the critical statements are true. Doc. #21, pp. 25-26 (citing *O'Donnell v. Field Enters., Inc.*, 145 Ill. App. 3d 1032, 1035-36 (1986); *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 587 (2006)). The truth of the offending statements

[2] Plaintiffs incorrectly contend that the exhibits are barred as hearsay or are otherwise introduced to prove the truth of the matter asserted. To "support" their position, Plaintiffs cite to Section II of Defendants' memorandum, where Defendants argue the exhibits establish the offending speech *is a fair abridgment* of official records and news reporting under the Fair Report Privilege. Plaintiffs' vague and sometimes contradictory positions leave Defendants with little option other than to reiterate their arguments and play ping pong to avoid waiving any opportunity to clarify Plaintiffs' attempts to confuse the material issues. *See, e.g.,* Doc. #30, p. 18 (asserting, without further explanation, "Defendants *do not* ask the Court to take judicial notice of any specific facts related to the documents, and instead use them to improperly support their substantive defenses to Plaintiffs' claims" (emphasis added)).

and the sources upon which Defendants rely is *immaterial* to this Court's analysis. Plaintiffs' arguments have no support in the law and must be disregarded.

B. Appendices A and B are Properly Considered by this Court.

Plaintiffs ask that Appendices A and B be stricken, relying on cases where litigants filed briefs with exhibits that exceeded the page limits set by the court. Doc. #30, pp. 15-16. On June 17, 2022, this Court granted Defendants leave to file a motion in excess of fifteen pages by June 28, 2022, and Defendants complied with said Order. Docs. #19-21. Their argument is therefore misplaced.

Appendix A was prepared for organizational purposes to provide a summary of Defendants' exhibits and a full citation to their sources. Doc. #21-1. No novel legal arguments are set forth in this document, and as such, there is no basis to strike this submission.

Appendix B was also offered to promote organization, as well as to aid this Court in its analysis under the Fair Report Privilege doctrine. Doc. #21-2.[3] Whether the privilege applies is *a question of law* determined by "comparing the gist or sting of the alleged defamation in the official report or proceedings with the gist or sting in the news account." *Huon v. Denton*, 841 F.3d 733, 740 (7th Cir. 2016) (quoting *Harrison v. Chi. Sun-Times, Inc.*, 793 N.E.2d 760, 773 (2003)); *Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087 (N.D. Ill. 2016) (where Judge Tharp engaged in a lengthy comparison analysis of alleged defamatory statements and source materials under the Fair Report Privilege); *see also* Doc. #21, pp. 25-27. Appendix B merely extracts, in chart format, the at-issue statements from the Amended Complaint and compares each with the source materials relied upon by Defendants in making such statements. Doc. #21-2.

This Court is likely to engage in the same analysis whether or not it considers Appendices A and B for efficiency purposes. These materials were prepared solely to promote organization and

[3] Upon further examination, defense counsel has noted a scrivener's error in Appendix B. The citations to subparagraphs **51**(a) through (h) should be to subparagraphs **57**(a) through (h). It does not appear that this error caused any confusion or prejudice to Plaintiffs in responding to Defendants' present motion.

judicial economy, *not* for an improper purpose such as to evade some strict page-limit order. Defendants' Appendices can and should be considered in support of their pending motion.

C. Group Exhibit C Coincides with the "Incorporation By Reference" Doctrine.

Plaintiffs try to withstand dismissal by fabricating a narrative to misconstrue what Defendants' statements actually say. In that vein, Plaintiffs object to **Group Exhibit C** and its fourteen attachments (**C-1** through **C-14**). Doc. #30, pp. 16-17. Given the detail of their pleading, *which includes direct quotations* of the alleged false and defamatory statements published in Defendants' supposed "letter writing campaign," Plaintiffs clearly enjoy access to these communications and cannot feign undue surprise upon receiving Group Exhibit C. *See, e.g.,* Doc. #15, ¶¶ 57(a)-(h), 61(a)-(d), 66. It is suspicious (at best) and duplicitous (at worst) for Plaintiffs to assert five distinct causes of action -- *each based exclusively on Defendants' speech* -- then declare it unfair for this Court to consider the very language at issue within its full and proper context. *See Doctor's Data, Inc.*, 170 F. Supp. 3d at 1108 (confirming the general principal that "context is an important consideration in evaluating an allegedly defamatory statement").

1. Defendants' Unrefuted Precedent Supports Consideration of Group Exhibit C.

Longstanding First Amendment jurisprudence compels an evaluation of the offending publication at the onset of any claim. *See* Doc. #21, pp. 13-14. The Seventh Circuit has revisited the "incorporation by reference" doctrine in factually similar cases, many of which are cited in Defendants' opening brief (to which Plaintiffs declined to respond). *Id.* at pp. 5-6, n. 4.

Tierney v. Vahle, 304 F.3d 734 (7th Cir. 2002), is a particularly instructive case; it encompasses similar subject matter, did *not* involve specific claims of defamation, but was still evaluated by the Court as a free speech case. *Id.* at p. 15. The plaintiff-family filed Section 1983 claims against multiple individuals and institutions for retaliation and conspiracy to retaliate in connection with the plaintiffs' exercise of free speech. *Tierney*, 304 F.3d at 736. The Tierneys complained to the school district about the high school swim coach's alleged sexually improper conduct with his swim team. *Id.* Another

parent (who happened to be a juvenile court judge) supported the coach in a letter to the school, which could have been interpreted as "defamatory in accusing Tierney of paranoid misrepresentations[.]" *Id.* at 740. The Seventh Circuit affirmed dismissal of all claims against the defendant-parent/judge, specifically noting the significant free speech rights held by *both* the plaintiffs and defendant:

> The premise of the Tierneys' suit is that **a complaint about sexual improprieties committed by a public school coach is a matter of sufficient public interest to be protected by the First Amendment**, and **if that is correct**, **which it is**, * * * **the contesting of that complaint must also be protected by the First Amendment**—at least prima facie, for of course the First Amendment has not been interpreted to abolish defamation law in its entirety. **But while conceivably defamatory, Judge Vahle's letter was probably either privileged as a communication made to enable the recipient to act in the public interest**, * * * **or as constitutionally protected speech**. **Mr. Tierney**—who appears to have been conducting a vendetta with the school administration—**was probably what the cases call a "limited-purpose public figure,"** one who is as it were fair game but only in respect to the particular controversy in which the person has "gone public" with his ideas or opinions, * * * **so that to be allowed by the First Amendment to obtain relief in a suit against Judge Vahle for defamation he would have had to prove that Vahle knew or was reckless in failing to discover that the criticisms of Tierney in his letter were untrue**.
>
> **And if for either reason (common law or constitutional privilege) that we have suggested the letter was privileged, the privilege must also defeat a defamation claim dressed up in the language of conspiracy**. **To evade the constitutional limitations on defamation suits by charging the alleged defamer with participation in a conspiracy, which is to say just by relabeling the tort, cannot be permitted**. Cf. *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988);[4] * * *. **It is too easy a method of circumvention**.
>
> The relabeling is particularly thin when the substantive tort is being relabeled as a conspiracy to commit it. A newspaper article is not the product of a conspiracy between the journalist who wrote it and the publisher of the newspaper, so that both might be liable for the consequences of the article if it was defamatory even though if each were sued just for defamation rather than for conspiracy to defame both have a good defense under the First Amendment. That would be a nonsensical result.
>
> So while there is no reason to believe that the school district's lawyer asked Vahle to write the high school athletic director, if he did and if by doing so he were deemed to have roped Vahle into a conspiracy, **the deterrent effect on freedom of speech could be considerable**. What is more natural than for someone who believes that a

[4] Cited at Doc. #21, p. 15 (and *not* distinguished by Plaintiffs).

