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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 STRIKE DEFENDANTS' ANTI-SLAPP MOTION MADE UNDER GA CODE § 9-11-11.1

Plaintiffs Ruby Freeman and Wandrea Moss, through their attorneys, move this Court to strike as both procedurally improper and self-evidently meritless Defendants' motion seeking dismissal of this case pursuant to Georgia's anti-SLAPP law, Ga. Code § 9-11-11.1 (hereinafter the "anti-SLAPP motion").[1] Should the Court deny this motion asking that it be stricken, Plaintiffs would intend to file a substantive factual response to Defendants' motion and seek leave to pursue discovery on the issue of actual malice before filing their response, as provided for in the anti-SLAPP statute cited by Defendants, Ga. Code Ann. § 9-11-11.1(b)(2), and Missouri precedents involving early motions for summary judgment, *see, e.g., Sims v. Harmon*, 22 S.W.3d 256 (Mo. Ct. App. 2000).

[1] Defendants' motion is styled a motion to strike brought pursuant to Ga. Code § 9-11-11.1, but Defendants also cite Missouri Supreme Court Rule 74.04 as the procedural authority for their motion and sometimes refer to their filing as a motion for summary judgment. *See* Defs.' Mot. 1; Defs.' Mem. 1. As discussed below, the motion is meritless under either rule.

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PRELIMINARY STATEMENT

Defendants' anti-SLAPP motion should be rejected out-of-hand for two equally dispositive reasons: a) it seeks to apply a Georgia procedural rule in a Missouri state court case, and b) it does not meet the terms of the Georgia rule, even if that rule had any proper application in this Court. The Georgia anti-SLAPP law creates a procedure for the early disposition—before discovery—of certain cases involving the exercise of constitutional rights, but it expressly recognizes that such an early resolution is ***not*** proper in defamation cases brought by public figures where discovery is inherently necessary to determine if the defendant acted with the knowledge of falsity or recklessness (also known as "actual malice") that the First Amendment requires for liability to exist. Defendants' motion contends that this is a case brought by public figures. Their request for dismissal before discovery is thus improper under the very Georgia procedures they invoke, just as a pre-discovery dismissal would be improper under Missouri summary judgment standards.

This multiply flawed motion was filed by Defendants just as deposition discovery was about to begin. *See* Ex. A., M. Ampleman Aff., ¶¶ 7, 26, 28, 31. It is yet another in a growing list of improper and vexatious litigation tactics designed to delay, distract, and obstruct—a list that includes improperly removing this case to federal court, failing to comply with discovery obligations, failing to comply with discovery orders, seeking to prevent Plaintiffs' out of state counsel from seeing designated discovery documents, filing an improper counterclaim against counsel of record hoping to depose and disqualify them, and now filing an equally improper anti-SLAPP motion in an attempt to delay deposition discovery. This motion should be stricken.

Plaintiffs' complaint identifies *fifty-eight* articles published by Defendants over a period of more than eighteen months falsely accusing Plaintiffs of secretly bringing suitcases full of ballots for Joe Biden into the vote counting room and scanning them multiple times after sending the poll

watchers home. Defendants motion contends that they believe these stories to be true and cites a *Washington Examiner* article discussing a theory put forward by "volunteer Trump attorney Jacki Pick" that poll workers were told to go home for the night while other stayed and scanned ballots. Defs.' Mem. p. 6; Defs.' Ex. 13. Other than Defendants' articles, the *Washington Examiner* article is the only one cited in Defendants' motion that discusses this theory of election fraud, and said article acknowledges "contrary to [an election observer]'s initial claims, Georgia officials insist no one told observers they had to leave, and both an independent monitor and a state investigator oversaw the majority of the counting process." Defs.' Ex. 13. This theory, and Defendants' other allegations against Ms. Freeman and Ms. Moss were officially and fully debunked within twenty-four hours of initially being published, and the same publishers cited by Defendants have long since acknowledged that the allegations are false.[2] Defendants, to the contrary, published and embellished the false, partisan allegations over the course of eighteen months, all while apparently taking in thousands of dollars from the clicks received by promoting anger and distrust about the 2020 presidential election without any effort to verify the facts.

