UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY SHERROD, Plaintiff,	)	Case No. 1:11-cv-00477-RJL
v.	)	
ANDREW BREITBART, LARRY O'CONNOR, and JOHN DOE, Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ANDREW BREITBART'S SPECIAL MOTION TO DISMISS COMPLAINT UNDER THE DISTRICT OF COLUMBIA ANTI-SLAPP ACT OF 2010

Defendants Andrew Breitbart ("Breitbart") and Larry O'Connor ("O'Connor") (collectively, "Defendants"), by and through their respective counsel and pursuant to Local Rule of Civil Procedure 7(a), hereby submit the following Memorandum of Points and Authorities in support of Defendants' Special Motion to Dismiss Plaintiff's Complaint Under The Anti-SLAPP Act of 2010, 58 D.C. Reg. 741 (the "Anti-SLAPP Act"),[1] a copy of which is attached as **Exhibit 1**.

PRELIMINARY STATEMENT

Plaintiff has brought a classic SLAPP suit. Defendants file this Anti-SLAPP Motion now because the terms of the District of Columbia's newly enacted Anti-SLAPP Act, which became effective on March 31, 2011, require its filing at this juncture. The Court does not, however, have to adjudicate this motion at this stage of the proceedings and indeed, it would be in the

[1] SLAPP stands for a "Strategic Lawsuit Against Public Participation." The statute creates a procedural mechanism for the early evaluation of certain claims that threaten to inhibit free expression on public affairs. It is retroactive and applies to cases pending at the time of its enactment. *See Montgomery v. District of Columbia*, 598 A.2d 162, 166 (D.C. 1991) and *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 352 (1995) ("[T]he statute applies to actions which accrued before its effective date because it does not change the legal effect of past conduct.); *see also Aronson v. Dog Eat Dog Films, Inc.*, 2010 U.S. Dist. LEXIS 125253, 5-6 (W.D. Wash. Nov. 16, 2010) (applying an anti-SLAPP statute when the statute became effective after the lawsuit was initiated but before the defendant filed his responsive pleading).

interests of the orderly disposition and administration of this case to defer the adjudication of this motion until a later time. Defendants have filed a motion to dismiss on the grounds that venue is not proper in the District of Columbia. If the Court dismisses or transfers this case to California, Defendants will move to strike this case pursuant to California's well-developed Anti-SLAPP statute (California Code of Civil Procedure § 425.16) and brief the motion under California law. If the case remains in this District, other additional precedent will inform the Court's consideration of the motion. Defendants also have moved to dismiss pursuant to Rule 12(b)(6) on the grounds that the statement which Plaintiff alleges to be defamatory are all non-actionable expressions of opinion. Defendants suggest a conference with the Court and Plaintiff to determine how best to approach these issues in light of the concurrently filed 12(b) motion.

Defendants further note that for purposes of this Anti-SLAPP Motion, Defendants are not seeking to dismiss any claim in Plaintiff's Complaint on the grounds that Plaintiff cannot satisfy her enormous burden of proving by clear and convincing evidence that Defendants acted with "actual malice" as that term is used and defined in *New York Times v. Sullivan*, 376 U.S. 354 (1964) and its progeny. Defendants fully reserve all rights to move on such grounds at a later time, if necessary, including pursuant to California's Anti-SLAPP act, in a motion for summary judgment or at trial.

I. SUMMARY OF ADDITIONAL FACTS

A complete recitation of the background facts relevant to this case is set forth in the concurrently filed Motion to Dismiss Pursuant to Rule 12(b). For the convenience of the Court and the Parties, Defendants will not repeat those facts in this Motion, but rather hereby respectfully incorporate them by reference. One public statement by Plaintiff Shirley Sherrod

("Sherrod") warrants specific mention. On July 22, 2010, during a live CNN interview, Sherrod vowed to sue and silence Breitbart because she believes Breitbart's views are divisive:

> *KIRAN CHETRY, CNN ANCHOR: Again, you got to hear the whole thing in context. Would you consider a defamation suit against Andrew Breitbart?*
>
> *SHERROD: I really think I should. You know, I don't know a lot about the legal profession**, but that's one person I'd like to get back at**.*
>
> . . .
>
> *ROBERTS: So, in getting back at him, what would you be looking to exact from him?*
>
> *SHERROD: I don't know what I can get from him, an apology at this point. And he hasn't made that. It's just not enough for me.*
>
> *ROBERTS: Not enough for you?*
>
> *SHERROD: No. He didn't -- he didn't apologize.*
>
> *CHETRY: **Would you like his site to be shut down**?*
>
> *SHERROD: **That would be a great thing. Because I don't see how that advances us in this country. I don't see how that helps us, at a time when we have many, many minority groups in this -- many, many ethnic groups I guess is what I mean to say -- in this country, at a time when we should be trying to look at how we can make space for all of us in this country, so that we can all live and work together. He's doing more to divide us.**[2]*

