No. 12-CV-2002

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRADLEE DEAN, *ET AL.*
APPELLANTS,

v.

NBC UNIVERSAL (NBC), *ET AL.*,
APPELLEES.

ON APPEAL FROM A DECISION OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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JULY 2, 2013

CERTIFICATE OF PARTIES

Pursuant to D.C. App. R. 28(a)(2)(A), the following is a list of all parties, intervenors, and their counsel in the proceeding below:

Appellees/Defendants

Appellees/Defendants are MSNBC Cable, LLC (incorrectly named in the Complaint as "MSNBC"), NBCUniversal Media, LLC (incorrectly named in the Complaint as "NBC Universal"), and Rachel Maddow. Counsel for Appellees/Defendants is Laura R. Handman and Micah J. Ratner of Davis Wright Tremaine LLP, and Susan E. Weiner and Chelley E. Talbert of NBCUniversal Media LLC. John R. Eastburg of Davis Wright Tremaine LLP also represented Defendants in the Superior Court.

Pursuant to D.C. App. R. 28(a)(2)(B), Defendant MSNBC Cable, LLC, by and through undersigned counsel, states that it is a wholly owned, indirect subsidiary of defendant NBCUniversal Media, LLC. Defendant NBCUniversal Media LLC, by and through undersigned counsel, states that it is an indirect subsidiary of Comcast Corporation, which is publicly traded. Comcast Corporation does not have a parent company, and no other publicly held company owns 10% or more of its stock. The foregoing disclosures are made pursuant to D.C. App. R. 28(a)(2)(B) and are not included as evidence otherwise admissible in any proceeding or trial of this matter.

Defendant Andy Birkey was dismissed from the action in the Superior Court and is not a party to this appeal. Counsel for Defendant Andy Birkey were Elizabeth C. Koch and Thomas Curley of Levine Sullivan Koch & Shulz, LLP. Defendant Minnesota Independent was named in the Complaint but never served.

Appellants/Plaintiffs

Appellants/Plaintiffs are Bradlee Dean and You Can Run But You Cannot Hide International. Counsel for Appellants/Plaintiffs is Larry E. Klayman.

Intervenors

Intervenor in the Superior Court is the District of Columbia. Counsel for Intervenor is Ariel B. Levinson-Waldman and Andrew J. Saindon of the Office of the Attorney General.

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2. Did the trial court abuse its discretion when it found the attorneys' fees and costs assessed reasonable?

3. Did the trial court abuse its discretion when it refused to recuse itself from the case?

COUNTERSTATEMENT OF THE CASE

In July 2011, Plaintiffs Bradlee Dean and You Can Run But You Cannot Hide International ("YCR") (collectively "Plaintiffs" or "Dean") initiated an action for defamation and false light in the Superior Court of the District of Columbia ("the Superior Court Action"), naming as defendants NBC Universal, MSNBC and Rachel Maddow (collectively "NBCUniversal").[1] Dean, the founder of YCR, is an outspoken opponent of homosexuality who has been publicly criticized for his remarks, most notably those he made on a May 15, 2010 radio show. (JA13, 80-83, 97-147). On that occasion, Dean stated that Muslims "seem to be more moral than even the American Christians do" after noting that "Muslims are calling for the execution of homosexuals in America." (JA97, 112-13, 220-21). These assertions drew press attention and prompted public scrutiny and condemnation of local and national political candidates for their affiliation with Dean. (JA114-90). Rachel Maddow, host of The Rachel Maddow Show on MSNBC, was among those to report and comment on Dean's statements and these political affiliations. (JA191-218). In the Superior Court Action, Dean challenges comments she made on the August 2010 and May 2011 broadcasts of her show in which excerpts of Dean's May 2010 radio broadcast were played. (JA16-17).

On September 9, 2011, NBCUniversal made a special motion to dismiss pursuant to the District of Columbia Anti-SLAPP Act of 2010, D.C. Code § 16-5501 *et seq.* ("Anti-SLAPP Act"), and a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6). (JA29). As ground for the motions, NBCUniversal argued that the First Amendment protects, as a matter of law, NBCUniversal's reporting on Dean because the broadcasts at issue were true or were

[1] The Minnesota Independent and Andy Birkey were also named as defendants. Plaintiffs failed to serve The Minnesota Independent, resulting in The Minnesota Independent's dismissal from the action. (JA6). Defendant Birkey filed a motion to dismiss for lack of personal jurisdiction and was dismissed as well. (*Id.*).

protected opinion under the First Amendment and fair comment under District of Columbia law. (JA49-64). Not only should the Complaint be dismissed under Superior Court Civil Rule 12(b)(6) for failure to state a claim, NBCUniversal argued, but the District of Columbia's recently-enacted Anti-SLAPP Act required prompt dismissal of meritless claims, such as the ones here, aimed at silencing debate and critique on issues of public concern. (JA42-44, 47-49). As the broadcasts addressed an issue of public interest – political candidates and their controversial affiliations and views on homosexuality – NBCUniversal argued that the only way Dean's claims survive dismissal under the Anti-SLAPP Act at this stage is if he can carry the heavy burden of demonstrating he is "likely to succeed on the merits." (JA45-47). In support, NBCUniversal submitted a memorandum of law and affidavit with forty exhibits, consisting of video and audio recordings, web pages, and articles. (*See generally* JA22-227).

Plaintiffs opposed the motions on October 12, 2011 on grounds including that the Council of the District of Columbia had exceeded its authority under the District of Columbia Home Rule Act in enacting the Anti-SLAPP Act, and therefore, the Anti-SLAPP Act was unconstitutional and could not be applied to dismiss the action. (JA8).

The District of Columbia moved to intervene in the Superior Court Action for the limited purpose of defending the validity of the Act. (JA6-7). The Superior Court granted the motion and the District submitted additional briefing on December 13, 2011. (JA6). The Superior Court repeatedly gave the Dean parties notice under Superior Court Civil Rule 12(b) that it was considering converting the motions to dismiss to a motion for summary judgment and, as discussed more fully below, in fact converted the motions to dismiss to a motion for summary judgment on February 17, 2012, giving the Plaintiffs an opportunity to present material made

pertinent by the motion for summary judgment. (JA238-40, 228-29, 289-90, 298-99). Argument on NBCUniversal's dispositive motions was scheduled for February 24, 2012.

But, instead of submitting additional material, on February 21, 2012, three days before the scheduled argument, Plaintiffs filed a notice of voluntary dismissal for the stated purpose of taking advantage of the recent decision in *3M Co. v. Boulter*, 842 F. Supp. 2d 85 (D.D.C. 2012) (Wilkins, J.), *appeal dismissed*, No. 12-7012 (D.C. Cir. Oct. 19, 2012). (JA250). In that case, the district court judge held that the D.C. Anti-SLAPP Act did not apply in federal diversity cases. On February 21, 2012, the same day as the dismissal, Plaintiffs filed the identical action in the federal district court for the District of Columbia in the express hope of avoiding application of the Anti-SLAPP Act. *Dean v. NBCUniversal*, No 1:12-cv-00283-RJL (D.D.C. filed Feb. 21, 2012) (Leon, J.).

On NBCUniversal's motion and extensive briefing on the issue, on April 23, 2012, the Superior Court vacated the notice of voluntary dismissal as improperly filed under Superior Court Civil Rule 41(a)(1) and reinstated the case because Plaintiff could not voluntarily dismiss without a court order after the motion was converted to one for summary judgment. (JA299-301). The court treated Plaintiffs' notice as a motion for voluntary dismissal under Rule 41(a)(2) and stated that it would grant the motion on the condition that Plaintiffs pay NBCUniversal's reasonable attorneys' fees and costs for eight categories of work that NBCUniversal could not apply in the federal action. (JA300-02).

On May 7, 2012, NBCUniversal filed a Motion to Recover Attorneys' Fees and Costs for that work, along with a supporting affidavit and exhibits. (JA304-90). On June 25, 2012, the court granted the motion for attorneys' fees and costs of $24,625.23 and ordered Plaintiffs to pay

NBCUniversal that sum by August 3, 2012, or else the case would be dismissed with prejudice. (JA391-96).

Rather than pay the court-ordered fees and costs, on July 9, 2012 Plaintiffs filed a motion to recuse Judge Zeldon. (JA398-422). Plaintiffs then filed a notice of appeal to this Court on July 17, 2012, an appeal which this Court dismissed as interlocutory on November 1, 2012. *Bradlee Dean v. NBCUniversal*, No. 12-CV-1177 (D.C. Nov. 1, 2012) (per curiam). Judge Zeldon denied Plaintiffs' motion to recuse on November 5, 2012. (JA423-26). The same day, Judge Zeldon ordered that Plaintiffs notify the court by November 13, 2012 whether they had paid NBCUniversal the attorneys' fees and costs. (JA429-30). On November 14, 2012, the court found Plaintiffs had not paid the attorneys' fees and costs after repeated warnings that "failure to comply with court ordered conditions of dismissal will lead to dismissal of the case with prejudice" and therefore the court dismissed with prejudice. (JA441). Plaintiffs filed a notice of appeal from that order on December 7, 2012.

COUNTERSTATEMENT OF THE FACTS

I. Motion to Vacate Voluntary Dismissal Granted; Dismissal Without Prejudice Conditioned on Payment of Non-Duplicative Reasonable Attorney's Costs and Fees

At the heart of this appeal is Plaintiffs' decision to voluntarily dismiss the Superior Court Action seven months after they filed suit and their refusal to pay the attorneys' fees and costs for briefing and court conferences that could not be applied to their identical federal court action, resulting in dismissal of the Superior Court Action with prejudice.