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[2] *See e.g.,* M. Tani, *et al.,* "2 Georgia poll workers sue Giuliani, OAN over election conspiracy theories," POLITICO (Dec. 23, 2021) (reporting that the Trump campaign's conspiracy theories about plaintiffs had been "debunked" and noting that there were no "suitcases full of falsified ballots, but ballot containers that were routinely used"), https://www.politico.com/news/2021/12/23/georgia-poll-workers-sue-giuliani-oan-526122; C. Mondeaux, "Georgia election workers settle with One America News in defamation lawsuit," WASH. EXAMINER (April 23, 2022) (acknowledging that a state investigation "found the women properly and accurately counted ballots") https://www.washingtonexaminer.com/policy/courts/georgia-election-workers-settle-with-one-america-news-in-defamation-lawsuit; J. Coleman, "Who Is Shaye Moss? Former Elections Worker And Jan. 6 Witness Received Death Threats After Trump Campaign Conspiracy," FORBES (June 21, 2022) (noting that plaintiffs had been "targeted with false accusations circulated by Trump supporters"), https://www.forbes.com/sites/juliecoleman/2022/06/21/who-is-shaye-moss-former-elections-worker-and-jan-6-witness-received-death-threats-after-trump-campaign-conspiracy/?sh=20a189c36e9d. TGP tellingly fails to cite to similar reporting by One America News, which was sued over its stories and subsequently also acknowledged publicly that "Ruby Freeman and Wandrea 'Shaye' Moss ***did not engage in ballot fraud or criminal misconduct*** while working at State Farm Arena on election night." K. Brumback," OAN dismissed from election workers' suit after settlement," ASSOCIATED PRESS (May 12, 2022) https://apnews.com/article/2022-midterm-elections-lawsuits-georgia-atlanta-ba0a5021564d1377c394a3b4d8e554fb.

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Defendants cannot defend the truth of their fifty-eight published attacks on Plaintiffs, and so they admit them to be false and defamatory for purposes of their anti-SLAPP motion. Defs.' Mem. p. 14. Defendants ask the Court to throw out the complaint based solely on their own self-serving affirmations that they believe their disproven allegations to be true, arguing that Plaintiffs can therefore never prove actual malice. *Id.* at 23. Their argument is frivolous on its face.

A defamation defendant cannot "automatically [e]nsure a favorable verdict by testifying that he published with a belief that the statements were true," because the fact finder "must determine whether the publication was indeed made in good faith." *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). Even if Plaintiffs are ultimately deemed public figures (an issue to be determined later by the Court), the question of whether actual malice exists will turn on such intensely factual issues as whether the information available to Defendants created obvious reasons to doubt the veracity of the reports, and whether Defendants' incentives to publish false reports—economic or otherwise—led them to consciously avoid learning the truth. Precisely because of the factual complexity involved in determining actual malice, the statute Defendants invoke as the basis for their motion does not allow summary disposition before discovery in cases where Plaintiffs are alleged to be public figures. Ga. Ann. Stat. § 9-11-11.1(b)(2).

Defendants are among the leading purveyors of misinformation in the United States,[3] and spreading false information receives no First Amendment protection. "Neither the intentional lie

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[3] *See, e.g.,* P. Eisler, "Facebook's struggle with Gateway Pundit highlights challenge of containing disinformation," REUTERS (Dec. 3, 2021) (noting that "Facebook has long recognized Gateway Pundit as a source of false and divisive content") https://www.reuters.com/business/media-telecom/facebooks-struggle-with-gateway-pundit-highlights-challenge-containing-2021-12-03/; A. Brown, "Google Cuts Off Ad Money To 'Gateway Pundit,' A Haven For Vaccine And Election Misinformation," FORBES (July 29, 2021) (describing Gateway Pundit as "a far right news website" that "pushes a daily deluge of false, misleading or fake stories to a conservative audience eager to believe them" and describing a "business model built off the back of Google ads with misinformation attached to clickbait headlines") https://www.forbes.com/sites/abrambrown/2021/07/29/gateway-pundit-election-vaccine-covid-misinformation-google/?sh=492677336f14.