During the ensuing seven months, Sherrod continued to state publicly that this lawsuit was coming.[3] Not coincidentally, her threats persisted as Breitbart continued to investigate

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[2] Transcript of CNN American Morning (July 22, 2010), available at http://transcripts.cnn.com/TRANSCRIPTS/1007/22/ltm.01.html, attached as **Exhibit 2**. The Defendants respectfully request that this Court take judicial notice pursuant to Federal Rule of Evidence 201(b) of this and other factual information available in the public domain cited and described herein and attached to this Memorandum as Exhibits 2 through 7. *See e.g., Washington Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (taking judicial notice of newspaper articles); *Washington Ass'n for Television and Children v. F.C.C.*, 712 F.2d 677, 683 n.12 (D.C. Cir. 1983) (taking judicial notice of a speech); *Hamilton v. Paulson*, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008) (Walton, J.) (taking judicial notice of website).

[3] Marc Lacey, *A Lesson for the President*, N.Y. TIMES (Jul. 30, 2010), available at http://query.nytimes.com/gst/fullpage.html?res=9403EEDD153AF933A05754C0A9669D8B63&ref=shirleysherrod, attached as **Exhibit 3**; Julia Love, *Ousted U.S. Official Turns Down Job*, L.A. TIMES (Aug. 25, 2010), available at http://articles.latimes.com/2010/aug/25/nation/la-na-sherrod-says-no-20100825, attached as **Exhibit 4**.

whether millions of dollars in taxpayer money was improperly being awarded to claimants, including Sherrod, in the controversial *Pigford* class action litigation.[4]

Sherrod's lawsuit is nothing short of a direct assault on the Constitutionally guaranteed rights of free speech that protect not just Breitbart, but every other journalist, blogger and citizen who publicly expresses opinions on social, political and other issues of public concern. Sherrod did not initiate this action because she wants recompense; she wants revenge. She is trying to muzzle Breitbart—because she does not like his politics or his journalistic investigation of *Pigford*.

Her case illustrates precisely why the District of Columbia recently enacted its own Anti-SLAPP Act. The District has joined some 28 other jurisdictions with similar statutes in effect throughout the country which enable courts to quickly dispose of lawsuits—like Sherrod's—which threaten to chill a citizen's ability to speak out on issues of public interest.

II. THE ANTI-SLAPP ACT SQUARELY APPLIES TO THIS ACTION

Sherrod's Complaint pleads three purported claims for relief: (1) defamation; (2) false light; and (3) intentional infliction of emotional distress. All three arise from the statements made in the July 19, 2010 article posted on BigGovernment.com (the "Blog Post") and from two excerpts of Sherrod's March 27, 2010 speech embedded in the Blog Post. Because Sherrod was a public official[5] at the time Breitbart published the Blog Post and segments of her speech, and

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[4] The public record shows that Sherrod played and continues to play an important role in *Pigford*. In July 2009, New Communities, Inc.—a Georgia communal farm run by Sherrod and her husband, Charles, obtained the largest single class action settlement ever awarded against the USDA in *Pigford*—reported to be $13.3 million dollars—which included $150,000 each for Charles and Shirley Sherrod for "pain and suffering." The next month, Sherrod was appointed to the USDA and became its Georgia Director of Rural Development. *See, e.*g., Dan Weil, *Sherrod Won Earlier Case Against USDA*, NEWSMAX (Jul. 22, 2010), available at http://www.newsmax.com/PrintTemplate.aspx?nodeid=365407, attached as **Exhibit 5**. In the months following the events of mid-July 2010, members of Congress started calling for an investigation of alleged fraud within the *Pigford* class action. Breitbart has been covering this developing story on Big Government. In December 2010, Breitbart issued a 29-page investigative report which includes an explanation of Sherrod's involvement in *Pigford*. *See, e.g.*, Carolina May, *Will Pigford Vindicate Andrew Breitbart?*, THE DAILY CALLER (Dec. 9, 2010), available at http://dailycaller.Com/2010/12/09/will-pigford-vindicate-andrew-breitbart-print/, attached as **Exhibit 6**.

[5] *See* Complaint ¶ 1(referring to Sherrod as "a former Presidential appointee and former Georgia State Director for Rural Development for the United States Department of Agriculture").

further because Breitbart's comments and Sherrod's speech itself relate to issues of public concern, Sherrod's claims fall squarely within the Anti-SLAPP Act.