On February 8, 2012, the Superior Court issued an Order indicating it was considering "treating [NBCUniversal's] Motion to Dismiss as a motion for summary judgment under Superior Court Civil Rules 12(b) and 56 in light of the Handman Affidavit with its numerous

exhibits." (JA229). The court, citing Superior Court Civil Rule 12(b), provided the parties "an opportunity to present all material made pertinent to Defendants' motion for summary judgment, including any additional memorandum of law that they wish the Court to consider." (*Id.*) Oral argument was set for February 24, 2012. (JA5, 242). On February 14, 2012, in response to the court's February 8 Order, NBCUniversal filed a Statement of Material Facts Pursuant to Superior Court Civil Rule 12(k). (JA231-34). The Plaintiffs chose not to file additional materials.

At the start of an additional teleconference on February 17, 2012, the court unequivocally confirmed that it would be treating NBCUniversal's motions as a motion for summary judgment, stating, "to decide this [case] on the motion for summary judgment, which is what I'm going to do at this point," Mr. Klayman was "required to file an affidavit from Bradlee Dean" – providing Plaintiffs with additional opportunity to submit a factual affidavit in advance of any decision. (JA238, 289). The court also made plain that, "I have taken the position that I have the discretion to treat [the Motion to Dismiss] as a motion for summary judgment and that is the way I am proceeding." (JA239-40, 289-90). The court offered Plaintiffs additional time to submit this information to afford Plaintiffs the "right to be fully heard." (JA240). Plaintiffs' counsel represented that his client was considering dismissing the Superior Court action and refiling the claim in federal district court because he believed, based on the recent decision in *3M Co. v. Boulter*, the federal forum would refuse to apply the Anti-SLAPP Act in a diversity action. (JA242). On February 21, seven months after the Superior Court action was filed, long after briefing was completed, and just three days before oral argument on Defendants' dispositive motions, Plaintiffs filed a Notice of Dismissal Without Prejudice that expressly confirmed what counsel conceded at the teleconference – Plaintiffs had refiled the identical suit in the "U.S.

District Court for the District of Columbia due to the Court's recent decision in *3M v. Boulter*." (JA251).

The court held a teleconference on February 22, 2012 to discuss whether Plaintiffs' notice of voluntary dismissal was effective absent a court order. (JA252). NBCUniversal advised the court that, because the court had converted NBCUniversal's motions to a motion for summary judgment before Plaintiffs filed the notice of dismissal, Plaintiffs' dismissal was invalid under Superior Court Civil Rule 41. (JA254, 256-57). The court advised NBCUniversal to file a motion addressing the issue and gave Plaintiffs an opportunity to submit an opposition. (JA256).

On February 27, 2012, NBCUniversal filed a motion to vacate Plaintiffs' notice of voluntary dismissal. Plaintiffs opposed the motion on March 26. In response to the briefing by the parties – and in particular Plaintiffs' "inaccurate recollection of the record" – the court issued an Order on March 30, 2012 confirming that it had indeed converted NBCUniversal's motions to a motion for summary judgment. (JA289-90). In light of this affirmation, the court offered Plaintiffs yet another opportunity to oppose NBCUniversal's motion to vacate the notice of voluntary dismissal and NBCUniversal an opportunity to reply. (JA289).

Plaintiffs submitted their supplemental opposition on April 6, 2012. (JA298). NBCUniversal filed its supplemental reply on April 10, 2012. (JA291-93). Plaintiffs submitted an additional, unauthorized response on April 17, 2012, to which NBCUniversal briefly responded on April 19. (JA3, 294-97). Plaintiffs reacted with yet another unauthorized response that same day as well. (JA298). The court considered all seven submissions by the parties in its adjudication of the issue on April 23, 2012. (JA298).

On April 23, the court ordered that the notice of dismissal by Plaintiffs was vacated and the Superior Court action reinstated. (JA301). As grounds, the court reaffirmed that it had "explicitly converted" NBCUniversal's motions to dismiss into a motion for summary judgment during the February 17, 2012 teleconference (JA298), and therefore, the action could not be dismissed without a court order under Superior Court Civil Rule 41. (JA300). The court further ordered that the notice of dismissal would be treated as a motion for voluntary dismissal, and deferred ruling on that motion "until it resolved the conditions upon which [the] case may be dismissed." (JA301). The court ordered NBCUniversal to file evidence of its costs for filing and a "memorandum of law supported by evidence in the form of time sheets and one or more affidavits explaining the time sheets and hourly charges covering work that cannot be applied to the subsequent lawsuit filed in the District Court for the District of Columbia." (JA301-02).

II. Dismissal Without Prejudice Conditioned on Payment to NBCUniversal of $24,625.23 in Costs and Fees

NBCUniversal filed a motion to recover its attorneys' fees and costs on May 7, 2012. (JA304). NBCUniversal sought costs and fees for only those eight categories explicitly enumerated in the court's April 23, 2012 Order, which were unique to the Superior Court action and could not be used in the federal district court action:

- The hearing scheduled for February 24, 2012
- Conference calls about NBCUniversal's request to continue the hearing and how the motions to dismiss was being treated by the court as a motion for summary judgment
- NBCUniversal's Motion to Vacate Notice of Dismissal
- NBCUniversal's Supplemental Reply in Support of Motion to Vacate Notice of Dismissal
- NBCUniversal's Response to Plaintiffs' Supplement in Opposition to Defendants' Motion to Dismiss
- The two motions to admit NBCUniversal in-house attorneys Susan Weiner and Chelley Talbert pro hac vice

- NBCUniversal's corporate disclosure statement under Superior Court Civil Rule 7.1
- NBCUniversal's memoranda of law and exhibits filed in response to court's April 23, 2012 Order.

(JA308). NBCUniversal did not seek fees or costs related to its motions to dismiss pursuant to the Anti-SLAPP Act and Rule 12(b)(6).

To support its fee application, NBCUniversal submitted an affidavit of its lead counsel, Laura R. Handman of Davis Wright Tremaine LLP (the "Handman Affidavit"). (JA318). The Handman Affidavit described Ms. Handman's thirty-five years of experience as a litigator, which included her experience as a former Assistant U.S. Attorney and special federal master, co-chair of Davis Wright Tremaine's appellate practice, one of "America's Leading Lawyers for Business" in First Amendment Litigation and Media & Entertainment by Chambers USA; a "Washington, D.C., Super Lawyer" and "New York Super Lawyer" by Thomson Reuters, among other honors. (JA320). The Handman Affidavit also included Ms. Handman's standard billing rates, and established that those rates were significantly lower than rates charged by other top law firms in the District of Columbia. (JA322). It also provided the experience and billing rates for John Rory Eastburg, the sole Davis Wright associate who assisted in NBCUniversal's defense, and Marni Shapiro, an experienced litigation paralegal. (JA322).

The Handman Affidavit attached detailed Davis Wright Tremaine billing records, reflecting: (1) the time worked on the eight categories for which fees and costs were sought; (2) the date the work was performed; (3) the person responsible for performing the work; (4) a description of the services provided; and (5) a record of disbursements and costs. (JA327). The billing records reflect that Mr. Eastburg spent approximately 43.9 hours on researching, drafting, and editing court filings; coordinating with the court and the parties to schedule hearings and

conferences; and preparing for, and participating in, court proceedings. (JA323). Ms. Handman spent approximately 19.8 hours reviewing materials; formulating the MSNBC parties' litigation strategy; editing all filings and reviewing plaintiffs' papers; and preparing for and appearing at the court conferences. (JA323).

As the Handman Affidavit explained, NBCUniversal did *not* seek reimbursement for costs and fees that were actually billed and paid. Rather, NBCUniversal sought reimbursement based on *lower* hourly rates reflected in the *Laffey* Matrix used by the United States Attorney's Office for the District of Columbia for computing attorney and staff fees in fee-shifting cases against the government (the "*Laffey* Matrix"). For example, although NBCUniversal was billed $540 per hour for Ms. Handman's time, NBCUniversal only sought reimbursement for her time at the lower *Laffey* Matrix rate of $495 per hour. (JA322).

Moreover, NBCUniversal's in-house counsel performed a considerable amount of work and drafting, but NBCUniversal did not seek reimbursement for Ms. Weiner's or Ms. Talbert's time. Nor did NBCUniversal seek reimbursements for any copy charges, messenger services or electronic research charges. (JA314). Total fees and costs NBCUniversal requested for work performed that could not be repurposed for the federal district court action was $23,065.05. (JA314).

On May 23, 2012, Plaintiff opposed NBCUniversal's motion for fees and costs. Additionally, Plaintiffs moved for reconsideration of the court's April 23 Order and for sanctions against NBCUniversal. (JA364). As grounds for reconsideration, Plaintiffs argued that an assessment of fees and costs was inappropriate absent a finding that they had acted in bad faith. (JA365-66). Plaintiffs also argued that NBCUniversal's fees were excessive, "churned," and

"padded," and therefore, the court should not merely reject the application, but sanction NBCUniversal for the submission. (JA372-73).

