BONNEVILLE COUNTY IDAHO
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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

FRANK L. VANDERSLOOT, individual, and MELALEUCA, INC., an Idaho corporation, Plaintiffs, vs. THE FOUNDATION FOR NATIONAL PROGRESS, dba Mother Jones, a California incorporated nonprofit, and MONIKA BAUERLEIN and STEPHANIE MENCIMER, Defendants.	**CASE NO. CV-2013-532** **ORDER GRANTING THE *MOTHER JONES* DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
FRANK L. VANDERSLOOT, individual, Plaintiff, vs. PETER ZUCKERMAN, individual Defendant.	**Case No. CV-2014-2510** (Consolidated with Case No. CV-2013-532)

I. STATEMENT OF THE CASE

Defendants The Foundation for National Progress, doing business as Mother Jones, a California incorporated nonprofit (hereinafter "*Mother Jones*"), Monika Bauerlein (hereinafter "Bauerlein"), and Stephanie Mencimer (hereinafter "Mencimer") move for summary judgment

in the above-numbered and styled consolidated defamation causes of action.[1] Plaintiffs Frank L. VanderSloot, an individual (hereinafter "VanderSloot"), and Melaleuca, Inc., an Idaho Corporation (hereinafter "Melaleuca"), oppose the Defendants' Motion.[2]

A hearing was held on Mother Jones' Motion on September 17, 2015. Based upon the arguments of the parties, the record, and the relevant authorities, the Defendants' Motion shall be granted.

II. ISSUES PRESENTED

The Defendants premise their request for summary judgment on five theories: (1) no specific reference to Melaleuca; (2) rhetorical hyperbole or protected opinion; (3) lack of proof of actual malice; (4) substantial truth of the statements; and (5) lack of proof of damages.[3]

VanderSloot and Melaleuca reply that the Defendants' statements (1) are "of and concerning Melaleuca;" (2) are false; (3) were published with actual malice; (4) are not opinion or hyperbole; (5) are defamatory *per se*; and (6) caused damages even if not defamatory *per se*.

Based upon the parties' arguments, the record, and the relevant authorities, the following issues must be determined:

1. Did any of the statements at issue refer with particularity to Melaleuca?
2. Were any of the statements at issue protected as opinion or rhetorical hyperbole?
3. Are any of the statements at issue non-actionable truth or substantial truth?
4. Are any of the statements at issue defamatory *per se*?

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[1] Mother Jones' Notice of Motion and Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed July 15, 2014) (hereinafter the **"Defendants' Motion"**).
[2] Plaintiffs' Opposition to Mother Jones' Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed August 17, 2015) (hereinafter the **"Plaintiffs' Opposition"**).
[3] Memorandum of Points and Authorities in Support of Mother Jones' Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed July 17, 2015) (hereinafter the **"Defendants' Memorandum"**), at p. 1.

5. Is there a lack of damages?

6. Has actual malice been shown?

III. FINDINGS OF FACT

1. In late February and early March of 2005, the Idaho Falls *Post Register* published a six-day series of related articles entitled "Scout's Honor"[4] dealing with pedophilia occurring at a local Boy Scout camp.[5]

2. On June 5, 2005, Melaleuca took out a "Community Page Ad" in the Idaho Falls *Post-Register* entitled ""Responsible Journalism or Misleading Propaganda?" (hereinafter the June 5 Community Page Ad).[6] The June 5 Community Page Ad addressed the *Post Register's* "Scout's Honor" series. Of the June 5 Community Page Ad's thirteen paragraphs which bear a title in bold letters,[7] one paragraph, entitled "The Reporter: The Post Register's Peter Zuckerman" states:

> Peter Zuckerman is a fairly new reporter for the *Post Register.* He recently graduated from Poynter College in St. Petersburg Florida. He currently is assigned to cover "cops and courts" stories for the *Post Register.* While in Florida, he wrote an article entitled "Navigating between Silence and Speech" which appeared in a publication called *PointsSouth.* In this article he declared to the public that he is homosexual and admitted that it is very difficult for him to be objective on things he feels strongly about. He explained that other reporters have the same challenge. You can read his article at www.pointssouth.net/2003ps/staging/000249.htm. Much has been said on a local radio station and throughout the community, speculating that the Boy Scout's

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[4] Affidavit of Michael L. LaClare in Support of Plaintiffs' Opposition to Mother Jones' Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed August 4, 2015) (hereinafter the **"LaClare Affidavit"**), at Exhibit 84; Declaration of Tenaya Rodewald in Support of Mother Jones' Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed August 5, 2015) (hereinafter the **"Rodewald Declaration"**), at Exhibit 44.

[5] See: LaClare Affidavit, at Exhibit 15, p. 1; Rodewald Declaration at Exhibit 41, p. 2, and at Exhibit 42, p. 2.

[6] Complaint and Demand for Jury Trial, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed January 29, 2013) (hereinafter the **"Complaint"**), at p. 3, ¶ 4; LaClare Affidavit, at Exhibit 84; Rodewald Declaration, at Exhibit 44.