> friend has been wrongly (indeed wrongfully) accused of misconduct to speak out in his defense, which will often involve attacking the friend's critics?[5]

Id. at 742-43 (emphasis added, internal citations omitted).

The offending letter in *Tierney* was attached to the complaint. However, Judge Posner made it a point to explain why, given the circumstances of that case, *it would have been appropriate for the trial court to consider the concerning speech if submitted as an exhibit to a motion to dismiss without converting the motion to one for summary judgment*. *Id.* at 738 (finding, "**were it not for the exception, the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit**") (emphasis added)). The Court added, "perhaps [the incorporation by reference doctrine] is or should be limited to cases in which the suit is on a contract **or the plaintiff, if he has not attached, *has at least quoted from*, the document later submitted by the defendant**." *Id.* at 739 (emphasis added).

Using the *Tierney* case as a guide, the instant action justifies the trial court's consideration of materials outside the pleading on a Rule 12(b)(6) motion. *Id.* Plaintiffs cannot deny that their pleading *directly quotes* from the documents Defendants submit as Group Exhibit C. Yet they argue Group Exhibit C should be ignored because Defendants supposedly sent hundreds of undefined letters to multiple recipients that were not *verbatim*. Doc. #30, p. 16. The Amended Complaint provides ample support to conclude Group Exhibit C is a representative sample of the "letter writing campaign" repeatedly referenced and central to Plaintiffs' claims.

Notwithstanding the number or diversity of recipients, the *gist* of Defendants' "false and defamatory" speech and intended 'petitioning activities' were the same: schools, organizations and sponsors should "remov[e]" and "prohibit Rick Butler from coaching," or otherwise "boycott" Butler

[5] By the same token, what is more natural than for someone like Hogshead-Makar, who has dedicated her life to advocating for equality and safety in women's sports, and who believes (based on numerous victim reports, public records, governing body findings, etc.) that Butler has used his power to sexually abuse and exploit minor players, to speak out in defense of past and potential future victims, which would reasonably involve attacking the perpetrator (Butler)?

given his history of sexual abuse of minor girl volleyball players as supported by the "backup materials" and "original source materials" Hogshead-Makar provided. Doc. #15, ¶¶ 51(a)-(m), 56, 58-61. Plaintiffs broadly claim:

> [t]he Defendants used the threat of negative publicity, legal repercussions, and "cancel culture" to force organizations to cut ties with the Plaintiffs. **They sent letters** that threatened legal and financial repercussions **to clubs that attend GLV events**, **to GLV's corporate sponsors**, **and to the facilities where GLV holds summer programs**.

Id. at ¶ 60 (emphasis added). The next paragraph *specifies the substance of* ***the letters*** *sent to these recipients.* *Id.* at ¶ 61. When compared against Group Exhibit C, application of the incorporation by reference doctrine is required:

Amended Complaint (Doc. #15)	**Group Exhibit C (Doc. #21-5)**
¶ 61: **The letters** threatened clubs with violations of "safe-sport principles" and urged them to disassociate with Rick Butler, "including his teams, his facilities, or his personnel." In the **email text**,[6] the **attached letter**,[7] and the **numerous articles attached thereto**,[8] Champion Women knowingly and maliciously disseminated false and defamatory statements such as:	**Group Ex. C, at C-1, p.1** (Doc. #21-5, ECF p. 6): We are writing to you to urge you to use your positions as the people who can effect change at the YMCA to cut ties with Rick Butler. We would hope that, on safe-sport principles, YMCA would not associate with his teams, his facilities, and his personnel.
¶ 61(a): That on "January 10, 2018, USA Volleyball found that Rick Butler sexually abused four minor girls, and physically and verbally abused a fifth."	**Group Ex. C, at C-1, p.1** (Doc. #21-5, ECF p. 6): In January 10, 2018, USA Volleyball found that Rick Butler sexually abused four minor girls, and physically and verbally abused a fifth.
¶ 61(b): That "Rick Butler has now been banned for life from USA Volleyball for the second time, explicitly for the sexual abuse of minor girls he coached."	**Group Ex. C, at p.1** (Doc. #21-5, ECF p. 2): Rick Butler has now been banned for life from USA Volleyball for the second time, explicitly for the sexual abuse of minor girls he coached.

[6] *See* **Group Ex. C** ("the email") (Doc. #21-5, ECF pp. 2-4).
[7] *See* **Group Ex. C** at **C-1** ("the attached letter") (Doc. #21-5, ECF pp. 5-8).
[8] *See* **Group Ex. C** at **C-2 through C-14** (the "numerous articles" and "source materials" attached thereto) (Doc. #21-5, ECF pp. 9-14; Doc. #21-6; Doc. #21-7; Doc. #21-8).

¶ 61(c):	**Group Ex. C, at p.2, ¶ 1** (Doc. #21-5, ECF p. 3):
That "USA Volleyball has twice imposed a lifetime ban from coaching volleyball for sexually abusing his minor athletes."	USA Volleyball has twice imposed a lifetime ban from coaching volleyball for sexually abusing his minor athletes.

Plaintiffs also now suggest Group Exhibit C is distinct from the letters sent to schools, and in support they cite to Amended Complaint Paragraph 121. Doc. #30, p. 17. However, Plaintiffs' position is contradicted by their own allegation:

> [t]he Defendants' campaign also targeted the facilities where GLV hosts camps, clinics, and other events urging those organizations to immediately disassociate with Rick Butler and his business. **The letters included <u>the same information that was sent to Chicago-area clubs</u> by Champion Women.**

Doc. #15, ¶ 121 (emphasis added).

Finally, Plaintiffs argue against the use of extrinsic materials, claiming "this case centers on the Defendants' targeting of and interference with GLV's business relationships," *not* defamation. Doc. #30, p. 8. Plaintiffs continually refer to their allegation that, "[d]efendant Champion Women proudly announced that the organization 'convinced Mizuno and Molten, the volleyball sports manufacturers, to discontinue sponsoring Rick Butler's Sports Performance Volleyball Programs.'" *Id.* at p. 15 (citing "Dkt. 15, ¶ 66"). Once again, the quoted language is taken, *verbatim*, from the submitted sample of the "letter writing campaign." See **Group Ex. C**, at **C-1**, p.2 (Doc. #21-5, ECF p. 7) ("We have convinced Mizuno and Molten, the volleyball sports manufacturers, to discontinue sponsoring Rick Butler's Sports Performance Volleyball Programs"). Thus, even if this Court finds this to be a true business interference case, the interference is founded on the very speech reflected in Group Exhibit C, which may properly be considered under the incorporation by reference doctrine.

2. <u>Plaintiffs' Sparse Authority Does Not Alter The Analysis</u>.

Plaintiffs rely on case law that actually subsidize Defendants' position. *See, e.g.,* Doc. #30, p. 16 (offering a parenthetical to *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012), that is in no way reflective of the Seventh Circuit's decision). First, in *Brownmark Films, LLC*, the

Seventh Circuit *affirmed dismissal* of "a copyright infringement action based on the fair use affirmative defense while avoiding the burdens of discovery and trial." 682 F.3d at 689-90. The court **found the lower court *properly considered* the expressive works referenced in, but not attached to, the amended complaint that were submitted as exhibits to defendant's Rule 12(b)(6) motion**. *Id.* at 690. The Court explained,

> [i]n effect, the incorporation-by-reference doctrine provides that if a plaintiff mentions a document in his complaint, the defendant may then submit the document to the court without converting defendant's 12(b)(6) motion to a motion for summary judgment. The doctrine prevents a plaintiff from "evad[ing] dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that prove[s] his claim has no merit."