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nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Calling itself a "news and opinion publication of national renown" (Jim Hoft Aff. ¶ 5) does not give *The Gateway Pundit* license to accept false allegations at face value and report them as true for months on end.

Defendants' effort to upend this litigation—despite Plaintiffs' pending discovery and Defendants' continuing failure to comply with their discovery obligations or this Court's orders—is procedurally, legally, and factually baseless. It should promptly be rejected.

PROCEDURAL BACKGROUND

Defendants have pursued a course of improper conduct in their efforts to derail this litigation, shirking their discovery obligations, improperly filing a Counterclaim against Plaintiffs' counsel, and now seeking to prevent discovery altogether on the eve of depositions. Their vexatious conduct should not be allowed to further hamper this case.

Although Plaintiffs filed this action eighteen months ago, on December 2, 2021, Defendants stymied its forward progress first by improperly removing the case to federal court. Four days after remand back to this Court, Plaintiffs served discovery requests on Defendants on June 10, 2022. For months afterwards, Defendants asserted baseless objections and sought extensions of time to respond, at the end of which they merely produced links to articles from their website. Only after Plaintiffs filed and noticed two motions to compel did Defendants finally produce *any* documents that were not already publicly available, in December 2022.

That same month, the Court granted in significant part Plaintiffs' motions to compel and ordered Defendants to properly respond to Plaintiffs' requests. More than four months later, Defendants have yet to comply with the Court's discovery rulings. For example, they still have

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not provided information showing how much they profited from their defamatory statements, forcing Plaintiffs to file a *third* discovery motion to compel Defendants' compliance with the earlier discovery orders. And on April 26, Defendants disclosed that even in their late and incomplete production, they failed to produce all the documents they had collected because of an asserted problem with their discovery vendor. Ex. B. M. Ampleman email to J. Wolman.

In response to Plaintiffs' third set of document requests, submitted on February 3, 2023, Defendants promised to produce documents by April 21. It is May 5 as of the filing of this motion, and Defendants have produced none of the promised documents. Instead, Defendants filed their anti-SLAPP motion on April 26 and claimed it stayed discovery, including Plaintiffs' pending subpoenas concerning *The Gateway Pundit* independent contractors who wrote articles about Plaintiffs. *See* Ex. C, J. Wolman April 28, 2023, email to M. Ampleman. None of this reflects proper compliance with litigation obligations.

Defendants have pursued other improper tactics. They have sought to create a conflict between attorneys from Protect Democracy and the Yale Media Freedom and Information Access Clinic and their clients by naming these entities and individual attorneys on the case as counterclaim Defendants, simply for repeating the Petition's allegations that Defendants defamed Plaintiffs. *See* Pls.' Mot. to Dismiss Counterclaims pp. 5-6, 14-16. Although captioned as a defamation claim, Defendants' filing is in the nature of a malicious prosecution claim that cannot be brought as a Counterclaim. Defendants also insisted that attorneys from Protect Democracy and the Yale Media Freedom and Information Access Clinic should not be permitted to see any confidential discovery provided by Defendants unless they traveled to St. Louis or Atlanta and

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viewed it there,[4] a limitation that the Court rejected when it denied Defendants' first motion for a protective order.

Having gummed up the progress of this case for eighteen months with their dilatory conduct, Defendants now seek to halt the discovery process entirely by relying on a Georgia procedural rule that does not apply in Missouri. Defendants' most recent delaying tactic is frivolous, and the anti-SLAPP motion should be stricken out of hand. Given Defendants' continuing pattern of delay and obstruction, they should also be sanctioned for making a frivolous motion and to ensure compliance with their discovery obligations going forward.

