IN THE CIRCUIT COURT OF ST. LOUIS CITY, MISSOURI
TWENTY-SECOND JUDICIAL CIRCUIT

RUBY FREEMAN and WANDREA MOSS,	)	
Plaintiffs,	)	
v.	)	Case No. 2122-CC09815-01
JAMES HOFT, JOSEPH HOFT, and TGP COMMUNICATIONS LLC d/b/a *THE GATEWAY PUNDIT*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM PURSUANT TO RULE 55.27(a)(11), AND RULE 55.27(a)(6).

Beginning on December 3, 2020, Defendants James Hoft ("Jim Hoft"), Joseph Hoft ("Joe Hoft"), and TGP Communications LLC d/b/a *The Gateway Pundit* (collectively, "Defendants") knowingly and repeatedly published false accusations of election fraud against Plaintiffs Ruby Freeman and Wandrea Moss, both of whom were election workers in Fulton County, Georgia during the 2020 presidential election. *See* Plaintiffs' Second Amended Petition at ¶¶ 1, 4, 141-142, 202-203, 205, 220-221, 223, 234. Among other things, Defendants falsely accused Plaintiffs of conspiring to remove poll watchers from the room where they were counting ballots, producing secret suitcases full of illegal ballots, and counting those illegal ballots multiple times. *Id.* at ¶¶ 4-5, 90-91, 165, 197, 199, 215, 217. Within twenty-four hours, Defendants' accusations had been publicly and definitively refuted by Georgia elections officials. *Id.* at ¶¶ 5, 55-56. Defendants nonetheless repeated and republished their discredited, fictitious account, month after month, long after it was conclusively shown to be untrue. *Id.* at ¶¶ 5, 88, 110, 142.

Through their defamatory statements, Defendants caused Ms. Freeman and Ms. Moss to be vilified on social media and subjected to an onslaught of violent, racist threats and harassment.

Id. at ¶¶ 170-195. At the height of Defendants' campaign of disinformation, Ms. Freeman fled her home at the recommendation of the FBI. *Id.* at ¶ 178. On or around January 6, 2021, a crowd on foot and in vehicles surrounded Ms. Freeman's house. *Id.* Ms. Freeman was also forced to shutter her online business. *Id.* at ¶ 180. Ms. Moss has likewise suffered personal consequences and professional setbacks. On at least two occasions, strangers showed up at Plaintiff Moss's grandmother's home and attempted to push into the house to make a "citizens' arrest." *Id.* at ¶ 126. Ms. Moss and many of her colleagues received harassing messages forwarded from Fulton County Elections' general email address, filling her workplace with the same vile comments that stalked her at home. *Id.* at ¶ 188. Ms. Moss subsequently left her job. ¶¶ 191-192. As a result of Defendants' ongoing campaign, both Ms. Freeman and Ms. Moss are afraid to live normal lives. *Id.* at ¶ 7. Defendants have inflicted severe and ongoing emotional and economic damage on both Plaintiffs. *Id.*

To mitigate the harm caused by Defendants' false statements, Plaintiffs sent a letter to Defendants on November 22, 2021, demanding that they retract no fewer than sixteen defamatory articles. *Id.* at ¶ 149. Defendants failed to correct or retract their demonstrably false statements concerning Plaintiffs, *id.* at 150, and on December 2, 2021, Plaintiffs filed the instant lawsuit against Defendants. After Plaintiffs filed their original petition ("the Original Petition"), Defendants continued to publish articles repeating the lie that Plaintiffs had conspired to commit election crimes. *Id.* at ¶ 160. Upon discovering these and additional defamatory Articles, Plaintiffs prepared and filed a First Amended Petition and Second Amended Petition on January 14, 2022, and January 10, 2023, respectively. The Second Amended Petition documents fifty-eight articles (the "Articles"), published over the course of a year and a half, each of which defames Plaintiffs. Second Amended Petition at ¶¶ 45, 49, 58, 59, 63, 67, 70, 71, 76, 78, 82, 84, 89-97, 99, 100, 102,

104-106, 116-126, 127-140, 151-155, 158, 161, 162. Defendants have yet to retract or correct a single one of these articles, which remain accessible today.