Id. (quoting *Tierney,* 304 F.3d at 738).

Plaintiffs next cite to *Facebook, Inc. v. Teachbook.com LLC*, which confirms, "[i]n addition to the allegations in the complaint, **courts are free to examine 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice' in evaluating a motion to dismiss under Rule 12(b)(6)**." 819 F. Supp. 2d 764, 770 (N.D. Ill. 2011) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007); *Thompson v. Illinois Dep't of Professional Regulation,* 300 F.3d 750, 753 (7th Cir. 2002); *Henson v. CSC Credit Servs.,* 29 F.3d 280, 284 (7th Cir. 1994)) (emphasis added). *Facebook, Inc.* involved the social media company's trademark infringement action against "Teachbook.com," which ran a similar social platform targeting teachers. *Id.* at 769. The defendant submitted various portions of the plaintiff's website, including for example, printouts of Facebook groups named "Catbook," "Faithbook" and "Lamebook" to support its argument that the suffix-"BOOK" was generic or descriptive and non-actionable. *Id.* at 773 & 778. The Court refused to consider the defendant's cherry-picked website pages which, though originating from "Facebook.com," *were not central to the claims the plaintiff was actually raising in its pleading. Id.*; *see id.* at 778-79 (explaining "Facebook is not using the suffix-BOOK to designate the product itself," and is asking

the Court to consider the FACEBOOK mark as a whole, making consideration of the group pages inappropriate on a Rule 12(b)(6) motion).

The facts of *Facebook, Inc.* are inapposite to those here. As detailed *supra* at Section I.B.1., Defendants have not "cherry-picked" documents tangentially related to the claims. Rather, as the defendants in *Brownmark Films, LLC*, Hogshead-Makar and Champion Women ask this Court to consider the *very publication repeatedly referred to* and *directly quoted* in Plaintiffs' Amended Complaint. 682 F.3d at 690; *see also Tierney*, 304 F.3d at 739. Plaintiffs fail to demonstrate how Defendants have abused their discretion under Rule 12(b)(6) motion. *Hecker*, 556 F.3d at 583.

D. Plaintiffs Cannot Establish a Basis to Strike Exhibits A, B, D, E, F or G.

Plaintiffs do not specifically challenge Defendants' submission of Exhibits A, B, D, E, F and G, and have thus waived any argument to this end. *Brownmark Films, LLC,* 682 F.3d at 692 (finding a party's failure to oppose an argument raised in a Rule 12(b)(6) motion constitutes a waiver by that party to later argue the issue). They do, however, interject with a blanket statement that Defendants' exhibits are "inaccurate," "contradicted by the allegations in the Amended Complaint" and "inadmissible based on inadequate authentications[.]" Doc. #30, p. 14. The Northern District has repeatedly held that plaintiffs "must give the Court 'good reason to question [its] authenticity'" when arguing an exhibit to a Rule 12(b)(6) motion should be disregarded. *Brown v. Montgomery*, No. 20-CV-04893, 2022 WL 767254, at *4 (N.D. Ill. Mar. 14, 2022) (rejecting plaintiff's argument of "inauthenticity" where plaintiff simply argued defendant did not submit an affidavit authenticating the exhibit to its motion to dismiss) (citation omitted); *Sa'Buttar Health & Med., P.C. v. Tap Pharms., Inc.*, No. 03 C 4074, 2004 WL 1510023, at *3 (N.D. Ill. July 2, 2004) (considering a signed and dated contract attached by the defendant as an exhibit even though unauthenticated because the plaintiff did not suggest that the document was inauthentic); *see also ABN AMRO, Inc. v. Cap. Int'l Ltd.*, No. 04 C 3123, 2007 WL 845046, at *11 (N.D. Ill. Mar. 16, 2007) ("[A]lthough Plaintiff argues that the

agreements are unauthenticated, Plaintiff does not assert that they are inauthentic"). Plaintiffs fail to expound on their arguments or even differentiate the exhibits they refer to; without more, this argument must be summarily disregarded.

Defendants' exhibits support their arguments that Plaintiffs constitute public figures for purposes of a First Amendment analysis, and also application of the Fair Report Privilege. *See* Doc. #21, pp. 7-8, 11-12, 17-21 & 25-27. Failing to account for these materials would unduly prejudice Defendants, who are being wrongfully held accountable for their protected speech through creative but artificial pleading of alternative torts.

To draw a finer point, Defendants submitted (at **Exhibit E)** the Local Rule 56.1(a)(3) Statement of Undisputed Material Facts that counsel of record (Attorney D'Ambrose) filed on behalf of our Plaintiffs in *Mullen v. GLV, Inc.*, Case No. 18-cv-1465 (N.D. Ill. May 28, 2019) (Doc. #144-1). Plaintiffs' Statement details and attaches copies of the *decades* of public coverage of the allegations of sexual abuse lodged against Butler through official news reporting, blog posts, and even communications directly from Plaintiffs to their community. Doc. #21-10, pp. 7-17. For example, Plaintiffs cite and attach an article from February 1996, reporting "Rick Butler . . . was expelled in July from USA Volleyball for allegedly having sex with three [of his] underage athletes." *Id.* at p. 8, ¶ 33. In the present case, Plaintiffs attempt to hold Defendants liable for republishing *the same exact allegation*. Doc. #15, ¶¶ 61(c), 63, 78; Doc. #30, pp. 23, 27-28. And, although Plaintiffs republished articles with such allegations in a public court filing, they now unjustifiably argue: (1) Defendants should be precluded from relying on such news articles, (2) the Fair Report Privilege is inapplicable, and (3) Plaintiffs require discovery on Defendants' motion. What Plaintiffs are really seeking to accomplish through this lawsuit is an abuse of process at the most basic level; using the judicial system to harass Defendants. This Court can and should consider the materials properly submitted with Defendants' motion.

E. Plaintiffs' Demand to Engage in Discovery Should Be Denied.

Plaintiffs' insistence on discovery is truly an attempt to bully the Defendants financially knowing free speech cases are often resolved at the pleading stage. To wit, it is well-settled that a court may consider documents attached to a motion to dismiss without converting the motion to one for summary judgment. *Edwards v. Johnson*, 198 F. Supp. 3d 874, 877-78 (N.D. Ill. 2016) (*citing Brownmark Films, LLC*, 682 F.3d at 690). However, even if this Court converts Defendants' motion, it should deny Plaintiffs' baseless request for discovery. Similar to the concerns at-issue in *Brownmark Films, LLC*, "[t]he expense of discovery . . . looms over this suit." 682 F.3d at 691 (adding, "[r]uinous discovery heightens the incentive to settle rather than defend [ ] frivolous suits"). Importantly, "**[d]istrict courts need not, and indeed ought not, allow discovery when it is clear that the case turns on facts already in evidence**." *Id.* (emphasis added); *Edwards*, 198 F. Supp. 3d at 878 ("a district court may resolve the defense under Rule 12(b)(6) where (as here) it has before it everything 'needed in order to be able to rule on the defense'" (citations omitted)).

Plaintiffs do not demonstrate they face prejudice in defending against the pending dispositive motion absent leave to conduct discovery. In fact, their request for leave reads like a proverbial fishing expedition; they hope to uncover information on the participation of "additional unknown individuals who participated in the scheme" so they may "learn the full reach and extent of the conspiracy." Doc. #30, p. 19. Yet, Plaintiffs must first state a viable claim for some underlying tort before a conspiracy to commit that tort can be established. *Doctor's Data, Inc.* 170 F. Supp. 3d at 1159.