In the alternative, Plaintiffs argued that NBCUniversal should be awarded a maximum $2,947.50 in costs and fees. (JA374). Plaintiffs reached this total by reducing Ms. Handman's and Mr. Eastburg's rates – by $100/hour and $35/hour respectively, from the already reduced *Laffey* Matrix rates – based solely on Plaintiffs' counsel's "experience and observations." (JA367-68). Plaintiffs also summarily reduced the number of hours it took counsel to complete certain tasks. Plaintiffs protested, for example, that it should have taken NBCUniversal no more than three hours to research and draft the motion to vacate and the ten-page memorandum of points and authorities. (JA370). Under Plaintiffs' reasoning, "with the advent of LexisNexis and Westlaw there is no more need for attorneys to spend hours researching; the relevant case law simply comes straight to the computer, ready to be copied to a word processor." (*Id.*). Plaintiffs sought discovery, including depositions of not only outside counsel, but also in-house counsel for whom no fees were sought. (JA3, 373, 395).

NBCUniversal opposed Plaintiffs' request for reconsideration and sanctions on June 4, 2012. (JA337). NBCUniversal explained that Plaintiffs' arguments about their good faith was inapposite since this was not a sanction for bad faith litigation. As the court stated in its April 23, 2012 Order, "[t]he purpose of a 'terms and conditions' clause is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal." (JA300-01). In response to a *sua sponte* court order dated June 12, on June 18, 2012, NBCUniversal submitted a supplemental affidavit of Laura Handman accounting for work performed by NBCUniversal to respond to Plaintiffs' motion for reconsideration and sanctions. (JA385). The additional fees and costs NBCUniversal submitted totaled $1,446.68. (JA386).

On June 25, 2012, the court granted NBCUniversal's motion for attorneys' fees and costs in part, and denied Plaintiffs' motion for reconsideration and sanctions. The court explicitly determined that "the motive for Plaintiffs' effort to abandon this action seven months after it was filed is to the pursue the same claims against the same Defendants in the U.S. District Court for the District of Columbia." (JA392). As the court recognized, "[n]otwithstanding the fact that this Court was proceeding to address first Defendants' converted Motion for Summary Judgment, Plaintiffs' counsel did not want to have the Anti-SLAPP issue 'hanging over [their] heads." (*Id.*). The court rejected Plaintiffs' allegation that they attempted to dismiss the Superior Court action "to avoid parallel claims that would have required both parties to needlessly waste the time and expense required to litigate the same claim in two courts," emphasizing that it was "only the filing of the second action by Plaintiffs in the Federal Court (seven months after they filed this Superior Court case) that created any risk of a waste of time and expense." (JA394). The court also refused to "credit Plaintiffs with their purported reason for seeking to discontinue the action." (*Id.*). The court found that it was "Plaintiffs – not Defendants – who [ ] created the possibility of increased time and expense arising out of duplicative actions, and the certainty that some of the time and expenses that Defendants [ ] experienced, unless reimbursed by Plaintiffs, would be wasted." (JA395). (Indeed, Plaintiffs strenuously resisted NBCUniversal's motion to stay the federal action while the Superior Court action was pending.) *See Dean v. NBC Universal*, 1:12-cv-00283-RJL, ECF Nos. 4, 9 (D.D.C. Mar. 15 & Apr. 16, 2012) (stay granted).

The court reminded Plaintiffs in the Order that "the Court's Order conditioning the grant of an Order of Dismissal without prejudice upon payment of certain attorneys' fees and costs was carefully limited to avoid any of the charges allowed by the Court being for work that can be used in the federal action." (JA395).

The court concluded that, with few exceptions, NBCUniversal's fees and costs were reasonable:

> [W]ith only a few exceptions, the requested fees and costs are reasonable. From Defendants' perspective, this case involves a serious attack on their First Amendment right. They had every right to retain distinguished counsel to defend them. The Laffey Index rates that Defendants' lead counsel has used to justify Defendants' fee request are very reasonable. The Court notes that Defendants did not even request fees for in-house counsel, who did much of the work.

(JA395). The court, in rejecting discovery, noted that Plaintiffs would "raise the cost of the Superior Court litigation by deposing attorneys about their timesheets submitted to the Court." (JA395 n.7). The court, however, excluded $154 in costs and fees related to the corporate disclosure that could be used by NBCUniversal in the federal action and two taxi charges. (JA396).

The court ordered Plaintiffs to pay $24,625.23 in attorneys' fees and costs within thirty days (July 25, 2012), as a condition of dismissal without prejudice. (JA396). The court further ordered that the case would remain open until August 3, 2012 and "a failure to pay the court-ordered costs would lead to a dismissal with prejudice." (*Id.*). Finally, the court denied Plaintiffs' motion for sanctions and reconsideration. (*Id.*).

III. Motion to Recuse Judge Zeldon Denied

Plaintiffs did *not* pay the fees and costs ordered by the June 25, 2012 Order. Rather, on July 6, 2012, Plaintiff Dean filed an affidavit (with a supporting memorandum of law) seeking to recuse Judge Zeldon for "extra-judicial bias and prejudice." (JA398, 407). Dean claimed that, "based on Judge Zeldon's statement and actions," it became clear to him that "she favored Defendant Rachel Maddow, who is an avowed lesbian and Defendants NBC and MSNBC, both of which are strong advocates of this gay and lesbian political agenda." (JA399, 408).

As evidence of such "extra-judicial bias and prejudice," Dean:

(1) protested Judge Zeldon's rulings and observation about the Plaintiff's case:

- "Nowhere is this prejudice so evident as in Judge Zeldon's Memorandum and Order of June 25, 2012. In assessing large and punitive attorneys' fees and costs against YCR and me, despite my good faith reasons for having voluntarily dismissed this case for valid reasons..." (JA399, 408);

- "As a judicial officer, Judge Zeldon should not have created even the appearance of partiality by stating that our legitimate argument and absolute right to make it were in bad faith and then just a page later praising defense counsel as 'distinguished.' What Judge Zeldon is saying is that Defendants' counsel are 'distinguished', but we are not." (JA401, 410);

- "Plaintiff requested discovery, but was shot down by Judge Zeldon, obviously to protect 'distinguished counsel' and their clients." (*Id.*);

(2) characterized the court's comment on one factor contributing to the pace of the litigation that "no Anti-SLAPP Motion hearing was set for 2011 because Plaintiffs' counsel...informed the Court that health problems required him to forego travel" as "snide and offensive" and an "unprofessional and injudicious cheap shot." (JA400-01, 409-10);

(3) claimed that Judge Zeldon retained the case after announcing her retirement to "ultimately grant Defendants motions to dismiss and ensure the desired result...and punish Plaintiffs for bringing the case" (JA399, 408);

(4) asserted that the decision was the "result of Judge Zeldon acting like a 'woman scorned' after YCR and I decided to file suit in federal court given [the] decision in *3M Corporation v. Boulter*..." (JA402, 411).

Dean concluded with the assertion that the mere filing of his affidavit *required* Judge Zeldon to recuse herself from the case and that all of her prior orders be vacated. (JA404, 413).

On November 5, 2012, Judge Zeldon denied Plaintiffs' request for her recusal. (JA423). The court determined that "Plaintiffs are mistaken in their belief that the mere filing of an affidavit asserting bias or prejudice together with a certificate from counsel of record...automatically disqualifies the judge." (*Id.*). The court then denied the motion, holding that Plaintiffs failed to present any material facts or extra-judicial source of bias. (*Id.*).

Plaintiffs moved for reconsideration or, in the alternative, for Certification of Interlocutory Appeal (JA435), which motion was denied. (JA437).

Finally, on November 14, 2012, when Plaintiffs had not paid the $24,625.23 by the deadline, and despite repeated warnings, the court dismissed the action with prejudice. (JA441). This appeal followed.

SUMMARY OF ARGUMENT

After choosing to file a defamation suit in Superior Court, Plaintiffs decided to voluntarily dismiss their action – just three days before argument on NBCUniversal's fully briefed dispositive motions and after the motions to dismiss had been converted to summary judgment – and refile the identical action in federal court for the avowed purpose of forum shopping. The Superior Court held that Plaintiffs could dismiss without prejudice, provided that they compensated NBCUniversal for non-duplicative, reasonable fees and costs for tasks that could not be applied to the defense of the federal action. Plaintiffs' arguments that their actions

were not in bad faith are quite simply beside the point; the award of fees was not to sanction Plaintiffs for bad faith litigation, but, as the court said, so that Plaintiffs' tactical decisions were "on their own dime" and not at NBCUniversal's expense. (JA395). The Superior Court did not abuse its discretion in conditioning dismissal without prejudice on payment of non-duplicative fees and costs. Indeed, such conditions are "imposed as a matter of course" for dismissal under Superior Court Civil Rule 41(a)(2) and failure to condition dismissal on fees could have been an abuse of discretion. *Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, 1211 n.7 (D.C. 2002) (citation omitted).

At that time or, indeed, at any time thereafter, Plaintiffs could have chosen to withdraw their dismissal; argument on Defendants' dispositive motions would have been rescheduled in Superior Court and Plaintiffs could have avoided not only delay but any attorney's fees. Instead, fully aware of the consequences, Plaintiffs did not pay the fees, but instead moved to recuse the judge, who then ordered dismissal with prejudice as the court had repeatedly warned. (Point I).

The Superior Court did not abuse its discretion in finding that $24,625.23 in fees and costs – a fraction of what has been actually billed over the many months of litigation – were reasonable. The rate applied, the *Laffey* Matrix rate, used to determine fees awarded against the government, is well below prevailing D.C. rates and below the rates Davis Wright Tremaine normally charges and the discounted rates actually charged NBCUniversal. The fees were limited to the eight tasks that the court identified as non-duplicative of what NBCUniversal could apply to defense of the federal action. The court did not abuse its discretion in rejecting Plaintiffs' contentions that the bills were "padded" or "churned" or that the depositions of counsel were required, where one partner, one associate, and one paralegal worked on a case that raised important First Amendment issues, complex procedural issues, and the application of a

new District of Columbia law. The eight tasks identified by the court required multiple court filings, two substantive briefs, and a number of court conferences, some prompted in response to Plaintiffs' motions for reconsideration and unauthorized supplemental filings. (Point II).