On January 16, 2023, Defendants filed their Answer and affirmative defenses to the Second Amended Petition. As if their ongoing defamation of Plaintiffs were not enough, with their Answer to the Second Amended Petition, Defendants for the first time filed a Counterclaim, which was captioned as a claim for "defamation." Defendants purport to name as Counterclaim-Defendants Plaintiffs Wandrea Moss and Ruby Freeman, along with Plaintiffs' counsel of record in this matter, John Langford, Brittany Williams, and David Schulz (collectively "Plaintiffs' Counsel"), and the entities Protect Democracy Project and Yale University.[1] The Counterclaim filed against Ms. Freeman and Ms. Moss seeks to hold them personally liable for statements made by their attorneys after this lawsuit was filed which merely restated the allegations in the Original Petition. Defendants' allegations in their Counterclaim are meritless. However, this Court need not reach the merits of Defendants' scurrilous and harassing Counterclaim because it is legally deficient on its face, and must be dismissed for three independent reasons:

First and foremost, Defendants' Counterclaim must be promptly dismissed because it is, in essence, a premature claim for malicious prosecution that can only be filed after the instant litigation is resolved. *State ex rel. O'Basuyi v. Vincent*, 434 S.W.3d 517, 518 (Mo. banc 2014) (Missouri law does not "authorize[] the opposing party to file, much less try in the same action, a malicious prosecution counterclaim to any of the first party's claims"). Defendants' attempt to caption their Counterclaim as "defamation" rather than malicious prosecution does not allow them to plead an otherwise premature counterclaim. *See, e.g.*, *Harris v. Steinem,* 571 F.2d 119, 124 (2d Cir. 1978) (a counterclaim for defamation based on statements made in a complaint and

[1] This motion to dismiss is solely directed towards the counterclaims against Ms. Freeman and Ms. Moss.

republished in extrajudicial comments "while artfully drafted, in essence is a claim for malicious prosecution" which was "premature prior to the determination of the main action") (internal quotations omitted); *O'Basuyi*, 434 S.W.3d at 524 (citing approvingly to *Harris*).

As the Missouri Supreme Court has cautioned, permitting malicious prosecution-type counterclaims to be joined with the underlying action has the potential to "increas[e] the risk that a party will be discouraged from bringing valid claims and also risks undue prejudice by allowing the opposing party to bring in evidence irrelevant to the first party's claim." *O'Basuyi*, 434 S.W.3d at 519. Courts have also noted the potential of such counterclaims to be filed for purposes of tactical abuse. *Howell v. Town of Fairfield*, 123 F.R.D. 429, 430-31 (D. Conn. 1988); *O'Basuyi*, 434 S.W.3d at 519. This case provides a prime example: Defendants have asserted their Counterclaim to retaliate against Ms. Freeman and Ms. Moss for seeking redress for the harms they have suffered. Moreover, if Defendants were allowed to join their Counterclaim with the underlying action, it would create a host of unnecessary practical and ethical challenges, including issues involving potential conflicts of interest, attorney-client privilege and work product protection, and jury confusion. Such an outcome, which would risk depriving Plaintiffs of their choice of counsel, is an unconscionable litigation tactic that must not be permitted.

Even if Defendants were able to escape the clear holding of *O'Basuyi* by captioning their Counterclaim as defamation—and they cannot do so—the Counterclaim must be dismissed for a second reason. Plaintiffs' Counsel's statements are absolutely privileged because they do no more than repeat content in the Original, First Amended, and Second Amended Petitions. That absolute privilege for descriptive statements about the pleadings extends to Ms. Freeman and Ms. Moss, whom Defendants are attempting to hold responsible for statements of their counsel.

Finally, even if a defamation claim could properly be brought at this time, Defendants' Counterclaim must be dismissed because Defendants have not pleaded, and cannot plead, all the elements of a defamation claim including (1) that Plaintiffs or Plaintiffs' Counsel had knowledge of falsity or serious doubts as to the truth of the attorneys' statements, and (2) that Defendants have suffered any damages. Should the court rule for Plaintiffs on any of these arguments, Defendants' Counterclaim must be dismissed.

I. BACKGROUND

The allegedly "defamatory" statements by Plaintiffs' Counsel, for which Defendants seek to hold Ms. Freeman and Ms. Moss liable, merely repeat facts and opinions contained within Plaintiffs' pleadings in this case. Defendants' Counterclaim asserts that the Defendants were "defamed" by the following seven statements—all of which were made by Plaintiffs' Counsel after the Original Petition was filed on December 2, 2021:

(1) A statement by Protect Democracy on the website law4truth.org that, "The Gateway Pundit, along with its founding editor Jim Hoft, and contributor Joe Hoft, knowingly fabricated and disseminated blatantly false stories claiming that Ms. Freeman and Ms. Moss were involved in a conspiracy to commit election fraud, and continued to publish these untruths long after they were proven to be false." Counterclaim, ¶ 20. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 2, 4, 5, 80, 82-83, 94, 96, 97, 100, 103, 109, 119, 136(l), 138(c), 141-142, 144, 146, 154(i), 156(c), 159, 162, 164, 173.