Plaintiffs' clear intent here is to drag Defendants through the extensive discovery of countless "phone calls, emails, and other communications." Doc. #30, p. 19; *see* Doc. #21, pp. 13-14 (quoting cases affirming the importance of early resolution of unmeritorious cases to avoid the costs of litigation and preserve First Amendment freedoms). This request must be denied.

II. THE PLEADING SPEAKS FOR ITSELF; THIS CASE CENTERS ON WHETHER CRITICAL SPEECH IS ACTIONABLE IN THE FACE OF CONSTITUTIONAL SAFEGUARDS.

Regardless of how the claims are labeled, each and every cause is predicated upon whether speech critical of Butler is actionable as a matter of law. *See* Doc. #21, p. 15 (citing various sources, *which Plaintiffs make no attempt to refute*, where courts expressly rejected litigants' attempt to evade First Amendment protections through creative pleading of claims).[9] When a claimant's challenge of speech is at the heart of the dispute, the law requires the Court to strike a balance by weighing the rights implicated. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52-57 (1988) (cited at Doc. #21, p. 15, for the proposition that a public figure cannot recover for a tort based on speech absent proof of "actual malice" under the *New York Times* standard). As the Supreme Court explained,

> even though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," * * * and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.'"

Id. at 52 (citations omitted).

Plaintiffs tried to control the narrative by filing an expansive pleading aimed at punishing Defendants for voicing their concerns and related petitioning activity. Alleging causes of action other than libel does not obviate the need to analyze the present claims under First Amendment protections. Plaintiffs go to great lengths to pluck select passages from their 52-page pleading that allege "wrongful conduct" by Defendants *other than* "false and misleading statements made about the Plaintiffs[.]" Doc. #30, pp. 21-22 (citing "Dkt. 15, ¶¶ 25-26, 57, 121").[10] Though these accusations cannot be considered

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[9] *See also, HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill. 2d 145, 154-55 (1989) (concluding a claim of tortious interference could not be maintained based on the defendants' publication of disagreement with the plaintiff's statements and threats to stop donating money to the school and encourage other alumnus to follow suit because defendants' speech was protected); *Nat'l Org. for Women, Inc. v. Scheidler*, No. 86 C 7888, 1997 WL 610782, at *31 (N.D. Ill. Sept. 23, 1997) (holding application of tortious interference claim would violate the First Amendment in case where defendant published offending statements, organized a letter writing campaign and threatened boycotts against a landlord unless it cancelled its lease contract with an abortion clinic).

[10] *But cf.,* Doc. #15, at:

in a vacuum, especially where Plaintiffs exert little effort to mask their untimely defamation claims and persuade the Court that this is not a case about speech at all. Quite the contrary, actually: Defendants are being called to answer for: (1) **spreading awareness and republishing** public records and news articles easily found on a simple Google search; (2) **advocating** for Butler's victims and for the safety of athletes from abusive coaches; and (3) **petitioning** schools, sponsors and affiliates to disassociate with Butler based on his well-publicized history of deplorable conduct. *See* Doc. #15, ¶¶ 16-18, 25, 48, 50-52, 56-57, 61, 68-69, 90, 121, 128 & 146.

Each and every cause of action stems from Defendants' *publication* of critical information to dissuade from associating with Butler as a result of his checkered past (i.e., sexually abusing his minor female volleyball players). Plaintiffs cannot circumvent their obligation to first overcome the constitutional defenses, heightened pleading standard and other statutory or common law protections afforded to a speaker and as outlined in the opening brief. Plaintiffs' response chooses to ignore this argument rather than competently refute it.

A. <u>Plaintiffs Waive Their Right to Dispute their Claims are Time-Barred</u>.

Plaintiffs' only response to the Defendants' statute of limitations argument is that they have pled actions based on tortious interference and deceptive trade practices. Doc. #30, p. 22 (citing "Dkt. 15, ¶¶ 25-26, 57, 121"); *but see supra* at n. 10. Figurative pleading and mislabeled claims are not an end-around the 1-year limitations period for defamation actions, which would render the 2017 and 2018 publications expired. Plaintiffs' lack of any substantive response speaks volumes and should be

¶ 25 (alleging, Hogshead-Makar and Champion Women "sen[t] hundreds of threatening **letters** to GLV's business associates **demanding organizations immediately disassociate with Rick Butler**"),

¶ 26 (alleging, "**Defendants urged**, and even threatened, college coaches, athletic departments, and other top-level university officials **to boycott** the recruitment of players from **[Butler]'s program**"),

¶ 57 (alleging, "[i]n emails, letters, and social media posts **related to the letter writing campaign**, the Defendants threatened GLV's business associates with the following **false, defamatory and/or misleading statements** . . .") &

¶ 121 (alleging, "[t[he Defendants' campaign also targeted the facilities where GLV hosts camps, clinics, and other events **urging those organizations to immediately disassociate with Rick Butler** and his business. The **letters included the same information** that was sent to 'Chicago-area clubs' by Champion Women" – *i.e.,* "**the letter writing campaign**") (emphasis added).

considered a waiver. *Brownmark Films, LLC,* 682 F.3d at 692. A dismissal with prejudice should be entered for the reasons articulated in the opening brief. Doc. #21, pp. 16-17 (Legal Argument § I.A.).

B. Plaintiffs Cannot Meet their Burden of Proving Defendants Acted with "Actual Malice."

Plaintiffs do not dispute the following material legal standards:

(1) A "public figure" must establish "actual malice" under the *New York Times* standard to be held liable *for any tort claim* based on their offending speech;[11]
(2) "Actual malice" requires a heightened pleading standard of *specific facts* showing the defendant knew the offending statement was false or acted with reckless disregard for whether it was false;[12] and
(3) Whether an individual is a "public figure" is a question of law for the Court.[13]

Where the parties diverge is (1) whether Plaintiffs constitute public figures and (2) whether the Amended Complaint sets forth facts sufficient to support a finding that Defendants acted with actual malice. Plaintiffs make no effort to refute the authority cited by Defendants in their opening brief.

1. Plaintiffs constitute "public figures" as a matter of law.

The analysis of whether a plaintiff becomes a public figure turns "upon whether the plaintiff, through his voluntary conduct, has assumed a role of 'especial prominence in the affairs of society' so as to 'invite attention and comment' upon his actions." *Jacobson v. CBS Broad., Inc.*, 2014 IL App (1st)

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[11] *See* Doc. #21, p. 17 (citing *Hustler Magazine, Inc.*, 285 U.S. at 56-57; *Imperial Apparel, Ltd.*, 227 Ill. 2d at 394; *Zelaya v. UNICCO Serv. Co.*, 587 F. Supp. 2d 277, 287 (D.C. Cir. 2008)); *see also*, *id.* at 15 (citing *Tierney*, 304 F.3d at 743; *Food Lion, Inc. v. Capital Cities ABC, Inc.,* 194 F.3d 505, 522-23 (4th Cir. 1999)). **Plaintiffs do not dispute or distinguish any of these cases on the basis for which they are cited and have therefore waived any argument to that end**. *Brownmark Films, LLC,* 682 F.3d at 692.