The Anti-SLAPP Act provides that a defendant who makes a showing that the claim at issue arises from an act in furtherance of the right to free speech related to an issue of public concern may file a special motion to dismiss. Once such a showing is made, the burden then immediately shifts to the plaintiff, who must come forward with evidence to prove that the claim is likely to succeed on the merits. If plaintiff fails to meet this burden, the motion is granted, the case is dismissed with prejudice, and the defendant may seek an award of litigation costs, including attorney fees. (Section 3(a)-(e)).[6]

The Anti-SLAPP Act unquestionably applies to this case. First, Sherrod alleges she was a high ranking governmental official when the alleged defamatory matters were published. (See Complaint, ¶ 1, referring to Sherrod as "a former Presidential appointee and former Georgia State Director for Rural Development for the United States Department of Agriculture.") Accordingly, Sherrod is, by definition, a "public figure" and former "public official." Second, the "speech" at issue (i.e., Sherrod's speech and Breitbart's Blog Post commentary) concerns race and race relations, especially as they touch on public debate. Third, Breitbart's published comments clearly were expressions of opinion on matters of unquestionable public significance; notably: race; race relations; social policies; the importance of the Tea Party movement; the media's coverage of the Tea Party; and, the role of the NAACP in the political process.

The legislative history demonstrates that the Anti-SLAPP Act was intended to apply to precisely this type of action. According to the report of the Council on the District of Columbia Committee on Public Safety and the Judiciary (the "Committee Report"):

> Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend of lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public

[6] Pursuant to the Court's Consent Orders dated March 15, 2011, and April 12, 2011, the time for filing this motion has been extended through and including April 18, 2011.

> participation—or SLAPPs—have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further defendants of a SLAPP must dedicate a substantially [sic] amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this [sic] Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.[7]
>
> (emphasis added).

The Committee Report also cited a number of relevant studies, which found that "these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander) . . ." (*Id.*, p. 2). Accordingly, "as of January 28, 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue." (*Id.*, p. 3).

The Committee Report further noted that "the actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy." (*Id.*) "What has been repeated by many who have studied this issue . . . is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence." (*Id.*, p. 4). Accordingly, the express purpose of the statute is to ensure that citizens "are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates." (*Id.*)

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[7] Council of the District of Columbia, Committee on Public Safety and the Judiciary Committee Report, "Report on Bill 18-893, Anti-SLAPP Act of 2010" (Nov. 18, 2010), available at http://www.dccouncil .washington.dc.us/images/00001/20110120184936.pdf, attached as **Exhibit 7.**

Unless dismissed pursuant to the Anti-SLAPP Act, the very existence of Sherrod's case threatens Breitbart's right and ability to participate in these important political, social and public policy debates.

III. FOR THE REASONS SET FORTH IN DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP 12 (B)(6), SHERROD CANNOT DEMONSTRATE LIKELIHOOD OF SUCCESS ON THE MERITS AS A MATTER OF LAW

As set forth in Defendants' concurrently filed motion to dismiss pursuant to Rule 12 (b)(6), each of the purported defamatory statements fails as a matter of law either because it was (a) a nonactionable expression of opinion based on truthful disclosed facts; (b) a nonactionable opinion that is not a provably false statement of fact; or (c) a constitutionally protected expression of opinion. Rather than burden the Court or the parties by repeating the details of these arguments, points and authorities, Defendants hereby respectfully incorporate the relevant sections of Defendants' Rule 12 (b)(6) Motion herein.

Unlike in the Rule 12 (b) (6) Motion—where Sherrod is entitled to certain inferences—here, Sherrod bears the burden of demonstrating that her claims are likely to succeed. She cannot meet this far more burdensome standard and, thus, her claims must be dismissed.

IV. CONCLUSION.

If this Court does not dismiss or transfer this action on grounds of improper venue or forum non conveniens pursuant to the concurrently filed motion to dismiss, the Complaint must be dismissed because it violates the Anti-SLAPP Act. Sherrod's nationally broadcasted statements show that her goal in this litigation is to silence Breitbart and wipe his websites from the blogosphere. Even if Sherrod had not foreshadowed her true motives and intentions, the case would still be an impermissible attempt by a public official to inhibit a journalist's Constitutional right of free expression on issues of public importance.

Sherrod cannot meet her burden to show that her claims are likely to succeed on the merits. Accordingly, Defendants respectfully request that the Court grant the Motion.

This the 18th day of April, 2011.

Respectfully submitted,

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