Plaintiffs' grounds for recusal of Judge Zeldon are nothing more than that her rulings were adverse to Plaintiffs. "[T]o be disqualifying, the alleged bias and prejudice must stem from an extra judicial source and result in an opinion on the merits on some basis other than what the judge learned from [her] participation in the case." *Mayers v. Mayers*, 908 A.2d 1182, 1191 (D.C. 2006). Plaintiffs point to no evidence, extrajudicial or otherwise, for their assertion that Judge Zeldon was biased against Plaintiffs' "conservative Christian advocacy against the so-called gay and lesbian agenda" – none. Instead, Plaintiffs cite Judge Zeldon's use of the word "distinguished" to describe NBCUniversal's counsel – a conclusion the court offered in the course of evaluating the fee petition and which the court explained was based on qualifications and quality of written memoranda. (JA424). Judge Zeldon strenuously rejected Plaintiffs' accusation of dilatory tactics on NBCUniversal's part as a "gross and transparent distortion of the record" based on her observations that "[i]t is Plaintiffs – not Defendants – who have created the possibility of increased time and expense out of duplicate actions," and Plaintiffs' counsel's request for extensions for health reasons as a cause for delay. (JA395). Judge Zeldon kept the pending motions in this case, as she did 35 other motions when she took senior status, consistent with D.C. Superior Court's "customary practice" – not because she was a "woman scorned" by Plaintiff's decision to abandon Superior Court at the eleventh hour for federal court where Plaintiffs believed the D.C. Anti-SLAPP Act would not apply. (JA424). Merely because Plaintiffs filed an affidavit seeking recusal did not mean that Judge Zeldon had to automatically

step aside, as Plaintiffs insist. Rather, she properly evaluated the sufficiency of the request and, finding it lacking, performed her duty to preside and decide. (Point III).

In short, the Superior Court did not abuse its discretion in conditioning dismissal without prejudice on payment of reasonable attorney's fees for what would otherwise be wasted expense and then dismissing with prejudice when Plaintiffs failed to pay the fees and costs she had found reasonable. The judgment dismissing with prejudice should be easily affirmed.

STATEMENT OF THE STANDARD OF REVIEW

In their brief, Plaintiffs challenge only (1) the district court's assessment of attorneys' fees and costs as a condition of dismissal; (2) the reasonableness of the cost and fees assessed; and (3) denial of Plaintiffs' recusal demand. They do not challenge the court's determination that dismissal was appropriate only under Rule 41(a)(2) because the motions had been converted to summary judgment or the court's discretion to dismiss the case with prejudice for failure to comply with conditions imposed pursuant to Rule 41(a)(2). *E.g.*, *In re Shearin*, 764 A.2d 774, 778 (D.C. 2000) ("Points not urged in a party's initial brief are treated as abandoned."); *Braxton v. United States*, 852 A.2d 941, 949 n.10 (D.C. 2004) ("A claim not argued in the appellant's brief is waived."); *Mitchell v. United States*, 4 A.3d 154, 156 n.4 (D.C. 2013) (holding that any claim "counsel has not argued in her brief...has therefore been waived").

In reviewing the Superior Court's imposition of conditions for dismissal pursuant to Superior Court Civil Rule 41, this Court may reverse only for abuse of discretion. *Schoonover v. Chavous*, 974 A.2d 876, (D.C. 2009); *Thoubboron v. Ford Motor Co.*, 809 A.2d 1204, (D.C. 2002); *Thoubboron v. Ford Motor Co.*, 749 A.2d 745, (D.C. 2000) (affirming trial court's award of attorneys' fees and costs as condition of dismissal without prejudice). With respect to the *amount* of attorneys' fees that may be imposed as a condition under Rule 41(a)(2), the

determination of the reasonableness of an award is a matter also addressed to the trial court's sound discretion. *Bagley v. Foundation for Preservation of Historic Georgetown*, 647 A.2d 1110, 1115 (D.C. 1994). An award of fees and costs should be reversed "only upon an 'extremely strong showing [which will] convince this court that an award is so arbitrary as to constitute an abuse of discretion.'" *Id.* (citing *Padgett v. Padgett*, 478 A.2d 1098, 1100 (D.C. 1984). "The concept of 'exercise of discretion' is a review-restraining one." *Schoonover*, 974 A.2d at 880 (citing *Johnson v. United States*, 398 A.2d 354, 362 (D.C.1979)). This Court's "role in reviewing 'the exercise of discretion' is supervisory in nature and deferential in attitude." *Id.*

This Court has not set forth a standard of review of the trial court's denial of a motion to recuse. "Since Superior Court Civil Rule 63-I...tracks the language of 28 U.S.C. § 144, we turn to the cases that have been decided under that statute to offer guidance for the case at hand." *Matter of Bell*, 373 A.2d 232, 233 (D.C. 1977); *see also In re Evans*, 411 A.2d 984, 994 n.11 (D.C. 1980) (same). The D.C. "Circuit has never articulated the standard by which it will review denial of a section 144 motion to recuse" but "[m]ost circuits review for abuse of discretion." *S.E.C. v. Loving Spirit Found. Inc.*, 364 U.S. App. D.C. 116, 122, 392 F.3d 486, 492 (D.C. Cir. 2004) (citing *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1356 (3d Cir. 1990); *United States v. Owens*, 902 F.2d 1154, 1157 & n.2 (4th Cir. 1990)); *see also Pesnell v. Arsenault*, 543 F.3d 1038, 1043 (9th Cir. 2008); *United States v. Scoggins*, 485 F.3d 824, 829 (5th Cir. 2007). NBCUniversal respectfully requests that this Court follow the majority rule and apply the abuse of discretion standard.

In reviewing Judge Zeldon's decision not to recuse herself, the question presented is whether the affidavit alleging person bias or prejudice is "sufficient" within the meaning of Superior Court Rule 63-I. *See Carter v. Carter*, 615 A.2d 197, 198 (D.C. 1992). This Court

should "strictly scrutinize" the affidavit for sufficiency, *Mayers*, 908 A.2d at 1192, and find that recusal is not required where the '"average citizen' would not reasonably question the judge's impartiality," *York v. United States*, 785 A.2d 651, 654 (D.C. 2001).

I. The Trial Court Did Not Abuse Its Discretion in Conditioning Voluntary Dismissal Upon the Payment of Costs and Fees

It was entirely proper for the court to condition dismissal without prejudice upon Plaintiffs' payment of NBCUniversal's costs and fees expended on work that could not be used in the district court matter. Such a ruling is, in fact, compelled by controlling precedent, which this Court has repeatedly and recently reaffirmed.

A. Costs and Fees Should Be Assessed When Granting a Dismissal Without Prejudice

Superior Court Civil Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper." *Schoonover*, 974 A.2d at 880 (quoting Super. Ct. Civ. R. 41(a)(2)). When granting a dismissal without prejudice, "the court often may impose terms and conditions that compensate a defendant for the wasted expenditure of funds." *Id.* The purpose of the conditions is "to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal." *Thoubboron*, 809 A.2d at 1211 (quoting *Taragan v. Eli Lilly & Co.*, 267 U.S. App. D.C. 387, 390, 838 F.2d 1337, 1340 (D.C. Cir. 1988))

The most common condition is payment of costs and attorneys' fees. "Generally, courts condition the voluntary dismissal on the requirement that the plaintiff pay defendant's attorneys' fees and costs in order 'to compensate the defendant for the unnecessary expense that the litigation has caused' because 'the defendant may have to defend again at a later time and incur duplicative legal expenses.'" *In re Calomiris*, 3 A.3d at 314 (D.C. 2010) (quoting *Thoubboron*, 809 A.2d at 1211). "Thus, conditioning a voluntary dismissal on the payment of defendant's

legal fees and costs is envisioned as a means to protect the defendant's interests." *Thoubboron*, 809 A.2d at 1211 (citations omitted). Of course, "[a]ttorney's fees and costs are limited to the amount expended for work that cannot be applied to the subsequent lawsuit concerning the same claims, and this amount 'must be supported by evidence in the record.'" *Id.*

An award of fees and costs is the *rule*, not the exception. "Such conditions should be imposed as a matter of course in most cases." *Id.* at 1211 n.7 (quoting *Davis v. USX Corp.*, 819 F.2d 1270, 1276 (4th Cir.1987)); *see also In re Calomiris*, 3 A.3d at 314 ("Rule 41(a)(2) also provides for mitigation of this factor by permitting the trial judge to award the defendant costs and attorneys' fees when granting a voluntary dismissal. Indeed, such an award is customary.").