[12] *See* Doc. #21, pp. 19-21 (citing *Madison v. Frazier*, 539 F.3d 646, 657 (7th Cir. 2008); *Hustler Magazine, Inc.,* 485 U.S. at 56; *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *New York Times*, 376 U.S. at 270; *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 706 (N.D. Ill. 1990); *American Pet Motels, Inc. v. Chicago Veterinary Medical Association,* 106 Ill. App. 3d 626, 632 (1st Dist. 1982); *Catalano v. Pechous*, 83 Ill. 2d 146, 170 (1980); *Rosenbloom v. Metromedia, Inc.* 403 U.S. 29, 55 (1971); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Brennan v. Kadner*, 351 Ill. App. 3d 963, 971 (1st Dist. 2004); *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016); *Audition Div., Ltd. v. Better Bus. Bureau of Metro. Chi., Inc.*, 458 N.E.2d 115, 120 (1983); *George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.*, 719 F.2d 1326, 1333 (7th Cir. 1983); *Lee v. Radulovic*, No. 94 C 930, 1994 WL 384010, at *7 (N.D. Ill. July 20, 1994). **Plaintiffs do not dispute or distinguish any of these cases on the basis for which they are cited and have therefore waived any argument to that end**. *Brownmark Films, LLC,* 682 F.3d at 692.

[13] *See* Doc. #21, p. 18 (citing *Dilworth v. Sudley*, 75 F.3d 307, 309 (7th Cir. 1996)); *see also id.* (citing *Jacobson*, 2014 IL App (1st) at ¶ 28). **Plaintiffs do not dispute or distinguish any of these cases on the basis for which they are cited and have therefore waived any argument to that end**. *Brownmark Films, LLC,* 682 F.3d at 692.

at ¶ 26 (1st Dist. 2014) (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974); and *Kessler v. Zekman,* 250 Ill. App. 3d 172, 180 (1993)). As explained,

> [t]he imposition of this heightened burden is justified, the [Supreme] Court reasoned, because public individuals not only have placed themselves in a position inviting commentary and scrutiny, but also have significantly greater access to channels of effective communication, thus providing a more realistic opportunity to counteract false statements and rectify any damage to their reputation.

Id. (citing *Gertz,* 418 U.S. at 344).

Plaintiffs initially argue, "Rick's involvement in lawsuits cannot serve as the sole factual contention that 'thrust himself into public controversy.'" Doc. #30, p. 22. Setting this aside, Defendants tendered *multiple* bases to support a finding that Butler is a public figure in connection with the offending speech at the center of this case. Doc. #21, p. 18. Given the clear admissions in their own pleading, Plaintiffs cannot (in good faith) dispute that Butler has risen to such a level of notoriety (or infamy) within the competitive volleyball world that he constitutes a public figure for purposes of the very public controversy tied to his engagement in the sport. *Id.*; *see also* Doc. #15, ¶¶ 2-4, 8, 10-11, 77, 90-91. Nor can Plaintiffs claim Butler has been a passive observer throughout the *decades* of news reporting on his sexual relationships with his minor volleyball players. Aside from filing lawsuits against the USAV and his accusers, Butler has willingly provided public comment and engaged in media interviews -- even inviting at least one reporter into his home to openly discuss the controversy less than 24 hours after his USAV suspension. *See* Doc. #21, p. 18 (citing **Group Ex. C**, at **C-11**, pp. 78-79 (Doc. #21-8, ECF pp. 16-17)); *see also* Doc. #21-10, ¶¶ 66-70 (where Plaintiffs detail their public communications over the years "regarding the allegations of misconduct in the 1980s"). Butler has voluntarily thrust himself into the spotlight and any debate over what constitutes appropriate coaching practices and conduct involving female athletes. Butler has certainly invited comment on his actions, and he and his fellow Plaintiffs have exploited various communication channels to rebuke (if not vilify) their critics. Butler is undeniably a "public figure" who must establish

the Defendants each acted with "actual malice" before he can withstand a dismissal at the pleadings stage. *Jacobson*, 2014 IL App (1st) at ¶ 26; *Imperial Apparel, Ltd.*, 227 Ill. 2d at 394.

Plaintiffs also do not refute that they are inextricably intertwined for purposes of this analysis. Regarding GLV, Inc., Plaintiffs cannot contend Defendants' "false and defamatory" statements about Butler's personal indiscretions directly affected GLV's business, and simultaneously deny Butler is the figurehead of their organization. *See* Doc. #21, pp. 18-19. As for Cheryl, Defendants refer the Court to a 115-page "Statement by Cheryl Butler" originally published online in February 2018, which Plaintiffs filed with their Answer and Affirmative Defenses in *Mullen v. GLV, Inc.*, Case No. 1:18-cv-1465 (N.D. Ill. July 23, 2018) (Doc. #76-1). *Id.* at pp. 11 & 19 (citing **Ex. F** (Doc. #21-11)). Plaintiffs conclude, *absent any logical basis*, that Defendants' exhibit was "improperly submitted to this Court," and its "evidentiary value . . . is subject to reasonable dispute." Doc. #30, p. 21. Ironically, the Plaintiffs poach this language from *Facebook, Inc.,* where the Court refused to take judicial notice of Facebook's filings with European trademark authority. 819 F. Supp. at 772. The Court acknowledged, generally, that the contents of court records are subject to judicially noticeable facts on a Rule 12(b)(6) motion, but rejected the defendant's argument that Facebook's filings in a "very different factual and legal context" constituted judicial admissions sufficient to dismiss the present claims. *Id.* at 771-72.

Conversely, Defendants offer **Exhibit F** not for the truth of the matter asserted, but solely so this Court may consider the existence of a document filed in the public record *by Plaintiffs*. *See Indep. Trust Corp. v. Steward Info. Servs. Corp.*, 665 F.3d 930, 942-43 (7th Cir. 2012). Plaintiffs do not dispute the authenticity of Exhibit F, nor do they argue that its subject matter is irrelevant to their present claims. Accordingly, this Court may properly take judicial notice of this public record, which supports the notion that Cheryl has voluntarily injected herself into the public controversy surrounding her husband's at-issue behavior. In fact, her public statement begins:

> **Note**: For the past almost 25 years Rick and I have tried be professional regarding the issues I am about to discuss in this statement. Our goal was to move on from 1994 and the allegations from the 1980's, to provide the absolute best service we could to our customers and our employees. I have been involved with the Sports Performance program for over 30 years, Rick and I have been together for the past 27 years. I never wanted to go public with the things that I have written in this statement, but the ongoing smear campaign in the press and on social media has made "taking the high road" virtually impossible.
>
> I am writing this statement to address the ongoing smear campaign against my husband Rick Butler that is taking place on social media and in the press. The number of lies and false statements I have seen printed over the past couple years has brought me to this point. This statement will address allegations that date back to the early and mid 1980's as well as the recent ruling by USA Volleyball to ban Rick for life. The most serious allegations were made in 1994 against Rick by his former partner who he asked to leave the organization in 1989, Kay Rogness and three former players Sarah Powers, Christine Brigman and Julie Bremner. Powers, Brigman and Bremner have alleged that they were victims of sexual abuse when they played for teams coached by Rick in the early and mid-1980's and have remained traumatized for the past three decades. Kay Rogness, also claimed that she was aware of the abuse. Everything included in this statement has been seen or read with my own eyes, heard with my own ears or was addressed in the six total polygraph tests that Rick and I have voluntarily taken.

Doc. #21-11, ECF p. 3.

Wherein each Plaintiff named in the lawsuit is a "public figure," they must establish that the Defendants published the offending statements *with "actual malice"* to avoid dismissal. They have not and cannot meet their burden.