LEGAL STANDARD

A motion to strike is often regarded as a "catch-all" motion with the ability to reach defects in a pleading or motion and dispose of them before requiring a substantive response. *See, e.g.*, *Jungmeyer v. City of Eldon*, 472 S.W.3d 202, 205 (Mo. Ct. App. 2015) (plaintiffs correctly sought resolution of procedural issues via motion to strike before responding substantively to motion for summary judgment); *Wedemeier v. Gregory*, 872 S.W.2d 625, 627 (Mo. Ct. App. 1994) (concluding that it is proper to strike a pleading when third-party petition states cause of action that is not proper subject of a third-party petition).

A motion to strike is an appropriate "'response' to a motion for summary judgment" under Rule 74.04(c). *Jungmeyer*, 472 S.W.3d at 205; *see also Reddick v. Spring Lake Ests. Homeowner's Ass'n*, 648 S.W.3d 765, 773 (Mo. Ct. App. 2022) (same) (citing Rule 74.04(c)). When such a motion is made, it is only after the trial court rules on the motion to strike that a "party [can] be

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[4] Page 9 of Defendants' proposed protective order makes clear that only "outside counsel" can view materials labeled "confidential" or "attorney's eyes only." Page 4 of the same protective order defines "outside counsel" as a for-profit law firm, excluding counsel with Protect Democracy and the Yale Media Freedom and Information Access Clinic.

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expected to respond substantively" to those portions of the underlying summary judgment motion papers the trial court finds to comply with the requirements of the Missouri Rules. *Jungmeyer* at 206. "It would defeat the purpose of a motion to strike to impose … a requirement [that nonmoving parties file a substantive response simultaneously with their motion to strike] where valid objections to the form of a motion for summary judgment may eliminate the necessity to file any substantive response to a pending motion for summary judgment." *Id.* at 205 n.3.

Missouri Supreme Court Rule 74.04(g) provides that if affidavits supporting a summary judgment motion are "presented in bad faith or solely for the purpose of delay" attorneys' fees should be awarded to the other party. Further, under both the Missouri and Georgia anti-SLAPP statutes, if an anti-SLAPP motion is "frivolous or solely intended to cause unnecessary delay," the court should award costs and fees to the prevailing party§ 537.528.2, R.S.Mo.; Ga. Code § 9-11-11.1(b.1) (requiring fees if court finds motion is "frivolous or is solely intended to cause unnecessary delay").

ARGUMENT

I. Defendants' Anti-SLAPP Motion Is Based on a Georgia Procedural Rule That Does Not Apply in This Court or on These Facts.

A. The Georgia Anti-SLAPP Law Provides Procedural Rules That Do Not Apply in Missouri Courts.

While Plaintiffs hail from Georgia, the present matter is properly before this Court in Missouri, under the purview of Missouri procedural rules. The Georgia anti-SLAPP statute provides a procedural mechanism for the early disposition of certain cases involving the exercise of First Amendment rights, but Georgia procedural rules do not apply in Missouri courts. Defendants' anti-SLAPP motion should be stricken as procedurally improper.

Courts apply the procedures of the forum state even if another state's substantive law governs the claim, and Missouri courts are no different. *See Grosshart v. Kansas City Power &*

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Light Co., 623 S.W.3d 160, 167 (Mo. Ct. App. 2021). "Regardless of which state's law governs the substantive issues involved in this case, … procedural questions are determined by the state law where the action is brought." *Kissinger v. Am. Family Mut. Ins. Co.*, 563 S.W.3d 765, 775 (Mo. Ct. App. 2018) (quoting *Williams v. Silvola*, 234 S.W.3d 396, 399 (Mo. Ct. App.2007)); *see also Brizendine v. Bartlett Grain Co., LP*, 477 S.W.3d 710, 714 (Mo. Ct. App. 2015) (though Kansas law determined the question of negligence, given that alleged tort occurred there, court held Missouri law governed all procedural issues).