The trial court's discretion in awarding costs and fees was "exercised in conformity with correct legal principles" and should be affirmed. *Schoonover*, 974 A.2d at 881 (citations omitted). In fact, in its April 23 Opinion, the court acknowledged that this Court "has quoted with approval" an Eighth Circuit decision "that a court's failure to condition a voluntary dismissal upon the plaintiff's payment of attorney's fees and costs may constitute an abuse of discretion." (*See* JA301) (citing *Thoubboron*, 809 A.2d at 1211 n.7 (quoting *Belle-Midwest, Inc. v. Missouri Prop. & Cas. Ins. Guar. Assoc.*, 56 F.3d 977, 978 (8th Cir.1995))). The Superior Court also recognized that this Court has "made clear that the failure of a plaintiff to comply with the Court's conditions of dismissal may lead to dismissal of the case with prejudice." (*See* JA301) (citing *Thoubboron*, 809 A.2d at 1211-12); *see also Choice Hotels Int'l., Inc. v. Goodwin and Boone*, 11 F.3d 469, 471 (4th Cir. 1993) (Fed. R. Civ. P 41(a)(2) "allows the district court to dismiss the plaintiff's action without prejudice but with conditions that the plaintiff must satisfy, and to specify that the dismissal will become prejudicial if the plaintiff fails to satisfy the conditions.").

B. Plaintiffs' Good Faith Is Irrelevant to Imposition of Costs and Fees

Plaintiffs object strenuously that, because their actions were in good faith, the court's imposition of costs and fees was improper. (Br. at 15). Yet, this proposition, and the cases Plaintiffs point to in support, are inapposite. The authority Plaintiffs cite concern whether attorneys' fees were an appropriate sanction for bad faith or frivolous litigation. *See Schwartz v. Franklin Nat'l Bank*, 718 A.2d 553, 555 (D.C. 1998) (concerning appropriateness of sanctions under Super. Ct. Civ. R. 11); *District of Columbia v. Fraternal Order of Police, Metro. Police-Labor Comm.*, 691 A.2d 115, 118-19 (D.C. 1997) (same); *Synanon Found., Inc., v. Bernstein*, 517 A.2d at 29 (D.C. 1986) (discussing when it is proper to award "attorneys' fees for bad faith litigation"). These cases do not stand for the proposition that attorneys' fees are never appropriate absent bad faith, but merely that the requisite bad faith must be demonstrated when imposing fees as a sanction for bad faith litigation.

Bad faith, however, is not the basis for the June 25 Order. As the Superior Court recognized in its April 23, 2012 Order when deciding to impose conditions upon a voluntary dismissal, "[t]he purpose of [a] 'terms and conditions' clause is to protect a defendant from any prejudice or inconvenience that may result from a plaintiff's voluntary dismissal." (JA300-01) (citing *Thoubboron*, 809 A.2d at 1211 (internal quotation marks and citation omitted)). "Good faith . . . is simply irrelevant to an award of attorney's fees under Rule 41(a)(2)." *Taragan*, 838 F.2d at 1340, 267 U.S. App. D.C. at 390 (quoting *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 (D.C. Cir. 1981)). "No matter how conscientious and diligent [Plaintiffs] may have been, [NBCUniversal] suffered some costs by defending this action in the District of Columbia before it was moved elsewhere, and [NBCUniversal] is entitled to such reimbursement of those

costs as the court may order." *Taragan*, 838 F.2d at 1340, 267 U.S. App. D.C. at 390 (internal quotation marks omitted).

Nor does it matter that Plaintiffs had avowed a "good faith" basis to voluntary dismiss the action in the Superior Court. Whether or not forum-shopping to take advantage of a "change in circumstances whereby the District of Columbia's Anti-SLAPP statute was ruled no longer applicable in federal court" is "a good faith legal basis to voluntary dismiss the Superior Court action," (Pl. Br. at 6), this is not the relevant inquiry. The "fact that it had become more advantageous for [Plaintiffs] to drop [their] claim does not mean that [they were] entitled to do so." *Schoonover*, 974 A.2d at 883.

The Superior Court properly weighed equities on both sides and expressly concluded that it was "Plaintiffs – not Defendants – who [ ] created the possibility of increased time and expenses arising out of duplicative actions, and the certainty that some of the time and expense that Defendants have experienced, unless reimbursed by Plaintiff, would be wasted." (JA395); (*see also* JA394) ("The Court finds that Plaintiffs' accusations that the Defendants' conduct in this litigation is a 'bad faith attempt to further harm Plaintiffs' or that Defendants are engaging in 'underhanded and extreme methods of delaying and raising the cost of this litigation' to be a gross and transparent distortion of the record."). Plaintiffs' protests of unfairness now ignore that they "alone [are] responsible for whatever predicament [they] find[] [themselves] in." *Yoffe v. Keller Indus., Inc.*, 582 F.2d 982, 983-84 (5th Cir. 1978) (recognizing authority of district court to impose fees and conditions on plaintiff that sought to voluntarily dismiss action on eve of trial to pursue parallel state court action).

The court's June 25 Order was "carefully limited to avoid any... charges...for work that [could] be used in the federal action." (JA395). It was well within the court's authority to

impose these conditions – indeed '"such conditions should be imposed as a matter of course.'" *In re Calomiris*, 3 A.3d 308, 314-15 (D.C. 2010) (quoting *Thoubboron*, 809 A.2d at 1211 n.7). Where, as here, "well-established and undisputed legal rules were applied to a fully litigated assessment of all the circumstances...[t]here [is] no abuse of discretion...and the judgment of the Superior Court [should be] affirmed." *Schoonover*, 974 A.2d at 884.

C. The Court's Preliminary Statements About Plaintiffs' Right to Voluntarily Dismiss Are Mischaracterized and Irrelevant

Plaintiffs also suggest that an imposition of costs and fees is not appropriate because the court "initially agreed that Plaintiffs could voluntarily dismiss the Superior Court action without paying attorneys' fees." (*See* Br. at 7). Not merely does this argument not constitute an adequate legal basis for challenging the court's order, it is a misstatement of the record. At no point during the February 17 or February 22 teleconferences was the issue of attorney fees' or costs discussed. Also, as the court emphasized in its April 23 Order, the court did not *agree* with Plaintiffs during the February 22 teleconference that voluntary dismissal was proper. (JA300). The court simply acknowledged that the case has been closed by the clerk of court as a matter of course upon the filing of the voluntary dismissal. *Id.* What is more, the court expressly declined to decide the issue during the teleconference. (*See* JA256) (stating "you're arguing a motion that hasn't been filed and I don't do business that way" and inviting the parties to brief the issue).

The major flaw in Plaintiffs' challenge, however, is that the statements by the court which Plaintiffs highlight as "unfair" had no impact on the options available to Plaintiffs and resulted in no prejudice to Plaintiffs. Had the court remained utterly silent about Plaintiffs' expressed intent to file a voluntary dismissal, Plaintiffs would have had two choices: They could have proceeded with filing a notice of voluntary dismissal, to which NBCUniversal would have filed a motion to vacate and the parties would be in precisely the same position as they are today.

Or, Plaintiffs would not have filed a notice of voluntary dismissal, and the case would have proceeded three days later to a hearing on the summary judgment motion as had been scheduled. Plaintiffs never lost, however, this option to have their case heard on the merits without an obligation to pay NBCUniversal's fees and costs. If they wished to avoid the conditions imposed with voluntary dismissal, they needed only to have withdrawn their motion for voluntary dismissal and joined in NBCUniversal's request to re-set the matter for oral argument before the Superior Court. *See Thoubboron,* 809 A.2d at 1212 (D.C. 2002) ("In the event that the plaintiff finds that the conditions [of dismissal] are too onerous, the plaintiff may withdraw the motion and risk trial.") (internal quotation marks omitted). They sought instead to have their cake and eat it too – a federal action with no reimbursement for fees incurred because of their decision to abandon their Superior Court action on the eve of argument after seven months of litigation.

II. The Trial Court Did Not Abuse Its Discretion in Finding That the Costs and Fees Assessed Were Reasonable

A "request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983); *Hampton Courts Tenants Ass'n v. District of Columbia Rental Hous. Comm'n,* 599 A.2d 1113, 1115 (D.C. 1991). Accordingly, "the determination of the reasonableness of attorney's fee amounts is clearly 'a matter within the trial judge's discretion.'" *Hampton Courts*, 599 A.2d at 1115 (citing *District of Columbia v. Jerry M.*, 580 A.2d 1270, 1280 (D.C.1990)). This is appropriate in view of the trial court's "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Id.* (citing *Hensley*, 461 U.S. at 437). This Court should be "hesitant to upset the product of [the trial court's] judgment," particularly as it is the trial court which "closely monitors the litigation on a day-to-day basis...is intimately familiar with the...pleadings, memoranda, and documents filed, and...observes[s] the proficiency of counsel

in court. *Hampton Courts*, 599 A.2d at 1117 (citing *Copeland v. Marshall*, 641 F.2d 880, 901 (D.C. 1980) (en banc).

The "starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Henderson*, 493 A.2d at 999; *see also District of Columbia v. Jerry M.*, 580 A.2d 1270, 1281 (D.C. 1990). There is a "strong presumption" that this calculation constitutes a reasonable fee. *See District of Columbia v. Patterson*, 667 A.2d 1338, 1346 (D.C. 1995) (quoting *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992)). The trial court applied this method in assessing NBCUniversal's fees and determined that, with minor exceptions, the requested fees and costs were reasonable. (JA395). Plaintiffs now bear the burden of demonstrating that the court abused its discretion. *Hampton Courts*, 599 A.2d. at 1116. They have failed to do so.

A. The Calculation of Hours Expended Was Reasonable

An applicant for attorneys' fees should submit "billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437. This does not require "daily task-specific billing," and the "fee application need not present 'the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney.'" *Jemison v. National Baptist Convention, USA, Inc.*, 720 A.2d 275, 287 (D.C. 1998) (citation omitted). This Court has found it sufficient, for example, to submit "the daily time entries of each of the attorneys and legal assistants involved ...prepared in the same manner in which the law firm maintained its time entries for billing purposes." *Id.* at 287-88.