2. Plaintiffs are unable to allege facts to satisfy the heighted actual malice standard.

Plaintiffs ignore the multitude of cases Defendants cite to explain that boilerplate allegations of "malice," "ill will" or "knowledge of falsity" are *insufficient* to survive dismissal under the *Iqbal/Twombly* pleading standard. Doc. #21, pp. 19-21. Similarly, Plaintiffs' reiteration of their formulaic allegations also does not pass muster. Doc. #30, pp. 22-23 (citing Doc. #15, ¶ 160 (alleging Defendants' misconduct was "willful" and done "with specific intent to harm"), ¶ 168 (alleging Defendants interfered with contracts with "malicious intent to cause harm"), ¶¶ 61-62 (alleging Defendants "knowingly and maliciously disseminated false and defamatory statements")). Nor can

Plaintiffs defend their action by asserting *new facts* for the first time in their Response brief. Doc. #21, p. 23 (Plaintiffs offer no citation to the last sentence on page 23 of their brief, which includes facts absent from their pleading); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 348 (7th Cir. 2012) ("the complaint may not be amended by the briefs in opposition to a motion to dismiss"). However, any attempt to amend the complaint would be futile, because Plaintiffs' new allegation does not "permit the conclusion that [Defendants] published defamatory statements despite a high degree of awareness of probable falsity or entertaining serious doubts as to its truth." Doc. #21, p. 21 (quoting *Madison*, 539 F.3d at 657-58).

C. Plaintiffs' Incidental Claims Against DiMatteo Must be Dismissed.

Plaintiffs neglect the legal authority and arguments Defendants advance to support dismissal of all claims against DiMatteo. *See* Doc. #21, p. 22. Plaintiffs have ostensibly sued DiMatteo for expressing her constitutionally-protected opinions, which are non-actionable as a matter of law. *Id.* (citing *Madison*, 539 F.3d at 653-54); *see* Doc. #30, pp. 24-25. Publicly supporting a cause of action, voicing distaste for the choices of others, and calling for a boycott of a business with disagreeable values are actions *firmly rooted* in free speech jurisprudence. Our Supreme Court did not mix words: "**[s]peech does not lose its protected character, however, simply because it may embarrass others or coerce them into action**." *N.A.A.C.P. v. Claiborne Hardware Co.,* 458 U.S. 886, 909-10 (1982) (emphasis added) (where petitioners repeatedly urged others to join their cause, named boycott violators in public meetings and local newspapers, and "admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism").[14]

[14] *See also, Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 294-95 (1981):

> We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost. The Court has long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas. That concept has been stated and restated almost since the Constitution was drafted.

In their Response, Plaintiffs *now* interpose theories that DiMatteo "caused or participated" in her co-defendants' defamatory speech, and that discovery could uncover additional co-conspirators. Doc. #30, p. 24. Plaintiffs' inability to maintain an action for Tortious Interference against DiMatteo precludes them from holding her liable for Conspiracy, regardless of whether discovery reveals new participants working in complicity. *Doctor's Data, Inc.*, 170 F. Supp. 3d at 1159. Moreover, *even if* Plaintiffs could prove Hogshead-Makar and/or Champion Women engaged in tortious acts -- which they cannot -- DiMatteo's vocal support for her co-defendants' initiatives still falls short of what the law requires to hold *DiMatteo* accountable. *Claiborne Hardware Co.*, 458 U.S. at 908 (confirming, "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected"). Dismissal with prejudice of all claims against Defendant DiMatteo is necessary and appropriate.

D. <u>The Speech At-Issue Does Not Support a Commercial Disparagement Claim.</u>

Plaintiffs' actions under the Illinois Uniform Deceptive Trade Practices Act ("UDTPA") (Count III) and Consumer Fraud and Deceptive Trade Practices Act ("CFA") (Count IV) are centered on Hogshead-Makar's and Champion Women's voiced concerns about player safety from sexual abuse and Butler's demonstrated *lack of integrity* when he engaged in improper sexual relationships with his former players. Plaintiffs fail to allege that Defendants attacked the *quality* of Plaintiffs' services, which is required to avoid dismissal of Counts III and IV. *See* Doc. #30, p. 12 (citing Dkt. 15, ¶¶ 24, 190, 199). Nor can they maintain a claim of "unfair practice" under the CFA based on protected speech.

1. Statements about Plaintiffs' lack of integrity are not actionable.

Plaintiffs oddly attempt to equate the "safety" concerns voiced by Hogshead-Makar and Champion Women with those raised in cases involving unsafe dog products. *Id.* at pp. 11-12. The

See, NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.")

cases Plaintiffs cite (and *grossly misrepresent*) present a quintessential apples-and-oranges comparison to the facts before this Court.

First, in *Evanger's Cat & Dog Food Co., Inc. v. Thixton*, the Court recognized one of plaintiff's publications as implicating *the UDTPA*,[15] finding the defendant "essentially states that Evanger's 'made' **an unsafe product**" -- dog food. 412 F. Supp. 3d 889, 904 (N.D. Ill. 2019) (emphasis added). Next, *Adkins v. Nestle Purina PetCare Co.* was a class action brought by 21 plaintiffs across various states whose pets became ill or died after eating the manufacturer-defendants' dog treats. 973 F. Supp. 2d 905, 910-11 (N.D. Ill. 2013). The Court *dismissed* the consumer protection act claims (brought under the plaintiffs' respective states' laws), "[b]ecause plaintiffs fail to allege any actionable false statements made by the merchant defendants[.]" *Id.* at 921; *but see* Doc. #30, p. 12 (which falsely asserts the Court held the "statements were actionable under the ICFA"). Finally, it is unclear how the finding in *Bietsch v. Sergeant's Pet Care Prod., Inc.*, No. 15 C 5432, 2016 WL 1011512 (N.D. Ill. Mar. 15, 2016), is in any way instructive. That Court merely held a manufacturer's representation that its pet treats are nutritious, safe and wholesome - - despite the harm caused - - could mislead a reasonable consumer and be actionable under various states' consumer fraud laws. *Id.* at *4.

Here, the "safety" concerns Hogshead-Makar/Champion Women voiced were *directly related* to the history of accusations about Butler's sexual improprieties. Doc. #15, ¶¶ 24, 190, 199. These statements do not in any way attack the *quality* of Plaintiffs' services. Putting aside the Plaintiffs' decision to ignore the legal authority raised by Defendants in their Motion, Hogshead-Makar and Champion Women cannot be held liable under the UDTPA or CFA for their critical remarks. Doc. #21, p. 23; *Brownmark Films, LLC,* 682 F.3d at 692.

[15] Contrary to Plaintiffs' misrepresentation, the Court *dismissed two of three* claims brought under the UDTPA and *all* actions under the CFA. *Evanger's Cat & Dog Food Co., Inc.*, 412 F. Supp. 3d at 904-05; *but see*, Doc. #30, pp. 11-12.

2. Plaintiffs' ancillary "claims" under the commercial disparagement statutes are insufficient at law.

Plaintiffs try to mislead the Court with an inaccurate summary of their deficient pleading. First, *nowhere* in the Amended Complaint do they allege facts to support a finding that Defendants' actions created a likelihood of consumer "confusion" or "misunderstanding." *But see* Doc. #30, p. 12.[16] Plaintiffs' allegations that these Defendants republished negative information about Butler and insisted the volleyball community cease association with Plaintiffs cannot support the presumption that consumers were *misled* or "dece[ived] in a course of conduct involving trade or commerce." *De Bouse v. Bayer*, 235 Ill. 2d 544, 550 (Ill. 2009) (providing the elements of a CFA claim); *see also, Ciszewski v. Denny's Corp.*, No. 09 C 5355, 2010 WL 2220584, at *1 (N.D. Ill. June 2, 2010) (relied on by Plaintiffs, which confirms CFA claims must be pled with the same particularity and specificity as required for fraud actions under Rule 9(b)); *Capiccioni v. Brennan Naperville, Inc.,* 791 N.E.2d 553, 558 (2nd Dist. 2003) ("Generally, **a deceptive representation or omission of law does not constitute a violation of the [CFA] because both parties are presumed to be equally capable of knowing and interpreting the law**" (emphasis added)). To the contrary, Plaintiffs claim, "[c]lub directors have interpreted the Defendants' actions as a warning to those who participate in GLV events." Doc. #15, ¶ 203. Thus, if anything, Hogshead-Makar/Champion Women's messaging was clear: parents, schools and sponsors should not associate with an individual repeatedly accused of using their power and authority as a coach to engage in inappropriate sexual conduct with minors. More importantly, Defendants have shown the at-issue speech is non-actionable and cannot serve as the basis of a claim under either statute. Doc. #21, pp. 15-27.