While the details of anti-SLAPP statutes vary by state, they typically provide a *procedural* remedy for defendants in so-called "SLAPP" suits, or "strategic litigation against public participation." This is true of the Missouri anti-SLAPP statute, § 537.528, R.S.Mo., which provides a special procedure to quickly resolve actions seeking money damages for conduct or speech in connection with a public hearing or meeting. § 537.528.1, R.S.Mo. The law makes plain that it is procedural, not substantive: it expressly does not "limit[] or prohibit[]" a party's substantive rights, *id.* at § 537.528.5, and does not "provide any special defenses or immunities." *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2010 WL 4853848, at *1 (W.D. Mo. Nov. 22, 2010). It is procedural in nature. *See Jiang v. Porter*, No. 4:15-CV-1008 (CEJ), 2015 WL 9459943, at *2 (E.D. Mo. Dec. 28, 2015).

So, too, the Georgia anti-SLAPP statute, Ga. Code § 9-11-11.1. It permits a special "motion to strike," any claim arising from an act "in furtherance of the person's or entity's right of petition or free speech… in connection with an issue of public interest or concern." Ga. Ann. Code. § 11-11-11.1(b)(1). It establishes an evidentiary standard for resolving the motion to strike, *id.* at § 11-11-11.1(b), a standard that differs from the evidentiary standard for other Missouri court motions, and provides a stay of discovery when actual malice is not at issue, *id.* at § 11-11-11.1(d).

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The statute is "a *procedural* protection to acts of communication on public issues." *Rogers v. Dupree*, 824 S.E.2d 823, 830 (Ga. Ct. App. 2019) (quoting *Denton v. Browns Mill Dev. Co.*, 561 S.E.2d 431 (Ga. 2002)); *see also, e.g.*, *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1348, 1350 (11th Cir. 2018) (concluding that, when invoked in federal court, the Georgia anti-SLAPP statute "provides a special procedural mechanism for the defendant to move to strike the claim" that does not apply because it conflicts with Rules 8, 12, and 56 of the Federal Rules of Civil Procedure).

Because Missouri procedures apply to cases pursued in Missouri court, the Georgia anti-SLAPP procedures have no application here. Defendants' motion is premised on procedural law of the wrong forum, and Plaintiffs should not be made to expend additional time and resources responding substantively to Defendants' procedurally improper anti-SLAPP motion.

B. The Georgia Anti-SLAPP Law Does Not Authorize the Relief Defendants Request, Given Defendants' Argue Actual Malice is Relevant to the Court's Determination.

Defendants' motion not only asks the Court to follow an inapplicable Georgia procedure, it asks the Court to do so in a manner expressly prohibited by the Georgia rule it invokes.[5]

The Georgia anti-SLAPP law expressly prohibits its use to dismiss before discovery any defamation case where Actual Malice is relevant to the court's determination: "if there exists a claim that the nonmoving party is a public figure plaintiff, then the nonmoving party *shall be entitled* to discovery on the sole issue of actual malice whenever actual malice is relevant to the court's determination." Ga. Code Ann. § 9-11-11.1(b)(2) (emphasis added). Defendants allege

[5] The motion would be improper under the Missouri anti-SLAPP law as well. Missouri's anti-SLAPP law applies only to actions premised on "conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state." § 537.528, R.S.Mo.. Plaintiffs' claims are premised on no such conduct by Defendants' publications, a fact that Defendants concede. Defendants' Mem. 9 n.17.

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that Plaintiffs are either public officials, limited purpose public figures, or both, for purposes of this lawsuit. *See* Defs.' Mot. ¶ 8; Defs.' Mem. 17-23. Thus, under Defendants' view of the case, the "issue of actual malice" is "relevant to the court's determination." In fact, Defendants devote at least 8 pages of their 35-page memorandum in support specifically to the issue of actual malice.

If actual malice applies as Defendants argue, the standard will require evidence that Defendants' false and defamatory articles were published with knowledge that they were false or with "reckless disregard" to whether they were true or not. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In Defendants' view, Plaintiffs cannot make this showing because Defendants were "entitled to believe what they saw with their own eyes" on that snippet of surveillance video made public by the Trump campaign (Defs.' Mem. 15), and summary judgment should be entered simply because Defendants have sworn that they believe "to this day" that their published reports accurate, (Defs.' Mem. 23). The claim is baseless.