In its fee application, NBCUniversal submitted contemporaneous billing records that did, in fact, reflect the exact number of minutes spent on particular activity for work performed on

this case by the law firm Davis Wright Tremaine. These billing records are redacted versions of the same bills presented to NBCUniversal for payment. The activities for which time was calculated included only those eight tasks specifically enumerated in the court's April 23, 2012 Order, which the court determined would not be duplicative of work performed in the federal action.[2] Plaintiffs do not dispute that the work preparing and participating in the eight tasks identified could not be applied to the federal action, and therefore concede this point. *In re Shearin*, 764 A.2d at 778.

Rather, Plaintiffs take issue with the number of hours required to complete certain tasks, the number of attorneys involved, and the ability to recoup fees for time necessarily expended on briefing the fee award. As an initial matter, it is settled that "the time spent litigating the fee award normally is itself compensable." *See Copeland*, 205 U.S. App. D.C. at 411, 641 F.2d at 901; *Gen. Fed. of Women's Clubs v. Iron Gate*, 537 A.2d 1123, 1129-30 (D.C. 1988) ("[A] party may also be awarded fees on fees, *i.e.*, the reasonable expenses incurred in the recovery of its original costs and fees."). Therefore, it was entirely appropriate for the court to consider both the fee motion and the motion to vacate in its assessment. That the fee motion may have accounted for the "second largest portion of the attorneys' fees calculated," as Plaintiffs point out, is irrelevant. Particularly so when understood in context: NBCUniversal did not seek any attorneys' fees or costs for a significant amount if its substantive legal work, including for the Rule 12(b)(6) motion to dismiss and the Anti-SLAPP motion.

Further, Plaintiffs' argument that there was an unreasonable number of attorneys (four) participating in NBCUniversal's defense should be disregarded as specious. Only two attorneys

[2] Notably, NBCUniversal has not applied for fees for opposing Plaintiffs' Motion to Recuse, which was filed after – and in reaction to – the Superior Court's award of fees in its June 25 Order.

from Davis Wright Tremaine – one partner and one associate – participated in this action and are reflected in the bills, hardly an unreasonable number given the tenor of the litigation, the $50,000,000 demanded in damages, and the serious attack on NBCUniversal's First Amendment rights as recognized by the court. *See Bagley*, 647 A.2d at 1115 (finding two attorneys not unreasonable for a case with claim for a million dollars). Indeed, as this Court has recognized, "if only one attorney – the partner – had represented [NBCUniversal] throughout the case, the total fee might have been higher as a result of [her] higher hourly rate." *Id.* at 1115 n.13. Moreover, as the Superior Court recognized in assessing the reasonableness of the fees, NBCUniversal did not seek legal fees for work performed by its in-house counsel, even though fees for time spent by in-house counsel generally are recoverable. *See Bond v. Blum*, 317 F.3d 385, 400 (4th Cir. 2003) ("[I]n-house counsel representing the corporation for whom they work may also be awarded attorneys' fees."); *FDIC v. Bender*, 337 U.S. App. D.C. 90, 94-95, 182 F.3d 1, 5-6 (D.C. Cir. 1999) (fees for work performed by in-house counsel recoverable upon a showing that such counsel actively participated in the litigation). Further, Plaintiffs cannot credibly be claiming that in-house counsel, as the client, was not permitted to consult with and agree on litigation strategy with its outside attorneys or attend court conferences.

Plaintiffs have not met their burden of demonstrating that the hours expended by NBCUniversal's outside counsel were unreasonable. They have merely gone through the billing records, *reflecting actual time worked*, and arbitrarily reduced the hours based on misguided and implausible assumptions. Plaintiffs assert, incredibly, that NBCUniversal was entitled to spend "no more than a *combined 1 hour*" conferring with counsel on: (1) the February 24, 2012 hearing; (2) whether Plaintiffs' notice of dismissal was proper; (3) NBCUniversal's motion to vacate; (4) Plaintiffs' opposition to the motion to vacate; (5) NBCUniversal's reply to Plaintiffs'

opposition to the motion to vacate; (6) the April 23 Order; (7) NBCUniversal's supplemental reply in support of its motion to vacate; (8) Plaintiffs' supplement in opposition to NBCUniversal's motion to vacate; (9) NBCUniversal's response to Plaintiffs' supplement in opposition to NBCUniversal's motion to vacate; (10) the two motions to admit Attorneys Weiner and Talbert pro hac vice; and (11) the memorandum of law and exhibits filed in response to the April 23 Order.

Plaintiffs' demand that the time NBCUniversal spent researching and drafting its Motion to Vacate, responding to the opposition, and drafting a supplemental response to the Motion to Vacate be reduced to three hours because, "with the advent of LexisNexis and Westlaw...the relevant case law simply comes straight to the computer, ready to be copied to a word processor," is similarly illogical. Although Plaintiffs insist that "this case is a simple action for defamation and false light [and] Davis Wright Tremaine...specializes in First Amendment defense," (Br. at 18), the motion to vacate was anything but routine. Parties rarely dismiss on the eve of argument, only to refile an identical lawsuit in another court down the street. Plaintiffs' claims that this was a garden variety dispute is even less credible when considering this case involved one of the first applications of the Anti-SLAPP Act in the District of Columbia, and the most complex challenge to the constitutionality of that Act in the Superior Court, which prompted the intervention of the Attorney General of the District. *See Henderson*, 493 A.2d at 1001-02 ("[T]his appears to have been one of the first § 1983 actions tried in the Superior Court. Thus, counsel could reasonably conclude that it was prudent to thoroughly prepare all aspects of the case, both factual and legal, to assist the court in preparing to rule on questions of law."). Plaintiffs "cannot litigate tenaciously and then be heard to complain about the time necessarily spent by [NBCUniversal] in response." *Copeland*, 205 U.S. App. D.C. at 414, 641 F.2d at 904.

Nor did the court need to entertain Plaintiffs' criticisms of the time involved on the two pro hac vice motions. Plaintiffs afford NBCUniversal a mere twelve minutes to have completed these motions (Br. at 19), failing to appreciate that filing each motion involved completing an application package, going to the D.C. Bar to obtain a certification, and filing the certification with a motion, praecipe, affidavit, and proposed order.

Plaintiffs' time suggestions severely misrepresent or underestimate the time it takes to set forth the thoughtful, well-researched defense to which NBCUniversal was entitled. NBCUniversal produced substantive memoranda of law and detailed, contemporaneous billing records, reflecting the time counsel spent on the tasks explicitly enumerated in the April 23 Order. The trial court was "not required to engage in a document-by-document examination of the case record and compare each document to the attorney's time claims with respect thereto.'" *Bagley*, 647 A.2d at 1115 (citing *Henderson,* 493 A.2d at 1001). "Nor should the court be saddled with [for example] determining whether preparation of a particular pleading should have taken only four hours in contrast to the seven hours claimed." *Henderson*, 493 A.2d at 1001; *see also Copeland*, 205 U.S. App. D.C. at 413, 641 F.2d at 903 ("It is neither practical nor desirable to expect the trial court judge to have reviewed each paper in this massive case file to decide, for example, whether a particular motion could have been done in 9.6 hours instead of 14.3 hours.").

Nor was the court required to permit Plaintiffs' additional discovery or an evidentiary hearing into the reasonableness of NBCUniversal's attorneys' fees. (Br. at 23). Plaintiffs have not articulated, as they could not to the Superior Court, what additional, non-privileged information was relevant or necessary to the fee assessment. Plaintiffs' request for discovery – and, most especially, their attempt to depose in-house Attorneys Weiner and Talbert, for whose time no reimbursement is even sought – underscored that their discovery request was merely a

tactic to harass and improperly extract privileged information. (*See* Br. at 18) (criticizing billing records because they do not "detail what specifically was discussed [or] why it was *necessary* for the defense."). Moreover, it is unclear what "back-up time slips" NBCUniversal should (or could) have provided that would have added to the court's determination, given the detail contained in the billing records. (Br. at 9). "Unfocused requests to initiate discovery without indicating its nature or extent serve no purpose," and court has full discretion to deny such requests. *See Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 219 U.S. App. D.C. 94, 104-05, 675 F.2d 1319, 1329-30 (D.C. Cir. 1982). When the court determines that the information submitted provides an adequate factual basis for an award, it may in its discretion decline to hold a hearing or authorize additional discovery. *Id.* Moreover, the court's "discretion in determining the need for a hearing, as in fixing the scope of permissible discovery, should be exercised in light of the fact that the interests of justice will be served by awarding the prevailing party his fees as promptly as possible." *Id.* The court here appropriately exercised "its power to prevent [Plaintiffs] from engaging in a purely vindictive contest" over fees. *Id.*

In short, the Superior Court was "uniquely situated to gauge the reasonableness of the work claimed." *Hampton Court*, 599 A.2d. at 1118. Its decision should be affirmed.