[7] The June 5, 2005 Community Page ad contains other, untitled paragraphs as well as a grey box with a personal message signed by VanderSloot. LaClare Affidavit, at Exhibit 84; Rodewald Declaration, at Exhibit 44.

position of not letting gay men be Scout Leaders, and the LDS Church's position that marriage should be between a man and a woman may have caused Zuckerman to attack the scouts and the LDS Church through his journalism. We think it would be very unfair for anyone to conclude that is what is behind Zuckerman's motives. It would be wrong to do. The only known facts are, that for whatever reason, Zuckerman chose to weave a story that unfairly, and without merit, paints Scout leaders and church leaders to appear unscrupulous, and blame them for the molestation of little children. That too, is wrong and the editors of the *Post Register* should not have allowed it.[8]

3. On May 7, 2006, Melaleuca took out another "Community Page Ad" in the *Post-Register* entitled "Post Register Attacks the Scouts Again! *When Will It Stop?!*"[9] Of the nine titled paragraphs within that article, one was entitled "Biased Reporter" and read as follows:

> One strange aspect of the original story last year was that the *Post Register* had assigned a gay-rights advocate, Peter Zuckerman, to be the "investigative reporter" on the story. There is nothing wrong with having homosexual reporters but since the Boy Scouts' policy of not allowing homosexual men to be scout leaders has produced so much anger against the scouts from the homosexual community, it seems that if the *Post Register* had wanted a fair and balanced story on the Boy Scouts, they would have assigned a reporter who did not have a personal ax to grind.
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> The recent attacks on Kim Hansen are just as unfair. The *Post Register* continues to use the phony premise created by Zuckerman as the basis for its mean accusations.[10]

4. On February 6, 2012, Mother Jones, a non-profit magazine publisher, published on its website an article entitled: *Pyramid-Like Company Ponies Up $1 Million for Mitt Romney* (hereinafter the "February 6 Article").[11] The paragraphs containing the statements at issue read:

> VanderSloot has long been a controversial figure in Idaho politics, particularly when it comes to issues involving gays and lesbians. In 1999, he spent big on advertising in an ultimately unsuccessful effort to force Idaho Public Television to cancel a program that showed gays and lesbians (http://www.pridedepot.com/?p=1415) in a favorable light to school children.

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[8] LaClare Affidavit, at Exhibit 84; Rodewald Declaration, at Exhibit 44.
[9] Rodewald Declaration, at Exhibit 46.
[10] Id.
[11] Complaint, at p. 7, ¶ 15; and at Exhibit 1.

> **In 2005, he took out full-page ads in his hometown newspaper,** (http://www.pbs.org/wnet/expose_2007/episode215/essay.html) **the *Post Register* in Idaho Falls, publicly outing a reporter at the paper as gay.** The reporter, Peter Zuckerman, had rankled VanderSloot by breaking a major story revealing that the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders (http://www.postregister.com/scouts_honor/part1.php) or camp employees but did nothing about it. **VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership.**[12]

5. Bauerlein is a journalist and a co-editor of *Mother Jones* magazine.[13]

6. Mencimer is a journalist, and the author of the February 6 Article.[14] Mencimer participated in the correction and revisions to the February 6 Article.[15] Mencimer's work regularly appears on the *Mother Jones* website.[16]

7. VanderSloot and Melaleuca allege that the following statements in the above-cited paragraphs of the February 6 Article were defamatory:

(a) "In 2005, he took out full-page ads in his hometown newspaper, the *Post-Register* in Idaho Falls, publicly outing a reporter at the paper as gay."[17]

(b) "In 2005, VanderSloot took out full-page newspaper ads to out a local reporter as gay."[18]

(c) "VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership."[19]

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[12] LaClare Affidavit, at Exhibit 5 (emphasis added to clarify statements at issue); Rodewald Declaration, at Exhibit 9 (emphasis added).
[13] Amended Answer to Complaint with Affirmative Defenses and Demand for Jury Trial, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (filed April 3, 2013) (hereinafter the "**Amended Answer**"), at p. 4, ¶ 16.
[14] Amended Answer, at p. 4, ¶ 17.
[15] Id.
[16] Id.
[17] Complaint, at Exhibit 1, p. 2.

8. Also on February 6, 2012, Bauerlein, a Co-Editor-in-Chief of Mother Jones, tweeted "Romney's gay-bashing buddy runs a company that targets stay-at-home moms for misleading marketing scheme. Charming! bit.ly/AEWUKc" (hereinafter the "February 6 Tweet").[20] The hyperlink at the end of the February 6 Tweet leads the interested reader to the February 6 Article.

9. Mencimer republished or "retweeted" Bauerlein's February 6 Tweet.[21]

10. On February 7, 2012, VanderSloot and Melaleuca contacted the Washington Bureau Chief for *Mother Jones* and requested a retraction of portions of the February 6 Article, including the statements that VanderSloot "bashed" and "publicly outed" Zuckerman.[22]

11. Mother Jones temporarily removed the February 6 Article from its website.[23]

12. On February 16, 2012, Mother Jones printed a revision of the February 6 Article (hereinafter the "February 16 Revision").[24] The paragraphs containing the statements in issue read:

> VanderSloot has long been a controversial figure in Idaho politics, particularly when it comes to issues involving gays and lesbians. In 1999, he spent big on advertising in an ultimately unsuccessful effort to force Idaho Public Television to cancel a program that showed gays and lesbians in a favorable light to school children.
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> **In 2005, he took out full-page ads in his hometown newspaper, the *Post Register* in Idaho Falls, attacking the paper and one of its reporters.** The reporter, Peter Zuckerman, had rankled VanderSloot by breaking a major story revealing that local officials of the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders or camp employees but did nothing about it.

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[18] Id.
[19] Id.
[20] Complaint, at p. 3, ¶ 3; Amended Answer, at p. 2, ¶ 3.
[21] Id.
[22] LaClare Affidavit, at Exhibit 34, p. 2.
[23] Complaint, at p. 4, ¶ 5; Amended Answer, at p. 2, ¶ 5.
[24] Complaint, at pp. 4-5, ¶ 6; Amended Answer, at p. 3, ¶ 6.

VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story once that "it is very difficult for him to be objective on things he feels strongly." *(2)

. . .