(2) A statement by Protect Democracy on the website protectdemocracy.org that, "The Hofts' defamations, aimed at undermining confidence in the 2020 election in an effort to overturn the will of the voters, targeted two Black women for doing their jobs as election workers. In significant measure because of the lies told by The Gateway Pundit, our clients were and continue to be targeted with threats of violence and racial intimidation." Counterclaim, ¶ 23. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 6, 85, 103-107, 124, 131.

(3) A statement by Plaintiffs' attorney Brittany Williams on protectdemocracy.org that, "Lies like those that The Gateway Pundit knowingly told about Ruby Freeman and Shaye Moss cannot be divorced from the devastation they leave behind—both for the targeted individuals and for our democracy itself." Counterclaim, ¶ 28. This

statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 4, 96, 97, 100, 109, 119, 141-142, 144, 146, 159, 162, 164, 173.

(4) A statement by Plaintiffs' attorney John Langford in an NPR interview that, "But that didn't stop some of the former president's top allies in the media – The Gateway Pundit, One America News Network – from continuing to spread that lie about our clients." Counterclaim, ¶ 30. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 2, 4, 5, 80, 94, 97, 100, 109, 119, 146, 164.

(5) A statement by Protect Democracy on the website protectdemocracy.org that, "The defendants repeatedly published unverified and uncorroborated information claiming that Ms. Freeman and Ms. Moss were involved in a conspiracy to commit election fraud. They continue to publish these untruths long after they were proven to be false. Further, by identifying Ms. Freeman and Ms. Moss by name and publishing pictures of them online, Gateway Pundit caused, and was directly responsible for, the abuse and harassment Ms. Freeman and Ms. Moss suffered." Counterclaim, ¶ 32. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 4-6, 49-50, 51, 56, 80, 82-83, 85, 89, 90-91, 94, 97, 98, 103, 107, 124, 121, 136(d), (l), (o), 138(c), 142, 146, 154(i), (l), 156(c), 160, 164.

(6) A Twitter post by Yale University's Media Freedom & Information Access (MFIA) Clinic, stating, "Last year the Gateway Pundit knowingly published lies about two Georgia election workers." Counterclaim, ¶ 36. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 2, 4, 5, 96, 97, 100, 109, 119, 141-142, 144, 159, 162, 164, 173.

(7) A statement by Plaintiffs' attorney David Schulz on the MFIA Clinic website that, "the type of disinformation campaign waged by the Gateway Pundit is undermining the very ability of our democracy to function." Counterclaim, ¶ 38. This statement repeats the content in Plaintiffs' Original Petition at ¶¶ 1, 2, 3, 6.

All seven of these allegedly "defamatory" statements echo statements that had already been included within Plaintiffs' Original Petition.

II. LEGAL STANDARD

Defendants' Counterclaim against Ruby Freeman and Wandrea Moss must be dismissed under Rule 55.27(a)(11) as an improper effort to plead a malicious prosecution counterclaim or, alternatively, under Rule 55.27(a)(6) for failure to state a claim on which relief can be granted. A motion to dismiss under Missouri Rule 55.27(a)(11) asserts a defense that "the counterclaim or cross-claim is one which cannot be properly interposed in this action." No Missouri caselaw limits

a court's review of a claim under Rule 55.27(a)(11) to the pleadings. In fact, the language of Rule 55.27(a) makes clear that a defense of failure to state a claim under Rule 55.27(a)(6) is the only defense enumerated in Rule 55.27(a) for which a court is confined to the pleadings. *See* Mo. R. Civ. P. 55.27(a) ("If, *on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted*, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04) (emphasis added). However, in this case the improper nature of Defendants' Counterclaim can be determined from the face of the pleadings.

A motion to dismiss for failure to state a claim on which relief can be granted under Missouri Rule 55.27(a)(6) is a test of the adequacy of the petition. *See Missouri State Conf. of Nat'l Ass'n for Advancement of Colored People v. State*, 601 S.W.3d 241, 246 (Mo. banc 2020). Because Missouri is a fact-pleading state, a plaintiff or counterclaimant must plead allegations of fact in support of each element of the cause of action to survive a motion to dismiss. *Gerke v. City of Kansas City,* 493 S.W.3d 433, 436-37 (Mo. Ct. App. 2016). "Conclusory allegations of fact and legal conclusions are not considered in determining whether a petition states a claim upon which relief can be granted." *Bray v. Missouri Dep't of Corr.,* 498 S.W.3d 514, 518 (Mo. Ct. App. 2016) (internal quotation marks omitted). Moreover, even if a plaintiff has properly pleaded each element of a defamation cause of action, such action must be dismissed if an absolute privilege applies that shields the defendant or counterclaim defendant from liability for the statements at issue. *See*, *e.g.*, *Jackson v. Sloan*, 931 S.W.2d 807, 809 (Mo. Ct. App. 1996).