B. Hourly Rates Were Reasonable

The Superior Court also correctly concluded that the hourly rates sought were reasonable in determining the total costs and fees due to NBCUniversal as a condition of voluntary dismissal. Numerous courts have held the actual rate charged by counsel to private clients is generally the best evidence of a reasonable hourly rate. *Nat'l Ass'n of Concerned Veterans*, 219 U.S. App. D.C. at 101, 675 F.2d at 1326 ("[T]he actual rate that applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate."); *Tomazzoli v. Sheedy*, 804 F.2d 93, 98 (7th Cir. 1986) ("For private counsel with fee-paying

clients, the best evidence is the hourly rate customarily charged by counsel or by her law firm."); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 660 (7th Cir. 1985) ("[H]ourly rates used to compute the lodestar are typically the rates lawyers charge clients who pay on a regular basis...."). Indeed, "[a]n attorney's usual billing rate, when in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation, is presumptively reasonable." *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 97 (D.D.C. 2005) (citing cases); *see also Woodland v. Viacom Inc.*, 255 F.R.D. 278, 280-81 (D.D.C. 2008) (same); *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 876 F.2d 465, 469 (5th Cir. 1989), *rev'd on other grounds*, *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir. 1993) (attorney's uncontested customary billing rate is prima facie reasonable).

NBCUniversal provided evidence to the court that the three timekeepers for whom time was submitted have significant experience in defending defamation claims, and have billing rates that are far below the market rates for attorneys of their experience and stature. NBCUniversal supported its application with the annual survey of billing rates among the nation's 250 largest law firms conducted by the National Law Journal. (JA322, 353-55). The rates paid by NBCUniversal on this matter for Ms. Handman, Mr. Eastburg, and Ms. Shapiro were $540, $310, and $229.50, respectively. (JA322). These rates represent a significant discount from their standard 2012 rates ($625, $385, and $265, respectively) and were far below national average for attorneys of their prominence. (JA321-22). This Court has recognized that the Solicitor General of the United States has "conceded that market rate compensation must reflect the level of compensation necessary to attract profit making attorneys to accept" particular types of cases. *Henderson*, 493 A.2d at 1000. "The focus is properly on the prevailing rate in the *private, profitmaking sector*, as opposed to government salary rates. *Id.* (finding judge's

decision to reduce the hourly rate of attorneys to be abuse of discretion). Accordingly, it would have been entirely appropriate for the court to have awarded NBCUniversal fees at the rates at which NBCUniversal was billed.

That being said, NBCUniversal did *not* even seek the amounts it actually paid to defend this litigation. NBCUniversal only sought, and the court therefore awarded, reimbursement at the lower rate prescribed by the *Laffey* Matrix (also known as the USAO Matrix). This is a chart of hourly rates used by the United States Attorney's Office for the District of Columbia to evaluate requests for attorneys' fees in fee-shifting cases for prevailing parties in District of Columbia courts. *See, e.g., Covington v. District of Columbia*, 313 U.S. App. D.C. 16, 24, 57 F.3d 1101, 1109 (D.C. Cir. 1995) ("In order to demonstrate [a reasonable rate], plaintiffs may point to such evidence as an updated version of the *Laffey* Matrix...or their own survey of prevailing market rates in the community."); *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 & n.4 (D.C. 2007) ("[c]ertainly, the trial court did not err in looking to the *Laffey* Matrix as a beginning point for calculating these fees," though "this is not the only valid method for an equitable determination of attorneys' fees"); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 41-42 (D.D.C. 2011).[3] As the court concluded, NBCUniversal "had every right to retain

[3] Several courts have criticized the USAO Matrix as unrealistically low and instead used the Updated *Laffey* Matrix. *See Smith v. District of Columbia*, 466 F. Supp. 2d 151, 156 (D.D.C. 2006) ("While the Updated *Laffey* Matrix was, as of 2003, somewhat more generous to counsel than the USAO Matrix, it was also more accurate."); *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 14-15 (D.D.C. 2000) (updated *Laffey* Matrix "more accurately reflects the prevailing rates for legal services in the D.C. community"); *Hash v. United States*, No. 1:99-CV-00324 (MHW), 2012 WL 1252624, at *22 (D. Idaho Apr. 13, 2012) (concluding the Updated *Laffey* Matrix "is the most accurate representation of rates for legal services in the Washington, D.C. area for complex litigation," and noting "the Federal Circuit's recent statement implying acceptance of the use of the Updated *Laffey* Matrix"). Both Ms. Handman's and Mr. Eastburg's actual rates would fall substantially below even the Updated *Laffey* Matrix rate of $734 for attorneys with 20+ years' experience and $374 for attorneys with 4-7 years' experience. *See* Decl. of Michael Kavanaugh [dkt 259-12], *Hash,* 2012 WL 1252624. However, in the interest of

distinguished counsel.... The Laffey Index rates that Defendants' lead counsel has used to justify [the] fee request are very reasonable." (JA396). Indeed, they are so reasonable that even Plaintiffs do not challenge the rates on appeal. *See, e.g., In re: Shearin*, 764 A.2d at 778 ("Points not urged in a party's initial brief are treated as abandoned.").

III. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs' Motion to Recuse

Plaintiffs' demand to Judge Zeldon that she recuse herself from the litigation was entirely without justification. While Plaintiffs' brief is ripe with adjectives, it is devoid of any facts by which an "average citizen would [ ] reasonably question the judge's impartiality." *York*, 785 A.2d at 654.

A. Recusal Is Not Mandatory Simply Because Plaintiffs Filed an Affidavit

As an initial matter, and contrary to Plaintiffs' assertions, this Court has made it clear that recusal is *not* mandatory simply because a party has filed a motion for disqualification under Superior Court Civil Rule 63-I. *See Matter of Bell*, 373 A.2d 232, 234 (D.C. 1977) ("The mere filing of an affidavit of prejudice does not automatically disqualify a judge.... and the judge must pass on the legal sufficiency of the affidavit."); *see also, e.g., Carter*, 615 A.2d at 198 (stating "[t]he question presented is whether the wife's affidavit in this case was 'sufficient' within the meaning of Rule 63-I" and affirming Superior Court judge's decision not to disqualify herself). Rather the court must first determine whether the affidavit alleging personal bias or prejudice is "sufficient" under the Rule. *Mayers*, 908 A.2d at 1191 ("'[B]ecause the disqualification of a trial judge may disrupt and delay the judicial process, affidavits of bias are

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expediting this application, the NBCUniversal parties did *not* seek rates consistent with the Updated *Laffey* Matrix.

strictly scrutinized for form, timeliness and sufficiency.'") (quoting *In re Evans*, 411 A.2d 984, 994 (D.C. 1980)).

B. The Affidavit Was Not Sufficient to Warrant Disqualification

In assessing sufficiency, the affidavit must satisfy a three-part test: "(1) The facts must be material and stated with particularity; (2) The facts must be such that, if true they would convince a reasonable [person] that a bias exists; and (3) The facts must show the bias is personal as opposed to judicial, in nature." *Carter*, 615 A.2d at 199 (citing *Matter of Bell*, 372 A.2d at 234)). "[T]o be disqualifying, the alleged bias and prejudice 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" *Mayers*, 908 A.2d at 1194; *see also Burt v. First American Bank*, 490 A.2d 182 (D.C. 1985) (bias must come from outside the four corners of the courtroom). "Personal bias is unlike judicial exposure to the case in that a distinction is drawn 'between a judicial determination derived from evidence and lengthy proceedings had before the court, and a determination not so founded upon facts brought forth in court, but based on attitudes and conceptions that have their origins in sources beyond the four corners of the courtroom.'" *Matter of Bell*, 372 A.2d at 234 (citing *In re Fed. Facilities Realty Trust*, 140 F. Supp. 522, 526 (N.D. Ill. 1956)); *see also In re Banks*, 805 A.2d 990, 1003 (D.C. 2002) ("'[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'") (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

The attacks levied by Plaintiffs against the court were neither deserved nor supported by the record. Plaintiffs baldly assert that Judge Zeldon harbored an "extra-judicial bias and

prejudice against [them] stemming from [their] conservative Christian advocacy against the so-called gay and lesbian political agenda." (JA399, 408). They have pointed to no facts, no statements, no actions, no affiliations and no extra-judicial bias by Judge Zeldon to support this charge. In fact, they identify absolutely no factors about Judge Zeldon that reveal any view she may have about the Plaintiffs' self-described "advocacy." Instead, they have pointed to the court's decisions and observations in this case and asserted that, because those decisions were unfavorable to their litigation position, it must be that the court harbors a personal bias against them. This circular argument is legally insufficient to establish judicial bias.

Plaintiffs allege, for example, that the fact that Judge Zeldon decided to retain this case after announcing her retirement somehow proves her bias towards Plaintiffs. (*Id.*) Yet, how Judge Zeldon's decision to seek senior status and to retain this case is at all related to her opinions about Plaintiffs is unclear and completely unanswered by Plaintiffs. Such "speculation will not satisfy the requirements for disqualification of a judge." *York*, 785 A.2d at 655 (citing *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993). Judge Zeldon made clear that this decision has nothing to do with Plaintiffs or this case. (JA424). Given that she went "directly from retirement to senior judge status," "she was expected to keep all motions that were pending as of December 30, 2011." (*Id.*). The court retained not only this case, but more than thirty-five motions in other cases as well. (*Id.*).

Plaintiffs also claim Judge Zeldon demonstrated her extrajudicial prejudice by "reneg[ing] on her agreement with Plaintiffs to voluntarily dismiss the case (with no assessment of attorneys' fees)." (Br. at 23). As explained in Section I.C, *supra*, at pp. 24-25, Plaintiffs distort the record. There was no "agreement" between Judge Zeldon and Plaintiffs, and Plaintiffs suffered no prejudice based on any preliminary comments she may have made about the notice

of voluntary dismissal. Nevertheless, the conclusion Plaintiffs draw is a non-sequitor. It is difficult to square why Judge Zeldon would initially reach a supposed "agreement" with Plaintiffs with their argument that she was harboring an extra-judicial bias and scorn for them.