UPDATE: The article reported previously published assertions that VanderSloot's ad in the Post-Register outed reporter Peter Zuckerman. In a letter to Mother Jones, Melaleuca general counsel Ryan Nelson maintains that the ad did not out Zuckerman because Zuckerman had discussed his homosexuality publicly while in school in Florida. But Zuckerman's boss as the paper, Dean Miller, has said that in Idaho Falls, Zuckerman "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends."

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CORRECTION: The original version of this article contained errors, and it has been revised for accuracy. *Mother Jones* regrets these errors.

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*(2) The article incorrectly described statements made by VanderSloot, Melaleuca's CEO, in the Post Register ad. In the ad, VanderSloot repeated allegations – which he attributed to others – that reporter Peter Zuckerman's sexual orientation had moved him to "attack the Boy Scots and the LDS Church." VanderSloot said it would be "wrong" to draw conclusions about Zuckerman's motives.[25]

13. VanderSloot and Melaleuca complain that the following statements from the above-cited paragraphs of the February 16 Revision were defamatory:

(a) "In 2005, he took out full-page ads in his hometown newspaper, the *Post-Register* in Idaho Falls, attacking the paper and one of its reporters."[26]

(b) "VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story once that 'it is very difficult for him to be objective on things he feels strongly.'"[27]

(c) "UPDATE: The article reported previously published assertions that VanderSloot's ad in the Post-Register outed reporter Peter Zuckerman. In a letter to Mother Jones, Melaleuca general counsel Ryan Nelson maintains that the ad

[25] Complaint, at Exhibit 2, pp. 2, 4 (emphasis added to highlight the alleged defamatory statements); LaClare Affidavit, at Exhibit 6 (emphasis added); Rodewald Declaration, at Exhibits 10 and 11.
[26] Complaint, at Exhibit 2, p. 2.

did not out Zuckerman because Zuckerman had discussed his homosexuality publicly while in school in Florida. But Zuckerman's boss at the paper, Dean Miller, has said that in Idaho Falls, Zuckerman "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends."[28]

14. On February 28, 2012, Melaleuca and VanderSloot made a second formal demand for retraction upon *Mother Jones*.[29] The Plaintiffs complained that the February 6 Tweet was highly incendiary, and false and defamatory on its face.[30]

15. On June 13, 2014, Melaleuca and VanderSloot sent a third formal demand for a retraction of the February 6 Tweet and the February 16 Article.[31]

IV. APPLICABLE PRINCIPLES OF LAW

A. Standard of Review – Motion for Summary Judgment.

1. If the pleadings, depositions, and admissions on file, together with any affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment may be granted. Idaho Rule of Civil Procedure 56(c); *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 768, 203 P.3d 694, 698 (2009); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-7, 808 P.2d 851, 853-4 (1991).

2. Disputed facts are construed in favor of the non-moving party and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party. *Bushi v. Sage Health Care, PLLC*, 146 Idaho at 768, 203 P.3d at 698; *Lockheed Martin Corp. v. Idaho State Tax Commission*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006).

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[27] Id.
[28] Id., at Exhibit 2, p. 3.
[29] LaClare Affidavit, at Exhibit 35.
[30] Id., at p. 4.
[31] LaClare Affidavit, at Exhibit 36

3. A party against whom a summary judgment is sought cannot merely rest on its pleadings. *Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008); *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990). When faced with supporting affidavits or depositions, the opposing party must show material issues of fact which preclude the issuance of summary judgment. Id.

4. While the moving party must prove the absence of a genuine issue of material fact, *Watkins v. Peacock*, 145 Idaho 704, 708, 184 P.3d 210, 214 (2008); *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798, 41 P.3d 220, 226 (2001), the opposing party cannot simply speculate. *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). A mere scintilla of evidence is not enough to create a genuine factual issue. *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009); *West v. Sonke*, 132 Idaho 133, 138, 968 P.2d 228, 233 (1998). Summary judgment is appropriate when the non-moving party cannot establish the essential elements of the claim. *Summers v. Cambridge Joint School District No. 432*, 139 Idaho 953, 956, 88 P.3d 772, 775 (2004); *Dekker v. Magic Valley Regional Medical Center*, 115 Idaho 332, 333, 766 P.2d 1213, 1214 (1989).

5. If reasonable persons could reach differing conclusions on material issues, or draw conflicting inferences therefrom, then the motion for summary judgment must be denied. *Van v. Portneuf Medical Center*, 147 Idaho at 556, 212 P.3d at 986; *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009).

6. On a summary judgment motion in a defamation action in which the *New York Times v. Sullivan,* 376 U.S. 254, 267-83, 84 S. Ct. 710, 719-28, 11 L.Ed.2d 686, 698-708 (1964) standard applies, the plaintiff is not only required to produce evidence creating a genuine issue of material fact, but is additionally required to produce evidence that a jury could find is clear and

convincing evidence that the defendant acted with knowledge that the statements were false, or with reckless disregard for the statements' truth or falsity. *Steele v. The Spokesman-Review*, 138 Idaho 249, 251-2, 61 P.3d 606, 608-9 (2002) [citing: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-3, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Wiemer v. Rankin*, 117 Idaho 566, 569-70, 790 P.2d 347, 350-2 (1990)].

B. Elements of Defamation Cause of Action.

1. Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d 1430, 1437 (9th Cir. 1995).

2. In a defamation action, a plaintiff must prove that; (a) the defendant communicated information concerning the plaintiff to others; (b) the information was defamatory; and (c) the plaintiff was damaged because of the communication. *Clark v. The Spokesman-Review*, 144 Idaho 427, 430, 163 P.3d 216, 219 (2007).