III. ARGUMENT

A. Defendants' Counterclaim Is in Essence a Claim of Malicious Prosecution that Cannot be Filed until Termination of the Instant Matter.

Defendants' Counterclaim seeks to hold Plaintiffs Wandrea Moss and Ruby Freeman liable for statements made by their attorneys after this lawsuit was filed that merely echo the contents of Plaintiffs' pleadings. The Counterclaim is therefore premised entirely on Defendants' contention that the Original Petition (and subsequent Petitions) were filed by Plaintiffs without an adequate factual basis. In essence, Defendants' Counterclaim alleges a claim for malicious prosecution. *See State ex rel. O'Basuyi v. Vincent*, 434 S.W.3d 517, 519 (Mo. banc 2014) ("To establish a prima facie claim for malicious prosecution, a party must plead and prove six elements: (1) commencement of an earlier suit against the party; (2) instigation of that suit by the adverse party; (3) *termination of the suit in the party's favor*; (4) lack of probable cause for filing the suit; (5) malice by the adverse party in initiating the suit; and (6) damage sustained by the party as a result of the suit.") (emphasis in original).

In *O'Basuyi*, the Missouri Supreme Court held that Missouri law does not "authorize[] the opposing party *to file*, much less try in the same action, a malicious prosecution counterclaim to any of the first party's claims." *Id.* at 519 (emphasis added). For this reason, the *O'Basuyi* Court granted a permanent writ of prohibition preventing the trial court from simultaneously trying the plaintiffs' underlying claims with the defendants' malicious prosecution counterclaim. *Id.* at 518. The clear and unambiguous holding of *O'Basuyi* requires that this Court dismiss Defendants' Counterclaim pursuant to Rule 55.27(a)(11) and Rule 55.27(a)(6) as improper and premature.

Defendants' attempt to style their Counterclaim as "defamation" rather than as malicious prosecution does not allow them to evade *O'Basuyi* and plead an otherwise premature claim. There is a large body of federal case law holding that a claim pleaded as defamation but which, in essence,

is one for malicious prosecution, should not be brought until the underlying action is terminated. *See, e.g.*, *Harris v. Steinem*, 571 F.2d 119, 124 (2d Cir. 1978); *Sanders v. New World Design Build, Inc.*, 2020 WL 1957371 (S.D.N.Y. Apr. 23, 2020); *Howell v. Town of Fairfield*, 123 F.R.D. 429 (D. Conn. 1988). In *Harris*, the Second Circuit upheld the dismissal of a libel counterclaim based on extrajudicial comments. 571 F.2d at 124. The Second Circuit explained that the counterclaim, "'while artfully drafted, in essence is a claim for malicious prosecution'" and thus was "'premature prior to determination of the main action.'" *Id.* (quoting the trial court's opinion and 3 Moore's Federal Practice P 13.13, at 13-308 (2d ed. 1974)).

The Missouri Supreme Court indicated in *O'Basuyi* that it agreed with this line of cases and would hold that a malicious prosecution counterclaim recast as "defamation" cannot be filed prior to the disposition of the underlying case. The Missouri Supreme Court approvingly quoted *Harris* for the proposition that "'a claim ***in the nature of*** malicious prosecution, which arises out of the bringing of the main action, generally cannot be asserted either as a compulsory or a permissive counterclaim, since such a claim is premature prior to the determination of the main action.'" *O'Basuyi*, 434 S.W.3d at 523 (quoting *Harris*, 571 F.2d at 124; emphasis added). Therefore, in determining whether Defendants' Counterclaim in this case is premature—and thus improperly pleaded—the question is not whether the Counterclaim is captioned as malicious prosecution, but whether it is "in the nature of malicious prosecution."[2]

Since the Counterclaim against Ms. Freeman and Ms. Moss is solely based on statements by Plaintiffs' Counsel that restate the content of the pleadings, the Counterclaim is "in the nature

[2] An earlier Missouri federal court case, *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442 (W.D. Mo. 1995), dismissed a defamation counterclaim based on an attorney's allegedly defamatory statements related to a judicial proceeding, and stated that "a claim for malicious prosecution" "filed ***after the conclusion of litigation*** in favor of defendants" was the more appropriate vehicle for such a claim. *Id.* at 444 n.4 (emphasis added).

of malicious prosecution" and must be dismissed as premature. Indeed, Plaintiffs' counsel has found no Missouri court case where a defendant has been permitted to file a counterclaim, either against a plaintiff or plaintiff's attorney, for statements made by the plaintiff's attorney about the underlying litigation *during* the pendency of the underlying litigation.