[16] Plaintiffs cite to Amended Complaint Paragraph 202, claiming they "allege that the ***threats*** made to organizations doing business with GLV *are* ***intended to confuse*** *the volleyball community* ***about the legality and consequences of doing business*** *with Plaintiff*." Doc. #30, p. 12 (emphasis added). In actuality, their pleading states: "*[t]he* ***false narrative*** [*i.e.* that Butler is a "pedophile" coach] perpetuated by the Defendants *is* ***intended to mislead*** *consumers* in the general junior indoor volleyball market ***about the safety of players*** and the threats to these businesses for associating with the Plaintiffs are generally directed towards [sic] volleyball market at large." Doc. #15, ¶ 202 (emphasis added).

Stating further, Plaintiffs suggest they intended to bring an action under the CFA for "unfair practice," Doc. #30, p. 13, which was not entirely clear from Plaintiffs' vague allegations supporting their Count IV, *see* Doc. #15, ¶¶ 201 & 204. Yet, Plaintiffs cannot support their boilerplate claim that Hogshead-Makar's or Champion Women's conduct (1) offends public policy, (2) is immoral, unethical, oppressive, or unscrupulous, and (3) causes substantial injury to consumers. *Id.* Defendants establish herein that their supposedly "unfair" conduct is protected non-actionable speech, which cannot serve as the basis for a consumer fraud claim. Doc. #21, pp. 15-27. The Amended Complaint also confirms Hogshead-Makar's and Champion Women's conduct was not *so oppressive* that it "leave[s] the consumer with little alternative except to submit to it" and results in the "lack of meaningful choice." *Ciszewski*, 2010 WL 2220584, at *3 (quoting *Robinson v. Toyota Motor Credit Corp.,* 201 Ill.2d 403, 418-20 (2002)). Plaintiffs' assertion that "[c]lub directors have interpreted the Defendants' actions as a *warning*," Doc. #15, ¶ 203 (emphasis added), does not equate to a finding that recipients of the offending publications were *precluded* from engaging in commerce or, more specifically, *any* volleyball tournaments. In fact, the pleading indicates that other leagues and opportunities *were available*, and that "one club director, *when faced with the decision*," stuck with Butler and concluded that switching out of Plaintiffs' league "would be 'penalizing the players.'" *Id.* at ¶ 118.

Counts III and IV must be dismissed with prejudice where Plaintiffs cannot maintain an action under the UDTPA or CFA based on Hogshead-Makar's and Champion Women's critical speech.

E. <u>Plaintiffs Cannot Maintain a Conspiracy Action</u>.

For all of the foregoing reasons, including those recited in Defendants' opening brief, Plaintiffs' Conspiracy claim fails in the face of their inability to sustain a viable cause under any other theory of recovery. *Doctor's Data, Inc.* 170 F. Supp. 3d at 1159. Count V must be stricken.

III. THE FAIR REPORT PRIVILEGE SHIELDS DEFENDANTS FROM LIABILITY.

Once again, Plaintiffs fail to address, distinguish or discredit a single case Defendants relied upon to support invocation of the Fair Report Privilege. Had Plaintiffs considered the cited authority, they would have realized that any speech-related claim could trigger immunity under the privilege. The judiciary has deemed First Amendment protections far too critical to disregard them upon the artful pleading of a litigant; the broad scope of the Fair Report Privilege is applicable to torts (other than defamation) that seek to hold defendants liable for offending speech. Doc. #21, pp. 15 & 27; *supra* at n. 9.

Plaintiffs in desperation offer up a myriad of new facts hoping to convince the Court the Defendants acted with malice and abused the privilege. Doc. #30, pp. 28-29. Any unpled, newly-asserted facts should be disregarded outright. *Agnew*, 683 F.3d at 348. But even with these allegations, Plaintiffs cannot sidestep the privilege, which "is not concerned with the defendant's alleged subjective intent," *Huon*, 841 F.3d at 740, and "overcomes allegations of either common law or actual malice," *Solaia Tech, LLC*, 221 Ill. 2d at 587. *See* Doc. #21, pp. 25-26.

As is detailed *supra* at Section I, Plaintiffs not only quote directly from Hogshead-Makar's "false and defamatory" email and letter submitted at Group Exhibit C and C-1, but the Amended Complaint repeatedly references the "source materials" and "news articles" that accompanied the offending letters (C-2 through C-14). *See, e.g.,* Doc. #15, ¶¶ 50, 51, 56 & 61. Defendants are *not* asking for a resolution of factual issues, despite Plaintiffs' implication their pleading somehow "proves" Defendants' statements were false. *See* Doc. #30, pp. 2, 27-28. Such an inquiry is completely irrelevant to the determination of whether the Fair Report Privilege is triggered. Doc. #21, pp. 25-27.

Once the privilege is properly raised, as it has been here, the Court must then compare the offending statements against the source materials and determine, as a matter of law, whether the Defendants offered a "fair abridgment" of those public records, reports and proceedings. *Huon*, 841

F.3d at 740. That is, did Defendants "significantly change" the meaning appearing in the governmental or public proceeding"? *Id.* (quoting *O'Donnell v. Field Enters. Inc.*, 145 Ill. App. 3d 1032, 1039 (1986) (where the Court explained First Amendment freedoms "must be given breathing space," and "some public misstatements must be tolerated by each of us in order that the freedoms be maintained for all of us")). Appendix B presents a summary comparison, further bolstered by a review of the full versions of the publications submitted, which establish the Fair Report Privilege fully insulates the Defendants' offending speech. *See* Doc. #21, pp. 25-27; Doc. # 21-2.

IV. PLAINTIFFS' LAWSUIT CONSTITUTES AN IMPERMISSIBLE SLAPP.

Plaintiffs' generic "defense" to Defendants' arguments for dismissal under applicable Anti-SLAPP legislation is that speech which interferes with business operations should not be afforded *any* protections under the law. Doc. #30, pp. 29-30. Beyond their misunderstanding of these nuanced (but very powerful) statutes, Plaintiffs have also waived any argument that the choice of law analysis favors application of Florida's and Nevada's Anti-SLAPP statutes (by failing to argue otherwise). *Brownmark Films, LLC,* 682 F.3d at 692.

A. Hogshead-Makar and Champion Women are Entitled to a Dismissal With Prejudice and Recovery of Their Fees and Costs Under Florida Law.

Plaintiffs' reliance on *Baird v. Mason Classical Academy, Inc.*, 317 So. 3d 264 (Fla. Dist. Ct. App. 2021) is misplaced given the material difference between the communications and privileges at issue in that case versus those disseminated by Hogshead-Makar and Champion Women. In *Baird*, the offending speech included:

(1) a 24-page document *the defendant authored* that detailed the conduct by plaintiff that *defendant alleged* was "illegal or unsavory" and "could result in felony charges;" and

(2) a 21-page document *authored by defendant* that again detailed conduct by plaintiff that *defendant alleged* was evidence of "dishonesty among the [plaintiff's] board members and administration," as well as "illegal and improper conduct" by plaintiff.