The balance of Plaintiffs' arguments relies exclusively on the court's June 25 Order. Plaintiffs' central fault with this Order is that the court characterized NBCUniversal's counsel as "distinguished" (in the context of evaluating the reasonableness of their fees) while simultaneously disagreeing with the positions advanced by Plaintiffs. (Br. at 23-24); (JA399, 401, 408, 411). However, to be disqualifying, the alleged bias and prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis *other than what the judge learned from his participation in the case.*" *Mayers*, 908 A.2d at 1191 (emphasis added). "[T]he bias or prejudice must be personal in nature and have its source beyond the four corners of the courtroom." *Id.* at 1190-91 (citations omitted). The court explained that the "use of the term 'distinguished'...in the course of evaluating Defendants' Motion for Attorney's Fees ..." was based on "paragraphs six and eight of the Handman Affidavit ...as well as the quality of Defendants' written memoranda submitted in this case." (JA424). The court's decision not to permit needless discovery was not designed to protect counsel, but rather to avoid turning the issuance of fees into an unnecessary sideshow that would have raised the cost of the litigation and risked disclosure of privileged communications. (*See* Section II.A, *supra,* at pp. 30-31).

Thus, the court's conclusions that Plaintiffs' position was without merit and their representations were "a gross and transparent distortion of the record" were observations formed by Judge Zeldon "on the basis of facts introduced or events occurring in the course of the current proceedings" and cannot constitute a basis for a bias. *In re Banks*, 805 A.2d at 1003. "[O]therwise, every time a trial judge found a litigant unworthy of belief or lacking in good

character he would have to disqualify himself and there would be no end to the litigation. A finding adverse to a litigant is not proof that the finding was influenced by prejudice." *Beavers v. Beavers*, 177 A.2d 892, 893 (D.C. App. 1962) (denying disqualification). Moreover, as set forth in Defendants' Motion to Vacate Notice of Dismissal (and related filings) and in the June 25 Order, the court's conclusions are fully supported by the record and the law. *See Baylor v. United States*, 360 A.2d 42, 45 (D.C. 1976) ("Appellant contends that bias is also demonstrated by various legal determinations adverse to the defense. The challenged rulings were legally correct and proper and do not in any way support an inference of bias against appellant or counsel."). Plaintiffs' multiple supplemental filings and motions for reconsideration, as well as their decision to dismiss the Superior Court action on the eve of argument, support the court's conclusion that it was Plaintiffs – not Defendants – who engaged in tactics that increased the time and expense of this litigation. (JA395).

Plaintiffs also assert that the court responded unprofessionally towards Plaintiffs' counsel, Larry Klayman. (Br. at 22-23); (JA400-01, 409-10). They, quite viciously, attack the court's simple acknowledgement that a hearing was postponed due to medical reasons cited by Mr. Klayman. There is hardly anything "unprofessional" or "injudicious" about such an acknowledgment, Plaintiffs' labels notwithstanding. Not merely is the fact true and already part of the record, it was among the factors that contributed to the pace of the litigation, which Plaintiffs had attributed entirely to Defendants and to which the court was disagreeing. This allegation is particularly spurious given that Plaintiffs, in their own brief to this Court in their "Statement of the Case," made precisely the same comment: "[N]o Anti-SLAPP Motion hearing was set for 2011 b*ecause Plaintiffs' counsel Larry Klayman, Esq. had health problems that required him to forego travel.*" (Br. at 1-2) (emphasis added).

Plaintiffs' renewed characterization of the court as "jilted" and a "woman scorned" is indefensible, particularly in light of Plaintiffs' own unsupported accusations that the court has "denigrate[d]," disparage[d]," "berate[d]" and "mocked" Plaintiffs and their counsel. Given the lack of *any* basis for this attack on the court's partiality, Plaintiffs' recusal demand was properly dismissed as lacking the "good faith" required by Rule 63-I. Indeed, as has been judicially recognized and as the court was well aware, Plaintiffs' counsel "Mr. Klayman has a history of accusing judges of bias or prejudging cases." *Macdraw, Inc. v. The CIT Group Equip. Financing, Inc.*, 994 F. Supp. 447, 460 (S.D.N.Y. 1997). For example:

- In a case in the United States District Court for the Central District of California, a party represented by Mr. Klayman requested recusal and accused the judge of being "anti-Asian," "anti-semitic," and having "prejudged" the case. *See Baldwin Hardware Corp. v. Franksu Enter. Corp.*, 78 F.3d 550, 556-57 (Fed. Cir. 1996). In the course of those proceedings, the *Baldwin* trial judge had sanctioned Mr. Klayman for unprofessional conduct by permanently and prospectively barring him from appearing before the judge in the future, and by requiring him to attach the sanctions order to any future *pro hac vice* applications. *Id.* at 561. That decision was upheld on appeal. *Id.* at 561-62.

- In a case in the United States District Court the Southern District of New York, a party represented by Mr. Klayman requested recusal of *two judges* on the same matter, after those judges had issued unfavorable rulings. *See Macdraw, Inc. v. The CIT Group Equip. Financing, Inc.*, 994 F. Supp. 447, 448-50 (S.D.N.Y. 1997). Mr. Klayman moved for recusal of the first judge, and when that request was denied, filed with the Second Circuit a writ of mandamus. When the case was transferred to another judge, Mr. Klayman sought recusal of the second judge, questioning his impartiality in part because that judge was Asian-American. *Id.* For this reason, the second judge sanctioned Mr. Klayman for "undignified and discourteous conduct that was both degrading to the Court and prejudicial to the administration of justice" and levied the same sanctions against Mr. Klayman as did the *Baldwin* court. *Id.* at 455, 460. That decision too was upheld on appeal. 138 F.3d 33, 38-39 (2d Cir. 1998).

- In two cases in the United States District Court for the District of Columbia, Mr. Klayman unsuccessfully moved to disqualify the judge hearing both matters based on her rulings and because she was appointed by the Clinton administration and was allegedly affiliated with the Democratic Party. *See Klayman v. Judicial Watch, Inc.*, 744 F. Supp. 2d 264 (D.D.C. 2010) (J. Kollar-Kotelly); *Sataki v. Broadcasting Bd. of Governors*, 773 F. Supp. 2d 54, 55 (D.D.C. 2010) (J. Kollar-

Kotelly). In denying the motions for recusal, the court noted: "Although it is clear that Klayman is displeased with the substance of certain of those decisions, disqualification is not required merely because he disagrees with the Court's judicial rulings, and Klayman has failed to identify with particularity any alleged extrajudicial source of bias." *Klayman,* 744 F. Supp. 2d at 278; *see also Sataki*, 773 F. Supp. 2d at 69 (same). In response to these rulings, Mr. Klayman filed a complaint against Judge Kollar-Kotelly before the Judicial Council of the District of Columbia. *See Klayman v. Kollar-Kotelly et al.,* No. 1:11-cv-01775 (RJL), Compl. at 9-10 (filed Oct. 5, 2011). When the ethics complaint was dismissed as meritless, Mr. Klayman filed a lawsuit in the United States District Court for the District of Columbia against Judge Kollar-Kotelly and Chief Judge David Sentelle (who had allegedly dismissed the ethics complaint), alleging that they had "acted[ed] in conspiracy" to cover up Judge Kollar-Kotelley's purported misconduct. *Id.* at 10. Judge Richard Leon dismissed Mr. Klayman's action against these two judges for lack of subject-matter jurisdiction. *Klayman v. Kollar-Kotelly*, 892 F. Supp. 2d 261, 264 (D.D.C. 2012), *summarily aff'd*, No. 12-5340, 2013 WL 2395909, at *1 (D.C. Cir. May 20, 2013). Mr. Klayman accused Judge Leon of conflict of interest as evidenced by the fact that he issued his decision on Yom Kippur, and Mr. Klayman demanded production of communications between Judge Leon and other judges, a request Judge Leon denied. *Klayman v. Kollar-Kotelly*, No. 1:11-cv-01775-RJL, ECF No. 31 (D.D.C. Sept. 27, 2012).

- In a case in Ohio state court involving a parental rights dispute, Mr. Klayman moved to disqualify the magistrate judge after trial arguing that the magistrate's opinion on the parenting issues "'is so infused with personal animosity towards [him] that it should be viewed as a textbook example of an abuse of discretion.'" *Klayman v. Luck*, Nos. 97074, 97075, 2012 WL 3040043, at *4 (Ohio Ct. App. July 26, 2012), *appeal not accepted for review*, No. 2012-1771 (Ohio Jan. 23, 2013). The trial court denied his motion and the court of appeals affirmed. *Id.* ¶¶ 19-22.

Plaintiffs' counsel exhibits a pattern of baseless attacks on the courts that disagree with him and the positions of his clients. Plaintiffs, by their current demand, are engaging in similar intimidation and litigation tactics. Judge Zeldon's decision not to recuse herself was the appropriate one. Indeed, a judge has an affirmative "obligation not to recuse herself when" – as here – "it is not required." *Mayer*, 908 A.2d at 1991 (citing *Kreuzer,* 896 A.2d at 249–50).

CONCLUSION

For the foregoing reasons, NBCUniversal respectfully requests that this Court affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of July, 2013, a copy of the foregoing Brief for Appellees was served by first class U.S. mail, postage prepaid, to:

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