Moreover, the form, content, and nature of Defendants' counterclaim amply demonstrate that it is in essence a claim for malicious prosecution. First, Defendants' Answer begins by alleging that Plaintiffs' suit lacks legal merit and Plaintiffs have only filed this action because they disagree with Defendants and seek to use litigation "as a political weapon." Defendants' Answer, ¶¶ 11-13, 17-18. The gravamen of Defendants' Counterclaim is Plaintiffs' prosecution of the underlying action itself. Second, Defendants' counterclaim essentially repeats their defense, *i.e.,* that their dozens of publications alleging that Plaintiffs committed election fraud were true; and if they are false, they were not knowingly false, and they did not cause harm to Plaintiffs. *See Sanders v. New World Design Build, Inc*., No. 19-CV-1071 (VSB), 2020 WL 1957371, at *3 (S.D.N.Y. Apr. 23, 2020) (dismissing counterclaims that "arise out of the institution of the instant legal proceedings and statements allegedly made in connection therewith") (internal quotation omitted); *First State Bank of Caruthersville v. Blades*, 680 S.W.2d 441, 442 (Mo. Ct. App. 1984) (dismissing appeal of the trial court's dismissal of a counterclaim "which repeated the allegations in the answer."). Accordingly, Defendants cannot plead their Counterclaim unless Plaintiffs' claim is terminated in Defendants' favor.

B. Policy Considerations, including Judicial Economy and the Prevention of Tactical Abuse, Further Require Dismissal of Defendants' Counterclaim.

The Court in *O'Basuyi* also noted public policy reasons to prohibit premature malicious prosecution counterclaims, stating that such a prohibition "avoids the needless filing of suit by an opposing party who is not successful in the initial action." 434 S.W.3d at 519. In this case, if

Plaintiffs prevail on their underlying defamation claim against the Defendants, as they fully expect to, there will be no conceivable basis for Defendants to assert a Counterclaim. Therefore, a dismissal of the Counterclaim will serve the purposes of judicial economy, as was the case in *O'Basuyi. Id.* ("requiring [termination of the] underlying suit avoids the needless filing of suit by an opposing party who is not successful in the first action"); *see also Sanders v. New World Design Build, Inc.*, 2020 WL 1957371, at *4 ("postponement of suits that will ordinarily not arise if plaintiff wins the main action" is a "strong policy reason[ ] supporting" dismissal).

In contrast, allowing a malicious prosecution counterclaim disguised as libel creates "the obvious potential for tactical abuse in counterclaim practice." *Howell v. Town of Fairfield*, 123 F.R.D. 429, 430-31 (D. Conn. 1988). The Missouri Supreme Court in *O'Basuyi* cautioned against such outcomes, explaining that malicious prosecution actions are generally disfavored because they may discourage citizens from reporting potential wrongdoing. 434 S.W.3d at 519. As the Court in *O'Basuyi* stated, "Permitting malicious [prosecution] counterclaims to be joined and tried with the underlying action . . . increase[es] the risk that a party will be discouraged from bringing valid claims and also risks undue prejudice by allowing the opposing party to bring in evidence irrelevant to the first party's claims." *Id.*; *See also Badger Cab Co. v. Soule,* 492 N.W.2d 375, 378 (Wis. Ct. App. 1992) (expressing concern that counterclaims against plaintiff's counsel "could become potent 'dilatory and harassing devices' which could 'deter poor plaintiffs from asserting bona fide claims' due to the additional risk and expense.") (quoting *Babb v. Superior Ct.*, 479 P.2d 379, 382 (Cal. 1971)).

The concern about tactical abuse is particularly relevant in this case, where Defendants have repeatedly engaged in dilatory tactics and explicitly sought to sideline Plaintiffs' Counsel named in these counterclaims. Defendants have sought to delay this case in numerous ways. After

Plaintiffs filed this lawsuit on December 2, 2021, Defendants improperly removed it to federal court on December 5, 2021. The case was remanded by Judge Autrey on June 6, 2022. After removal and remand of the case back to this Court, on June 10, 2022, Plaintiffs served their First Requests for Production of Documents and First Interrogatories. Despite multiple meet and confers, discovery deficiency letters, and two motions to compel, Defendants did not produce a single non-public responsive document until December 6, 2022, a full year after the filing of the action and on the eve of this Court's hearing on Plaintiffs' motion to compel. Defendants did not produce such documents in significant number until January 9, 2023,[3] which was the deadline set by this Court's order granting Plaintiffs' motions to compel.