As the Supreme Court long ago recognized, actual malice "does not readily lend itself to summary disposition" because it "calls a defendant's state of mind into question," *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), and "plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant," *Herbert v. Lando*, 441 U.S. 153, 170 (1979). The Court has thus instructed that public figure defamation plaintiffs must be permitted "to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989). Such plaintiffs are entitled to discover and introduce at trial "*any* direct or indirect evidence relevant to the state of mind of the defendant." *Herbert*, 441 U.S. at 165 (emphasis added).

Self-serving attestations that a defendant believes what they published cannot and, as a matter of law, *do not* resolve the issue of actual malice, *St. Amant*, 390 U.S. at 732—otherwise every defendant in an actual malice case would claim as much to avoid liability. Instead, such claims of good faith must be tested through discovery, including through discovery of evidence that a defendant fabricated claims out of whole cloth; was aware that the published claims were false; consciously avoided finding out the truth; relied on wholly unreliable sources; set out to make facts conform to a preconceived narrative; published their claims with an ulterior motive, had economic or other incentives to misrepresent the facts, and more. *See, e.g.*, *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (avoidance of the truth); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (fabrication and unreliable sources); *Herbert v. Lando*, 441 U.S. 153, 163–64 & nn. 12, 15 (1979) (improper motive); *US Dominion, Inc. v. Powell*, 554 F. Supp. 3d 42, 60 (D.D.C. 2021) (preconceived narrative of election fraud). Professions of good faith are particularly inapposite where, as here, "the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *Burger v. McGilley Mem'l Chapels, Inc.*, 856 F.2d 1046, 1052 (8th Cir. 1988) (quoting *St. Amant*, 390 U.S. at 732).

Even the Georgia cases cited by Defendants confirm that their motion for judgment before discovery is misdirected. In *Annamalai v. Cap. One Fin. Corp.*, 738 S.E.2d 664 (2013), for example, the parties moved for summary judgment only *after* the close of discovery. *Id.* at 665–66. And in *Am. C.L. Union, Inc. v. Zeh*, 312 Ga. 647 (2021), the Georgia Supreme Court ordered the case remanded to the trial court to address the plaintiff's pending discovery motions, as the court could not "say as a matter of law that the discovery requested could not lead to additional

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evidence that would support Zeh's defamation claim and make granting the ACLU's motion to strike improper." *Id.* at 675.[6]

II. Even If Considered a Motion for Summary Judgment under the Missouri rules, Defendants' Motion Is Transparently Meritless.

Even if Defendants were to assert that their motion is a proper request for summary judgment under Missouri's rules of procedure, their pre-discovery request for a final determination on the issue of actual malice should be rejected out of hand. For all the reasons discussed above, Plaintiffs' affirmations of belief in their articles are wholly insufficient to deprive Plaintiffs of discovery into multiple areas likely to provide direct and circumstantial evidence of actual malice.

Missouri case law concerning the appropriate timing of motions for summary judgment makes this clear. In *Sims v. Harmon*, 22 S.W.3d 253 (Mo. Ct. App. 2000), the Court of Appeals considered whether a trial court had erred in granting the defendants' motion for summary judgment though court-ordered discovery was not yet complete. The *Sims* Court ultimately reversed the grant of summary judgment and concluded that the trial court erred in denying the plaintiff's request for additional time for discovery. Relevant to the Court's decision was that the plaintiff had been "allowed less than six months after the filing of [the defendants'] answer in which to complete her discovery—a substantial part of which she spent waiting for [the defendants'] answers and filing both a motion to compel and a writ of mandamus." *Id.* at 256. The Court also noted that (as here) "the court-mandated discovery period had not yet lapsed nor

[6] Defendants' invocation of Georgia privileges is—apart from being wrong on the merits—premature for the same reasons. Georgia cases make clear that proof of actual malice negates any privilege under O.C.G.A. § 51-5-7. *Smith v. Henry*, 276 Ga. App. 831, 833, 625 S.E.2d 93, 96 (2005); *Neff v. McGee*, 346 Ga. App. 522, 529, 816 S.E.2d 486, 493 (2018) ("Proof that the defendant acted with actual malice in making the statement defeats the defense of privilege."); *Fine v. Commc'n Trends, Inc.*, 305 Ga. App. 298, 303–04, 699 S.E.2d 623, 630 (2010) (same); *see also* O.G.C.A. § 51-5-9.