3. A "defamatory" statement is one "tending to harm a person's reputation, [usually] subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business." *Weitz v. Green*, 148 Idaho 851, 862, 230 P.3d 743, 754 (2010) [citing: *Black's Law Dictionary* 188 (3rd pocket ed. 2006)].

4. As a fourth element, when a publication concerns a public official, public figure, or matters of public concern and there is a media defendant, the plaintiff must also show the falsity of the statements at issue in order to prevail in a defamation suit. Id.

5. Finally, if the plaintiff is a public figure, the *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), standard applies, and the plaintiff can recover only if he

can prove the false statement was published with actual malice, which is defined as knowledge of falsity or reckless disregard of truth, by clear and convincing evidence. *Clark v. The Spokesman-Review*, 144 Idaho at 430, 163 P.3d at 219.

6. Due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 13, 110 S. Ct. 2695, 2703, 111 L.Ed.2d 1 (1990). "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Milkovich v. Lorain Journal Company*, 497 U.S. at 13, 110 S. Ct. at 2703 [citing: 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted)]. Comment was generally privileged when it dealt with a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. *Milkovich v. Lorain Journal Company*, 497 U.S. at 13-4, 110 S. Ct. at 2703 [citing: Restatement of Torts, § 606 (1938)].

7. In determining the defamatory character of a publication, the article must be read and construed as a whole; the words used are to be given their common and usually accepted meaning, and are to be read and interpreted as they would be read and understood by the persons to whom they are published. *Weeks v. M-P Publications, Inc.*, 95 Idaho 634, 636, 516 P.2d 193, 195 (1973).

C. First Amendment to the United States Constitution.

1. In order to advance society's interest in free and open discussion on matters of public concern and to avoid undue self-censorship by the press, the first Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability on

the basis of injurious falsehood. *Blatty v. New York Times Co.*, 42 Cal 3d 1033, 1041, 728 P.2d 1177 (1986) [citing, *inter alia*: *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513, 104 S. Ct. 1949, 80 L.Ed. 2d 502, 525 (1984); *New York Times v. Sullivan*, 376 U.S. 254, 267-83, 84 S. Ct. 710, 719-28, 11 L.Ed.2d 686, 698-708 (1964)].

2. The necessity for this protection is clear: the First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. at 503-4, 80 L.Ed.2d at 518.

3. Claims of injurious falsehood directed at the press must be considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. *New York Times Company v. Sullivan*, 376 U.S. at 270, 84 S. Ct. at 721. This standard also applies to defamatory criticism of 'public figures.' *Curtis Publishing Company v. Butts*, 388 U.S. 130, 162, 87 S. Ct. 1975, 1995, 18 L.Ed.2d 1094 (1967).

4. Erroneous statements are inevitable in free debate, and it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive. *New York Times Company v. Sullivan*, 376 U.S. at 271-2, 84 S. Ct. at 721.

D. Statements "Of and Concerning" the Plaintiff.

1. In defamation actions, the First Amendment to the United States Constitution requires that the statements on which the defamation claim rests must specifically refer to, or be "of and concerning," the plaintiff in some way. *Blatty v. New York Times Co.*, 42 Cal.3d at 1042, 728 P.2d at 1183.

2. The "of and concerning" requirement serves to immunize a kind of statement which, though it can cause hurt to an individual, is deemed too important to the vigor and openness of public discourse in a free society to be discouraged. *Blatty v. New York Times Co.,* 42 Cal.3d at 1044, 728 P.2d at 1184.

3. The "of and concerning" requirement does not require that the plaintiff allege that the defendant referred to the plaintiff by name as long as the plaintiff "may be identified by clear implication." *Blatty v. New York Times Co.,* 42 Cal.3d at 1044, fn. 1, 728 P.2d at 1184, fn. 1.

4. It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff. See: Restatement (Second) of Torts § 564, cmt. A.

E. Factual Statement versus Opinion or Hyperbole.

1. A writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be. *Wiemer v. Rankin,* 117 Idaho at 571-2, 790 P.2d at 352-3 [citing: *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied,* 434 U.S. 834, 98 s. Ct. 120, 54 L.Ed.2d 95 (1977)]. Statements of opinion are protected by the First Amendment unless they "imply a false assertion of fact." *Idaho State Bar v. Topp*, 129 Idaho 414, 416, 925 P.2d 1113, 1115 (1996) [citing: *Milkovich v. Lorain Journal Company*, 497 U.S. at 19, 110 S. Ct. at 2706; *Lewis v. Time, Inc.,* 710 F.2d 549, 555 (9th Cir. 1983); Restatement (Second) of Torts § 566 (1977)]. An opinion conveys personal belief; it may be made the basis for sanctions only if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman,* 55 F.3d at 1438-9 [citing: *Milkovich v. Lorain Journal Company*, 497 U.S. at 21, 110 S. Ct. at 2707; *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992)].

2. An assertion that cannot be proved false cannot be held libelous. *Wiemer v. Rankin*, 117 Idaho at 571-2, 790 P.2d at 352-3 [citing: *Hotchner v. Castillo-Puche*, 551 F.2d at 913].

3. Hyperbole, or statements that cannot reasonably be interpreted as stating actual facts about an individual, are also protected from liability. *Milkovich v. Lorain Journal Company*, 497 U.S. at 20, 110 S. Ct. at 2706 [citing: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 879, 99 L.Ed.2d 41 (1988)].

4. Mere "name-calling" is likewise not actionable. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1440 [citing: *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988); *Buckley v. Littell*, 539 F.2d 882, 894 (2d Cir. 1976); *Ward v. Zelikovsky*, 136 N.J. 516, 643 A.2d 972, 983 (1994)].