Defendants have also tried by other means to prevent Plaintiffs' Counsel from fully representing their clients. For example, Defendants' proposed protective order, filed on December 13, 2022, would have prevented any attorneys employed by Protect Democracy or Yale University from viewing any of Defendants' production except in-person at co-counsel's offices, in St. Louis, Missouri, or Atlanta, Georgia.[4] Exhibit A. On its face, Defendants' proposed protective order would have severely restricted the ability of Mr. Langford, Ms. Williams or Mr. Schulz to serve as Plaintiffs' counsel. *Id.* at p. 3., ¶ 2.I. The court denied Defendants' motion for a protective order and instead entered Plaintiffs' proposed protective order which, in accordance with standard practice, treated all counsel according to the same principles and provisions. December 20, 2022, Order Granting Plaintiffs' Second Motion to Compel and Denying in Significant Part Defendants'

[3] On January 23, 2023, Defendants made a second production of responsive documents subject to the Court's Order, an extension which Plaintiffs consented to at Defendants' request.

[4] Defendants have also repeatedly complained that Plaintiffs' Counsel should not have access to Defendants' production because Protect Democracy is a "political competitor," and because non-profit "advocacy organizations" like Protect Democracy and the Yale MFIA clinic cannot be trusted to properly safeguard confidential information. Defendants' December 13, 2022, Response to Plaintiffs' Second Motion to Compel, at 5, 10.

Cross Motion for a Protective Order, p. 4. Less than 30 days after their efforts to sideline Plaintiffs' Counsel via protective order failed, Defendants filed their Counterclaim. The aforementioned procedural history confirms that Defendants have asserted their Counterclaim for improper purposes and to accomplish what their proposed protective order improperly sought to do: to punish Ms. Freeman and Ms. Moss for their choice of counsel.

Moreover, permitting Defendants to pursue their Counterclaim would create additional, unnecessary procedural and ethical complications for this lawsuit going forward. First, if Defendants are permitted to pursue their Counterclaim, Plaintiffs' attorneys would likely become necessary witnesses in defense of the Counterclaim. In that instance, Plaintiffs' Counsel risk disqualification under Missouri Rule of Professional Conduct 4-3.7. Second, Defendants' Counterclaim would necessarily depend upon the discovery of opinion work product from Plaintiffs' Counsel, given that knowledge of falsity is an element of Defendants' Counterclaim. Defendants have already named Plaintiffs' Counsel as individuals likely to have discoverable information that Defendants may use to support their claims or defenses. *See* Exhibit B, Defendant *The Gateway Pundit*'s Answers to Plaintiffs' Interrogatory No. 24. Accordingly, Defendants would likely seek written discovery and depositions that would create unnecessary, costly, and time-consuming discovery disputes regarding privileged information. Third, if the Counterclaim were litigated in the same action (and proceeded to trial), Defendants would attempt to confuse the jury by seeking to reframe the case as a contest between themselves and Plaintiffs' Counsel. Defendants have already shown that intent in their recent filings before the court. *See* Answer to Second Amended Petition, ¶¶ 11-13, 17-18.

For all these reasons, Defendants' Counterclaim, although captioned as defamation, is in essence a premature and harassing claim for malicious prosecution which raises a host of public policy and judicial economy concerns. Since Defendants cannot bring such a claim unless and until they obtain a termination of the instant litigation in their favor, their Counterclaim should be dismissed under either Rule 55.27(a)(11) or Rule 55.27(a)(6).

C. The statements at issue are absolutely privileged, as they exclusively repeat content in Plaintiffs' pleadings.

In the alternative, even if Defendants' Counterclaim were not a premature claim in the nature of malicious prosecution, which it clearly is, it still must be dismissed for failure to state a claim. Plaintiffs Wandrea Moss and Ruby Freeman possess an absolute privilege with respect to the alleged defamatory statements, which are simply statements by their attorneys summarizing the allegations in the Original Petition. Both attorneys and parties to judicial proceedings possess an absolute privilege with respect to statements made in connection with litigation. *See Laun v. Union Elec. Co. of Mo.*, 166 S.W.2d 1065, 1068–69 (Mo. 1942) (this absolute privilege applies to "judicial officers, attorneys at law, ***parties to judicial proceedings*** . . . because the defamatory language was uttered or printed under circumstances such as to make it right that the one charged with libel may freely and fully speak his mind") (emphasis added). This absolute privilege provides "a complete defense, an 'absolute immunity from suit'" that necessitates the dismissal of a claim based on the privileged statements. *Id.* at 577 (citing *Jones v. Brownlee*, 61 S.W. 795, 796 (Mo. 1901)). The underlying principle of the doctrine is that "on certain occasions it is indispensable, or at least advantageous, to the public interest" that the person holding the privilege "should speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation." *Id.* at 577-78.