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had all parties agreed to hear the motion for summary judgment," calling "both strong indicators that disposition by summary judgment was premature." *Id.* After computing the number of days available to the plaintiff to pursue her claim, separate from those attributable to the defendants' delay or arbitrarily deducted by the trial court, "the time remaining for Plaintiffs to pursue their claim [was] grossly inadequate." *Id.*

In the present case, Plaintiffs filed their original petition approximately eighteen months ago, in December of 2021. Though Plaintiffs propounded discovery as soon as permitted under the Missouri Rules,[7] it was not until December *of 2022* that Defendants produced *any* non-publicly available documents in response to Plaintiffs' discovery requests. Ex. A, M. Ampleman Aff., ¶¶ 11, 16. That same month, this Court issued two discovery orders, overruling many of Defendants' objections to Plaintiffs' requests and ordering Defendants to respond in accordance with their obligations under Missouri law. But even now, nearly six months after the issuance of this Court's orders, Defendants have failed to provide basic information sought by Plaintiffs and adjudicated by this Court. Pls.' Mot. to Compel Compliance with the Court's Discovery Orders, April 24, 2023. In addition, the discovery period determined by the scheduling order issued in December has not lapsed. Under the current scheduling order, discovery is set to close in about 5 months, on October 1, 2023. However, due to Defendants' repeated delays, Plaintiffs will be moving to amend the case scheduling order to set a discovery deadline of January 16, 2024. At the present moment, Plaintiffs have four outstanding subpoenas for depositions of *TGP* contributing writers who wrote some of the defamatory articles in question. Ex. A, M. Ampleman Aff., ¶ 29. Plaintiffs will follow their depositions with depositions of Jim and Joe Hoft as well as a corporate representative deposition

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[7] *Compare with Curnutt v. Scott Melvin Transp., Inc.*, 903 S.W.2d 184, 193 (Mo. Ct. App. 1995) (early summary judgment may be appropriate where a party is "less than diligent in initiating any formal discovery.").

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of *TGP*. Actual malice will be a central topic of each of these depositions. According to *Sims*, the aforementioned factors are "strong indicators" that disposition by summary judgment would be premature.[8] *Id.*

Defendants' motion should be stricken as premature, even if considered procedurally proper under Missouri law.

III. Defendants Should Pay Plaintiffs' Reasonable Expenses for Filing a Meritless Motion for Purposes of Delay.

Improperly invoking procedures from a foreign jurisdiction and filing an unambiguously meritless motion, claiming an absence of disputed facts on a hotly contested issue for purposes of delay, warrants the imposition of sanctions—particularly where the dilatory motion is part of an ongoing pattern of litigation abuses. At the very least, Defendants should be ordered to pay Plaintiffs' attorneys' fees and costs of opposing this motion.

The sole admissible evidence that Defendants' offer in support of their anti-SLAPP motion are two self-serving affidavits signed by Jim and Joe Hoft, ten paragraphs and seven paragraphs long, respectively. These affidavits aver that the Hofts still "believe that the Plaintiffs committed election fraud"—no matter how many fact-checks and official reports have disproven this belief. *See* Jim Hoft Aff. ¶ 9; Joe Hoft Aff. ¶ 6. These thread-bare affidavits should be recognized for what they are: an attempt to delay and complicate this litigation taken in bad faith. *See, e.g.*, *St. Amant*, 390 U.S. at 732.