5. Liability for libel may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. *Wiemer v. Rankin*, 117 Idaho at 571-2, 790 P.2d at 352-3 [citing: *Hotchner v. Castillo-Puche*, 551 F.2d at 913]. If an author represents that he has private, first-hand knowledge which substantiates the opinions he expresses, the expression of opinion becomes as damaging as an assertion of fact. Id. A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1439 [citing: *Lewis v. Time, Inc.*, 710 F.2d 549, 555-6 (9th Cir. 1983); Restatement (Second) of Torts § 566, cmt. C ("A simple expression of opinion based on disclosed ... nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.")].

7. The rationale behind this rule is straightforward: When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented; they are therefore unlikely to construe the statement as insinuating the existence of additional, undisclosed facts. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1439 [citing: *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d at 730; *Lewis v. Time, Inc.*, 710 F.2d at 555]. Moreover, "an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea;" readers are free to accept or reject the author's opinion based on their own independent evaluation of the facts. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1439 [citing: *Redco Corporation v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir. 1985)].

8. The important consideration is whether the particular article provided sufficient information upon which the reader could make an independent judgment for himself. *Wiemer v. Rankin*, 117 Idaho at 572, 790 P.2d at 353.

9. When determining whether a statement can reasonably be interpreted as a factual assertion, the "totality of the circumstances in which it was made" must be examined. *Knievel v. ESPN*, 393 F.3d 1068, 1074-5 (9th Cir. 2009) [citing: *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995)]. First, the statement must be viewed in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. *Knievel v. ESPN*, 393 F.3d at 1075 [citing: *Underwager v. Channel 9 Australia*, 69 F.3d at 366]. Next, the focus turns to the specific context and contents of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable

expectations of the audience in that particular situation. Id. Finally, the question is asked whether the statement itself is sufficiently factual to be susceptible of being proved true or false. Id.

10. The context in which the statement appears is paramount, and in some cases dispositive. *Knievel v. ESPN*, 393 F.3d at 1075 [citing: *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1193 (9th Cir. 1989)].

11. A speaker's use of "loose, figurative" language can also determine whether his or her statement can reasonably be interpreted as a factual allegation. *Knievel v. ESPN*, 393 F.3d at 1075 [citing: *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1430].

F. Substantial Truth.

1. Where allegedly defamatory speech is of public concern, the First Amendment requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false. *Steele v. The Spokesman-Review*, 138 Idaho at 252, 61 P.3d at 609 [citing: *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L.Ed.2d 783 (1986)].

2. It is not necessary to establish the literal truth of the precise statement made. *Steele v. The Spokesman-Review*, 138 Idaho at 252, 61 P.3d at 609 [citing: Restatement (Second) of Torts § 581A, comment f (1977)]. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. Id. Under Idaho law, "so long as the substance, the gist, the sting of the allegedly libelous charge be justified," minor inaccuracies do not amount to falsity. *Steele v. Spokesman-Review*, 138 Idaho at 252, 61 P.3d at 609 [citing: *Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 690, 587 P.2d 829, 831 (1978); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-7, 111 S. Ct. 2419, 115 L.Ed.2d 447 (1991)].

G. Actual Malice or Reckless Disregard for the Truth.

1. The meaning of terms such as "actual malice" and "reckless disregard" is not readily captured in one infallible definition. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 686, 109 S. Ct. 2678, 2695, 105 L.Ed.2d 562 (1989) [citing: *St. Amant v. Thompson,* 390 U.S. at 730, 88 S. Ct. at 1325]. Only through the course of case-by-case adjudication can content to these elusive constitutional standards be given. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 686, 109 S. Ct. at 2695 [citing: *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. at 50, 104 S. Ct. at 1960].

2. "Malice," such as will defeat a publisher's privilege of "fair comment," does not include actual ill-will and a desire to do harm. *Weeks v. M-P Publications, Inc.*, 95 Idaho at 637, 516 P.2d at 193 [citing: *Henry v. Collins*, 380 U.S. 356, 357, 85 S. Ct. 992, 993, 13 L.Ed.2d 892 (1965)]. Furthermore, mere negligence in publishing a defamatory statement without verification does not rise to the legal definition of "malice." *Weeks v. M-P Publications, Inc.*, 95 Idaho at 637, 516 P.2d at 193 [citing: *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L.Ed.2d 262 (1968)]. Mere hatred also does not satisfy a plaintiff's burden to show malice. *Weeks v. M-P Publications, Inc.*, 95 Idaho at 637, 516 P.2d at 193 [citing: *Garrison v. Louisiana,* 379 U.S. 64, 73, 85 S. Ct. 209, 215, 13 L.Ed.2d 125 (1964)].

3. In addition, a "reckless disregard" for the truth requires more than a departure from reasonably prudent conduct. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 688 109 S. Ct. at 2696 [citing: *St. Amant v. Thompson*, 390 U.S. at 731, 88 S. Ct. at 1325]. Evidence must be sufficient to conclude that the defendant in fact entertained serious doubts as to the truth of his publication. Id. The standard is a subjective one: there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of … probable

falsity." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 688 109 S. Ct. at 2696 [citing: *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 215, 13 L.Ed.2d 125 (1964)].

4. Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 688 109 S. Ct. at 2696 [citing, *inter alia*: *St. Amant v. Thompson*, 390 U.S. at 731, 88 S. Ct. at 1325-6]. In a case involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 688 109 S. Ct. at 2696 [citing, *inter alia*: *St. Amant v. Thompson*, 390 U.S. at 732, 88 S. Ct. at 1326]. The focus is upon whether sufficient evidence of purposeful avoidance of the truth exists. *Clark v. The Spokesman-Review*, 144 Idaho at 431, 163 P.3d at 220.