This absolute privilege applies to extrajudicial statements by counsel that are related to a judicial proceeding, even if those statements are made before the proceeding is initiated. *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442, 443 (W.D. Mo. 1995) (citing *Laun*, Restatement (Second) of Torts § 586); *see also BlueLine Rental, LLC v. Rowland*, 2020 WL 1915252 (E.D. Mo. Apr. 20, 2020) ("an absolute privilege attaches to that matter which is contained both in the pleadings and in [attorneys'] pre-suit correspondence seeking to address concerns made the basis of the lawsuit"). In *Trachsel*, the United States District Court for the Western District of Missouri opined that the Missouri Supreme Court would adopt a rule of absolute immunity for attorneys' pre-suit extrajudicial communications, based in part on the Missouri Supreme Court's favorable citation to the Restatement (Second) of Torts in *Laun*. *Id.* at 443-44. The Restatement (Second) of Torts § 586 provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, ***or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding***.

(emphasis added). The Missouri Supreme Court has favorably cited to the Restatement in other instances as well. *See Henry v. Halliburton*, 690 S.W.2d 775 (Mo. banc 1985) (quoting the Restatement's (Second) definition of a defamatory communication at § 559 and distinction between facts and opinions at § 566); *Pulliam v. Bond*, 406 S.W.2d 635 (Mo. 1966) (citing the Restatement's (First) identification of certain qualified privileges at §§ 583 and 596).[5]

[5] While Missouri state courts have not ruled on the scope of the absolute privilege as applied to extrajudicial attorney statements repeating or elaborating on the content of a petition, *id.*, other states' courts have ruled the privilege exists in that context and given persuasive reasoning for their holdings. *See Chavez-Neal v. Kennedy*, 485 P.3d 811, 815 (N.M. Ct. App. 2021) (holding that attorney's statements in a news interview were absolutely privileged because they were "similarly limited to reiteration and explanation of the allegations of the complaint") (citing *Helena Chemical Co. v. Uribe*, 281 P.3d 237 (N.M. 2012)); *Norman v. Borison*, 17 A.3d 697, 715-18 (Md. Ct. App. 2011) (finding that statements to press and republication of complaint on internet were absolutely privileged); *Prokop v. Cannon*, 583 N.W.2d 51, 58 (Neb. Ct. App.

A close look at the alleged defamatory statements made by Plaintiffs' Counsel shows that each of them only repeats the claims and arguments made in Plaintiffs' pleadings. *See supra* pp. 5-6. Statements made by counsel repeating and summarizing the allegations in their complaint during the pendency of their proceeding are absolutely privileged. *See Trachsel*, 883 F. Supp. at 444 n.4 (quoting the Restatement (Second) of Torts and noting that "Once suit was filed, of course, communications made during the suit would be absolutely privileged."). Because Plaintiffs' Counsel's statements only repeated content contained within Plaintiffs' Original, First Amended, and Second Amended Petitions, these statements are absolutely privileged, and Defendants' Counterclaim must be dismissed on this additional ground.

D. Defendants have not pleaded, and cannot plead, all the elements of their defamation counterclaim.

Independent of absolute immunity and Rule 55.27(a)(11), Defendants' counterclaim fails because Defendants have not pleaded, and cannot adequately plead, all the elements of their defamation counterclaim. In Missouri, the elements of a defamation claim include 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false and not privileged, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation. *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 70 (Mo. banc 2000) (citing *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo. banc 1993)). A public figure bringing a defamation claim must plead that the person who made the alleged defamatory statement did so "'with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true.'" *Duggan v. Pulitzer Pub. Co.*, 913 S.W.2d 807, 810 (Mo. Ct. App. 1995) (quoting Missouri Approved Jury Instruction 23.06(2)). Additionally, all

1998) ("we conclude that 'releases made to the news media by the defendants and co-counsels' were also privileged as communications made as part of a judicial proceeding in which Hoch's attorneys participated as counsel").

defamation plaintiffs in Missouri must plead actual damages, as the Missouri Supreme Court has abrogated "the old rules of *per se* and *per quod*" defamation. *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 313 (Mo. banc 1993). Defendants have not adequately pleaded knowledge of falsity, reckless disregard for falsity or actual damages in their counterclaim.