317 So. 3d at 266. Therein, the defendant argued plaintiff's tortious interference claims constituted an impermissible SLAPP lawsuit because a privilege "attached to his 'statements made to public educational authorities concerning school affairs.'" *Id.* at 269.

In contrast, the claims against Hogshead-Makar and Champion Women *all* relate to their *reiteration* of years of accusations, lawsuits, governing body findings and published news articles concerning Butler's inappropriate sexual relationships with his minor volleyball players. In other words, these Defendants' "exercised the constitutional right of free speech in connection with a public issue" -- in this case, a "news report, or other similar work" -- placing their speech squarely within the protections afforded by Florida's Anti-SLAPP statute. Fla. Stat. Ann. § 768.295(2)(a), (3). Plaintiffs have not met their burden "to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit[.]'" *Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 314 (Fla. Dist. Ct. App. 2019). Accordingly, this Court should dismiss all claims against Hogshead-Makar and Champion Women and award them reasonable attorneys' fees and costs incurred in connection with their assertion of this defense. *Parekh v. CBS Corp.*, 820 F. App'x 827, 836 (11th Cir. 2020); Fla. Stat. Ann. § 768.295(4).

Even if this Court disagrees with Defendants' argument under the Florida anti-SLAPP statute, Plaintiffs tender zero basis (nor can defense counsel locate any supporting case law)[17] that would allow *Plaintiffs* to recover fees and costs in connection with Defendants' motion. *But see* Doc. #30, p. 35. The statute is unambiguous: "A person or entity sued by a governmental entity or another person in violation of this section has a right to an expeditious resolution *of a claim that the suit is in violation of this section*. . . . The court shall award the prevailing party reasonable attorney fees and costs *incurred in*

[17] *See* H. Blum, *SLAPPing Back in Federal Court: Florida's anti-SLAPP Statute*, U. MIAMI LAW REVIEW, Vol. 76, No. 1 (Nov. 23, 2021) (accessible at: https://repository.law.miami.edu/cgi/viewcontent.cgi?article=4668&context=umlr) (repeatedly stating that the fee-shifting provision of the statute allows *targets of SLAPP suits* to recover their attorney's fees and costs).

connection with a claim that an action was filed in violation of this section." Fla. Stat. Ann. § 768.295(4) (emphasis added). The "claim" of an impermissible SLAPP lawsuit was asserted by Defendants, not Plaintiffs, so Plaintiffs cannot reasonably be the "prevailing party" in connection with the claim asserted. Moreover, reading this provision in the manner Plaintiffs suggest would fly in the face of the spirit and intent of Florida's Anti-SLAPP statute. Fla. Stat. Ann. § 768.295(1).

B. <u>DiMatteo is Entitled to a Dismissal With Prejudice and Recovery of Her Fees and Costs Under Nevada Law</u>.

Plaintiffs first suggest that DiMatteo's motion under Nevada's Anti-SLAPP statute was filed beyond the 60-day rule set forth Section 41.660(2), *by four days*. Doc. #30, p. 30; Nev. Rev. Stat. Ann. § 41.660. However, good cause existed for a permissible extension of the deadline in this case. At the initial court hearing on April 5, 2022, defense counsel expressly raised the Anti-SLAPP defense, which put Plaintiffs on notice of the statute *prior to* their deadline to amend their pleading. Plaintiffs subsequently filed an Amended Complaint on April 25, 2022, that exceeded the length and complexity of their first pleading (despite dismissing a defendant). Only then did the Defendants move for an extension of time to file a dispositive motion, in part, to promote judicial economy in addressing all bases for dismissal in one consolidated filing. The facts of this case present a proper occasion for this Court to consider the statutory defense.

Plaintiffs next argue that Nevada's statute is inapplicable by grossly misrepresenting the facts actually pled *against DiMatteo*. This Court should disregard all *newly asserted* allegations absent from the pleading, including claims that DiMatteo: intentionally misrepresented "Plaintiffs' programs," made "public statements" (appearing in quotes at Response pages 31 and 32), made "misleading claims about the safety and quality of Plaintiffs' business," was the "driving force behind the recent publicity of allegations from the 1980s," "provided the conspiracy valuable insight related to GLV's sponsorships," and "participated in threats made to . . . other businesses with connections to GLV." Doc. #30, pp. 31-32. Plaintiffs' repeated efforts to subsidize their deficient pleading in briefing on a

12(b)(6) motion is not only procedurally improper, *Agnew*, 683 F.3d at 348, but a telling sign of concern.

As for the smattering of facts that are actually pled against DiMatteo, Plaintiffs have not met their burden "to show, with prima facie evidence, a probability of prevailing on the claim." *Smith v. Zilverberg*, 137 Nev. 65, 67 (2021) (citing Nev. Rev. Stat. Ann. § 41.660(3)(a)-(b)). To wit, Plaintiffs do not dispute that DiMatteo's at-issue speech involved matters of public concern, nor can they cite to any facts supporting the inference that DiMatteo *knowingly* published false statements of fact. Doc. #21, p. 33 (citing *Smith*, 137 Nev. at 67).

Next, Plaintiffs argue, "Defendants have failed to establish their entitlement to prevail as a matter of law" because they failed to submit affidavits with their motion. Doc. #30, pp. 39-40. The case they cite merely confirms a court *may* consider affidavits when analyzing an anti-SLAPP motion, not that an affidavit is *required*. *Coker v. Sassone*, 135 Nev. 8, 11 (2019); Nev. Rev. Stat. Ann. § 41.660(d). Notably, Nevada's statute permits a trial court to broadly "**[c]onsider such evidence, written** or oral, by witnesses or affidavits, **as may be material in making a determination**[.]" Nev. Rev. Stat. Ann. § 41.660(d) (emphasis added). This provision supports consideration of Defendants' exhibits, which demonstrate, unequivocally, that DiMatteo's speech is protected, and that Plaintiffs' lawsuit is a meritless SLAPP.

Lastly, Plaintiffs reiterate their generic demand for discovery without explanation or citation as to why allowing discovery would not perpetuate the bullying efforts the statute was designed to protect against. Doc. #30, p. 33. Plaintiffs' likely intent is to bury DiMatteo with discovery requests insisting upon all of DiMatteo's phone calls, emails and social media activity. Simply stated, Plaintiffs have failed to make the showing required for this Court to allow for even limited discovery under the applicable statute. Nev. Rev. Stat. Ann. § 41.660(4).

Plaintiffs' lawsuit against DiMatteo must be dismissed as a meritless SLAPP action, and this Court should award DiMatteo her reasonable fees and costs, in addition to the discretionary $10,000 award pursuant to Nevada law. Nev. Rev. Stat. Ann. § 41.670(1)(a)-(b).

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WHEREFORE, for the reasons set forth above and in their opening briefs, the defendants, **NANCY HOGSHEAD-MAKAR**, **CHAMPION WOMEN** and **DEBRA DIMATTEO**, respectfully request that this Court:

a) enter a dismissal *with prejudice* of Plaintiffs' First Amended Complaint pursuant to Rule 12(b)(6);

b) enter an award of the Defendants' respective attorneys' fees and costs pursuant to the applicable Florida and Nevada anti-SLAPP statutes; and

c) enter any additional relief this Honorable Court deems just and fair under the circumstances and in obeyance of the law.

Respectfully submitted,
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