Under Rule 74.04(g), such affidavits "presented in bad faith or solely for the purpose of delay," justify awarding Plaintiffs the fees and costs they were forced to incur in opposing the

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[8] *See also Traweek v. Smith*, 607 S.W.3d 779, 788 (Mo. Ct. App. 2020) (where attorney affidavit sufficiently described the evidence additional discovery would adduce, which would create a genuine issue of material fact, trial court abused its discretion by declining to grant plaintiff's motion for a continuance).

meritless motion. Missouri's anti-SLAPP statute likewise provides that anti-SLAPP motions for summary judgment that are "frivolous or solely intended to cause unnecessary delay" should result in the filer paying fees and costs. § 537.528, R.S.Mo.; *accord* Ga. Code Ann. § 9-11-11.1(b.1) (even were the court to apply Georgia's anti-SLAPP provisions as Defendants seek, a parallel provision disfavoring motions that are frivolous or solely seeking to unnecessarily delay would similarly require the award of costs and fees). Under either provision, Defendants should be ordered to pay Plaintiffs' fees and costs required to defeat their improper motion.

IV. If the Court Does Not Strike Defendants' Anti-SLAPP Motion, Plaintiffs Should Be Granted Leave to File a Substantive Response.

In the event the Court denies this Motion to Strike in whole or in part, such that factual allegations sufficient to support Defendants' anti-SLAPP motion for summary judgment remain, Plaintiffs request the Court grant them leave to file a substantive response to Defendants' motion as contemplated in *Jungmeyer*. 472 S.W.3d at 206-7; *see also Reddick*, 648 S.W.3d at 773. In that event, Plaintiffs would also seek discovery on the issue of actual malice, as provided for in the anti-SLAPP statute cited by Defendants, Ga. Code Ann. § 9-11-11.1(b)(2), and Missouri precedents involving early motions for summary judgment, *Sims*, 22 S.W.3d at 256, before filing their response.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request this Court grant their Motion to Strike Defendants' anti-SLAPP motion and enter any further relief the Court deems just and proper. In addition, Plaintiffs request that they be granted leave to file a substantive response to Defendants' motion, and pursue discovery on the issue of actual malice, to the extent that a substantive response is necessary after the Court's ruling upon the merits of this Motion to Strike.

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Respectfully submitted,

By: /s/ Matt D. Ampleman

James F. Bennett, No. 46826
John C. Danforth, No. 18438
Matt D. Ampleman, No. 69938
Dowd Bennett LLP
7676 Forsyth Blvd, Suite 1900
St. Louis, MO 63105
Phone: (314) 889-7373
Fax: (314) 863-2111
jbennett@dowdbennett.com
jdanforth@dowdbennett.com
mampleman@dowdbennett.com

Von A. DuBose*
75 14th Street, NE
Suite 2110
Atlanta, Georgia 30309
Telephone: (404) 720-8111
dubose@dubosemiller.com

Brittany Williams*
UNITED TO PROTECT DEMOCRACY
15 Main St., Suite 312
Watertown, MA 02472
(202) 579-4582
brittany.williams@protectdemocracy.org

Shalini Goel Agarwal*
UNITED TO PROTECT DEMOCRACY
2020 Pennsylvania Ave. NW, Suite 163
Washington, DC 20006
(202) 579-4582
shalini.agarwal@protectdemocracy.org

John Langford*
Rachel Goodman*
UNITED TO PROTECT DEMOCRACY
82 Nassau Street, #601
New York, NY 10038
(202) 579-4582
john.langford@protectdemocracy.org
rachel.goodman@protectdemocracy.org

David A. Schulz*
Kelsey R. Eberly*
MEDIA FREEDOM & INFORMATION ACCESS CLINIC
FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION
YALE LAW SCHOOL
127 Wall Street
P.O. Box 208215
New Haven, CT 06520
(203) 436-5827
david.schulz@yale.edu
kelsey.eberly@yale.edu

*Admitted *Pro hac vice*

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via the Court's electronic filing system this 5th day of May, 2023.

/s/ Matt D. Ampleman