There is no question that Defendants Jim Hoft, Joe Hoft and TGP Communications LLP are public figures for purposes of any defamation claim. In their Answer and Counterclaim, Defendants admitted that they published the fifty-eight articles identified in Plaintiffs' Second Amended petition, each of which pertain to vote counting at the State Farm Center in Atlanta, Georgia, during the 2020 presidential election. Defendants' Answer to the Second Amended Petition, ¶¶ 45, 49, 58, 59, 63, 67, 70, 71, 76, 78, 82, 84, 89-97, 99, 100, 102, 104-106, 116-126, 127-140, 151-155, 158, 161, 162. Accordingly, Defendants are public figures who have "voluntarily injecte[d]" themselves into matters of intense public debate and public interest, namely the "particular public controversy" regarding Defendants' allegations that Plaintiffs committed voter fraud. *See Nelsen v. S. Poverty L. Ctr.*, 513 F. Supp. 3d 1101, 1107 (W.D. Mo. 2021), *aff'd*, No. 21-1440, 2021 WL 6775692 (8th Cir. May 21, 2021), *cert. denied*, 212 L. Ed. 2d 241, 142 S. Ct. 1241 (2022); (quoting *Cockram v. Genesco, Inc.*, 680 F.3d 1046, 1053 (8th Cir. 2012) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974))); *see also Renner v. Donsbach*, 749 F. Supp. 987, 991 (W.D. Mo. 1990) (holding plaintiff was a public figure because he had "written extensively in this area as a newspaper columnist and author of various journal articles."); *Lundell Mfg. Co. v. Am. Broad. Companies, Inc.*, 98 F.3d 351, 362 (8th Cir. 1996) ("The determination of a plaintiff's status as a private or public figure is an issue of law.").

Since Defendants are public figures, to bring a defamation claim against Ms. Freeman and Ms. Moss they must plead facts to show that the persons who made the alleged defamatory

statements did so "with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true." *Duggan v. Pulitzer Pub. Co.*, 913 S.W.2d 807, 810 (Mo. Ct. App. 1995) (internal citations omitted). Defendants' sole allegation pertaining to the knowledge element is that "Counterclaim Defendants had Counterclaim Plaintiffs' statements regarding Ms. Freeman and Ms. Moss and knew that there were no factual inaccuracies, notwithstanding any disagreement with opinions and conclusions drawn from the factual statements."[6] Answer and Counterclaim to the Second Amended Petition, ¶ 53. Defendants' logic here is conclusory, circular, and does not meet Missouri's pleading standard. *Gerke v. City of Kansas City,* 493 S.W.3d 433, 436-37 (Mo. Ct. App. 2016) (holding that facts must be pleaded to support each element of the cause of action). In summary, Defendants plead that, because Plaintiffs' Counsel had possession of Defendants' defamatory Articles, they must have known that the claims in said Articles were true—even though Plaintiffs' counsel has pleaded in a 241-paragraph Second Amended Petition why they were false. Defendants' conclusory assertion of knowledge of falsity or reckless disregard for the truth fails as a matter of basic logic.

Second, Defendants' sole allegation pertaining to damages is that they "suffered general, actual, consequential, and special damages, including, but not limited to, impairment of reputation and standing." *Id.* at ¶ 56. No facts are alleged to support this allegation. *Compare with* Plaintiffs' Original Petition, ¶¶ 6-7, 165-195, 210-213, 231, 241 (pleading the specific harms suffered by Plaintiffs including through at least 420 harassing emails, phone calls, and text messages; Ms. Freeman's temporary relocation from her home; lost business revenue; security camera purchases; lost friendships; a damaged reputation at work and at home; lost sleep; and health impairment).

[6] As a first matter, this allegation is vague as to which parties (whether Plaintiffs or Plaintiffs' Counsel or both) had knowledge of Defendants' false statements.

Missouri is a fact-pleading state; a plaintiff must plead allegations of fact in support of each element of the cause of action, including damages, to survive a motion to dismiss. *Gerke v. City of Kansas City,* 493 S.W.3d 433, 436-37. Defendants' conclusory allegations are insufficient, and their Counterclaim must be dismissed on this additional ground. *Bray v. Missouri Dep't of Corr.,* 498 S.W.3d 514,518 (Mo. Ct. App. 2016).

CONCLUSION

Although styled as defamation, Defendants' Counterclaim is, in essence, a claim against Plaintiffs for malicious prosecution. As such, it is premature and must be dismissed pursuant to *State ex rel. O'Basuyi v. Vincent*, 434 S.W.3d 517 (Mo. banc 2014). Moreover, the procedural history of this case strongly suggests that Defendants are attempting to use their Counterclaim to sow confusion, increase the length and expense of the instant litigation, pierce the attorney-client privilege, and disqualify Plaintiffs' counsel. Therefore, Defendants must not be permitted to bring such a claim until the termination of the present action.

Even if *O'Basuyi* did not require the counterclaim to be dismissed, it would nonetheless have to be dismissed under Rule 55.27(a)(6) for failure to state a claim. Plaintiffs' Counsel's allegedly "defamatory" statements only repeat facts and opinions stated in the Original, First Amended, and Second Amended Petitions. Consequently, these statements are absolutely privileged. Defendants have also failed to adequately plead the required elements of knowledge of falsity and damages, and their Counterclaim must therefore be dismissed for this reason as well.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via the Court's electronic filing system this 23rd day of March, 2023.

/s/ James F. Bennett