5. The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. *Wiemer v. Rankin*, 117 Idaho at 575, 790 P.2d at 356 [citing: *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. at 685, 109 S. Ct. at 2694, 105 L.Ed.2d at 587].

H. Libel *Per Se*.

1. In order to be libelous *per se*, the defamatory words must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred, contempt, or ridicule or cause him to be shunned and avoided. *Weeks v. M-P Publications, Inc.*, 95 Idaho at 636-7, 516 P.2d at 195-6 [citing: *Gough v. Tribune-Journal Company*, 73 Idaho 173, 179, 249 P.2d 192, 195 (1952)]. The words must reflect on the plaintiff's integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt, or disgrace. Id.

2. The imputation must be one which tends to affect the plaintiff in a class of society whose standard of opinion the court can recognize. Id. It is not sufficient, standing alone, that the language is unpleasant and annoys or irks the plaintiff, or subjects him to jests or banter so as to affect his feelings. Id.

3. A statement imputing that a person is guilty of a serious crime is defamatory *per se*. *Wiemer v. Rankin*, 117 Idaho at 570, 790 P.2d at 351. Furthermore, utterances which ascribe to another conduct, characteristics, or a condition incompatible with the proper conduct of his lawful business, trade, or profession are defamatory *per se*. *Barlow v. International Harvester Company*, 95 Idaho 881, 890, 522 P.2d 1102, 1111 (1974) [citing: Restatement of Torts § 573 (1938)]. Allegations that someone possesses a loathsome disease, is insane, or commits infidelity are also considered libel *per se*. *Raible v. Newsweek, Inc.*, 341 F.Supp. 804, 809 (W.D.Pa. 1972).

4. A defamatory utterance regarding a corporation is slanderous *per se* when it "assails its management or credit and inflicts injury on its business." *Barlow v. International Harvester Company*, 95 Idaho at 890, 522 P.2d at 1111 [citing: *Diplomat Electric, Inc. v. Westinghouse Electric Supply Company*, 378 F.2d 377, 382-3 (5th Cir. 1967); Restatement of Torts §§ 561, 573 (1938)].

5. If the language at issue is plain and unambiguous, it is a question of law for the court to determine whether it is libelous *per se*. *Weeks v. M-P Publications, Inc.*, 95 Idaho at 636, 516 P.2d at 195. Otherwise, it is a question of fact for the trier of fact. Id.

6. Where an utterance or publication is defamatory *per se*, special damages need not be alleged. *Barlow v. International Harvester Company*, 95 Idaho at 890-1, 522 P.2d at 1111-2

[citing: *Diplomat Electric, Inc. v. Westinghouse Electric Supply Company*, 378 F.2d at 383; *Maytag Company v. Meadows Manufacturing Company*, 45 F.2d 299, 305 (7th Cir. 1930)].

I. Evidence of Damages.

1. If the plaintiff in a defamation action is a public figure, he must prove by clear and convincing evidence that the defendant knew the information was false, or acted with reckless disregard for its truth, at the time the information was communicated to others. *Clark v. The Spokesman-Review,* 144 Idaho at 430, 163 P.3d at 219; Idaho Jury Instruction 4.82.5.

2. In a defamation case in Idaho, the plaintiff must show by *a preponderance of evidence* that he was damaged because of the communication and the amount of damages suffered. Additionally, if the plaintiff is a public figure he must prove malice Idaho Jury Instruction 4.82.5, elements 4, 5 and 6. However, if the plaintiff proves *libel per se by clear and convincing evidence* the plaintiff need not prove actual injury in order to recover damages. Idaho Jury Instruction 4.84.5.

3. Although the distinction between "actual injury because of the defamation" (required in non-public figure cases) versus "the amount of damages suffered" (required in public figure cases) is blurry at best, some elucidation is offered in Idaho Jury Instruction 4.84.5 which states:

> If in this case, the plaintiff proves by clear and convincing evidence that the defendant knew the information was false, or acted with reckless disregard for its truth, at the time the information was communicated to another, the law deems the plaintiff to have been injured by the defamation, and the plaintiff need not prove actual injury in order to recover damages.

V. ANALYSIS

A. Specific Reference to Melaleuca.

Initially, the Defendants request summary judgment against Melaleuca alone, and argue that none of the statements at issue specifically refer to Melaleuca.[32] The Plaintiffs respond that the "Mother Jones' defamatory Articles and Tweets are clearly 'of and concerning' Melaleuca."[33]

While the February 6 Article, the February 6 Tweet, and the February 16 Revision must each be read and construed as a whole in determining their defamatory character, the allegedly defamatory statements shall be given their plain meaning. The Plaintiffs do not rest their allegations upon the entirety of the two published articles, but upon particular statements made therein.

1. The February 6 Article.

The Plaintiffs focus their attention upon three (3) particular statements published in the February 6 Article:[34]

(a) "In 2005, he took out full-page ads in his hometown newspaper, the *Post-Register* in Idaho Falls, publicly outing a reporter at the paper as gay."[35]

(b) "In 2005, VanderSloot took out full-page newspaper ads to out a local reporter as gay."[36]

(c) "VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership."[37]

While the February 6 Article certainly makes mention of Melaleuca, and VanderSloot's position as CEO of Melaleuca, the statements at issue name VanderSloot and focus on

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[32] Defendants' Motion, at pp. 1-2.
[33] Plaintiffs' Opposition, at p. 2.
[34] Complaint, at p. 3; and at pp. 16-17, ¶¶ 40-42.
[35] Complaint, at Exhibit 1, p. 2.
[36] Id.

VanderSloot's act of taking out full-page ads in the *Post-Register*.[38] The offending statements identify VanderSloot as the source of the ads' content. The statements specifically target VanderSloot the individual, rather than Melaleuca the corporation.

Indeed, the structure of the paragraphs within which the alleged defamatory statements are made focuses the reader upon VanderSloot alone. The immediately preceding paragraph begins "VanderSloot has long been a controversial figure in Idaho politics, particularly when it comes to issues involving gays and lesbians."[39] It continues:

> In 1999, he spent big on advertising in an ultimately unsuccessful effort to force Idaho Public Television to cancel a program that showed gays and lesbians (http://www.pridedepot.com/?p=1415) in a favorable light to school children.
>
> **In 2005, he took out full-page ads in his hometown newspaper,** (http://www.pbs.org/wnet/expose_2007/episode215/essay.html) **the *Post Register* in Idaho Falls, publicly outing a reporter at the paper as gay.** The reporter, Peter Zuckerman, had rankled VanderSloot by breaking a major story revealing that the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders (http://www.postregister.com/scouts_honor/part1.php) or camp employees bud did nothing about it. **VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership.**[40]

The very next paragraph refocuses the reader's attention to Melaleuca. It begins, "VanderSloot's company also has a controversial background."[41] It goes on to describe Melaleuca's business structure. None of the statements made in the paragraphs describing Melaleuca are challenged by the plaintiffs.

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[37] Id.
[38] LaClare Affidavit, at Exhibit 84.
[39] LaClare Affidavit, at Exhibit 5.
[40] LaClare Affidavit, at Exhibit 5 (emphasis added to clarify statements at issue); Rodewald Declaration, at Exhibit 9 (emphasis added).
[41] LaClare Affidavit, at Exhibit 5.

Furthermore, a review of the particular ad which was the subject of the third statement at issue reveals a one-page article entitled "Responsible Journalism or Misleading Propaganda."[42] The page bears the title "The Community Page," over which is found the identifier "Paid for by Melaleuca, The Wellness Company™."[43] The entire left-hand column of the three-column article is written in the first person and signed by VanderSloot.[44] Underneath his name appears his title, "President/CEO, Melaleuca, Inc."[45] The middle and right-hand columns are written in the third-person narrative.[46]

Again, it is not the February 6 Article in general of which the Plaintiffs complain. Instead, they argue that three particular statements defamed them, all three of which focus on VanderSloot alone. The offending statements do not mention Melaleuca. Viewing the evidence in the light most favorable to the Plaintiffs, there is insufficient evidence in the record to establish that the *Post-Register's* audience understood Melaleuca to be the object of the statements at issue.

Accordingly, summary judgment shall issue in favor of the *Mother Jones* defendants against Melaleuca regarding the February 6 Article.

2. The February 6 Tweet.

With regard to Bauerlein's February 6 Tweet ("Romney's gay-bashing buddy runs a company that targets stay-at-home moms for misleading marketing scheme. Charming! bit.ly/AEWUKc"), and republished or retweeted by Mencimer, the Plaintiffs complain that the tweet defames both Melaleuca and VanderSloot.[47] At oral argument, the *Mother Jones*

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[42] LaClare Affidavit, at Exhibit 84.
[43] Id.
[44] Id.
[45] Id.
[46] Id.
[47] Complaint, at p. 19, ¶ 48.

defendants took the position that neither VanderSloot nor Melaleuca is mentioned by name in Bauerlein's February 6 Tweet.[48]

Once again, the February 6 Tweet must be taken in context. Although the tweet itself mentions neither VanderSloot nor Melaleuca by name, it includes a hyperlink to the February 6 Article. The February 6 Article clearly identifies VanderSloot as the person referred to in the tweet as "Romney's gay-bashing buddy." Furthermore, the "company" named in the tweet, when viewed in context of the hyperlinked article, can only refer to Melaleuca. In sum, when the February 6 Tweet is viewed in context of its entire message, which includes the information in the hyperlink, the tweet clearly references VanderSloot and Melaleuca.

Furthermore, although the February 6 Tweet only credits VanderSloot as "gay-bashing," the question whether the term gay-bashing is "of and concerning Melaleuca" is a close one. Unlike the February 6 Article, which focuses the reader upon VanderSloot with regard to the statements at issue, the tweet uses the disputed term "gay-bashing" to describe VanderSloot, but refers to Melaleuca in the same sentence. Thus, whether the February 6 Tweet is "of and concerning" Melaleuca raises a fact issue which cannot be determined at the summary judgment level.

3. The February 16 Revision.

Finally, the February 16 Revision contains three statements offensive to the Plaintiffs:

(a) In 2005, he took out full-page ads in his hometown newspaper, the *Post-Register* in Idaho Falls, attacking the paper and one of its reporters."[49]

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[48] <u>See also</u>: Defendants' Memorandum, at p. 2; Reply in Support of Mother Jones' Motion for Summary Judgment, *VanderSloot v. The Foundation for National Progress,* Bonneville County case no. CV-2013-532 (filed August 26, 2015) (hereinafter the **"Defendants' Reply"**), at p. 2.

[49] Complaint, at Exhibit 2, p. 2.

(b) "VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story one that 'it is very difficult for him to be objective on things he feels strongly.'"[50]

(c) "UPDATE: The article reported previously published assertions that VanderSloot's ad in the Post-Register outed reporter Peter Zuckerman. In a letter to Mother Jones, Melaleuca general counsel Ryan Nelson maintains that the ad did not out Zuckerman because Zuckerman had discussed his homosexuality publicly while in school in Florida. But Zuckerman's boss as the paper, Dean Miller, has said that in Idaho Falls, Zuckerman "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends."[51]

The first two statements are identical to the statements made in the February 6 Article, with endnotes added. In context, they read:

> VanderSloot has long been a controversial figure in Idaho politics, particularly when it comes to issues involving gays and lesbians. In 1999, he spent big on advertising in an ultimately unsuccessful effort to force Idaho Public Television to cancel a program that showed gays and lesbians in a favorable light to school children.
>
> **In 2005, he took out full-page ads in his hometown newspaper, the *Post Register* in Idaho Falls, attacking the paper and one of its reporters.** The reporter, Peter Zuckerman, had rankled VanderSloot by breaking a major story revealing that local officials of the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders or camp employees but did nothing about it.
>
> **VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story once that "it is very difficult for him to be objective on things he feels strongly."** *(2)
>
> . . .
>
> *(2) The article incorrectly described statements made by VanderSloot, Melaleuca's CEO, in the Post Register ad. In the ad, VanderSloot repeated

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[50] Id.

[51] Id., at Exhibit 2, p. 3.

allegations – which he attributed to others – that reporter Peter Zuckerman's sexual orientation had moved him to "attack the Boy Scots and the LDS Church." VanderSloot said it would be "wrong" to draw conclusions about Zuckerman's motives.[52]

The paragraphs containing the statements at issue, again, focus the reader upon VanderSloot and his actions. The next paragraph, which begins the same as the February 6 Article ("VanderSloot's company also has a controversial background. ...."), redirects the reader's attention to Melaleuca. Thus, when viewing the February 16 Revision as a whole, the statements at issue targeted VanderSloot specifically. The next paragraph underscores this point. By redirecting the reader's attention to Melaleuca in subsequent paragraphs, the distinction made between Vandersloot and Melaleuca is even more pronounced. The statements at issue, taken in context of the February 16 Revision, are not "of and concerning" Melaleuca.

The third statement at issue in the February 16 Revision again spotlights VanderSloot as the author of the ad which allegedly outed Peter Zuckerman. The onus for the ad is placed squarely upon VanderSloot. Although Melaleuca is mentioned because of attorney Ryan Nelson's affiliation with Melaleuca, such reference does not change the contextual tenor of the allegation that VanderSloot authored the ad which outed Zuckerman. For these reasons, the third statement at issue in the February 16 Revision, when read in context of the entire article, is not "of and concerning" Melaleuca.

The statements at issue in the February 16 Revision, viewed in context of the entire February 16 Revision, are not "of and concerning" Melaleuca. Therefore, Melaleuca has not raised a material issue of fact with regard to the February 16 Revision. Summary judgment in favor of the *Mother Jones* defendants shall be granted against Melaleuca with regard to the February 16 Revision.

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[52] Complaint, at Exhibit 2, pp. 2, 4 (emphasis added to highlight the alleged defamatory statements).

B. The Totality of the Circumstances under which the Statements were Published.

A review of the broad context of the February 6 Article, the February 6 Tweet, and the February 16 Revision reveals that all of the Defendants' publications appeared in the midst of a national political campaign: the 2012 presidential election. *Mother Jones* is a self—described "nonprofit news organization that specializes in investigative, political, and social justice reporting."[53] Daniel Schulman, the editor who worked with Mencimer on the February 6 Article (hereinafter "Schulman"),[54] testified that *Mother Jones* reporters periodically look into Federal Election Commission filings.[55] *Mother Jones* describes its articles as "smart, fearless journalism," "ahead of the curve," and "not funded by or beholden to corporations."[56] *Mother Jones* takes interest in "stories of national importance."[57] *Mother Jones* explains "we're not a magazine that chiefly publishes opinion. We're about reporting."[58]

The general tenor of the entire February 6 Article, as well as the February 6 Tweet and the February 16 Revision, is political comment upon the financial arrangements of a candidate (Mitt Romney) for the highest political office in the United States. The general subject of the publications highlights the political leanings of the Chief Executive Officer (VanderSloot) of one of the major donors (Melaleuca) to Mr. Romney's super-PAC. The statements underscore VanderSloot's opinion (as understood by *Mother Jones*), made public by VanderSloot's full-page ads in the *Post Register*, that homosexuality is a negative character trait which undermines credible journalistic reporting.

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[53] LaClare Affidavit, at Exhibit 42, p. 1.
[54] LaClare Affidavit, at Exhibit 3, p. 2.
[55] LaClare Affidavit, at Exhibit 4, p. 2.
[56] LaClare Affidavit, at Exhibit 42, p. 1.
[57] LaClare Affidavit, at Exhibit 42, p. 5.
[58] Id.

If the person allegedly defamed has made an appeal to the public, the law allows a wider range of comment and expression. *Afro-American Publishing Company, Inc. v. Jaffe,* 366 F.2d 649, 656 (D.C. Cir. 1965). One who enters the public arena must expect latitude in the give-and-take of public debate, extending to sharp and coarse comment, and to excessive and perhaps unwarranted characterization. *Afro-American Publishing Company, Inc. v. Jaffe,* 366 F.2d at 657.

The specific context and contents of the publications at issue tend toward objective fact rather than subjective hyperbole. They do not contain an overwhelming presence of slang and non-literal language as did the captioned pictorial display in *Knievel v. ESPN*, supra. Instead, the publications were closer in tenor to those found in *Steele v. The Spokesman-Review*, supra: that is, a journalistic report about a matter of public interest. *Mother Jones'* audience could reasonably expect investigative journalism, supported by facts, with a more liberal-leaning bent.

C. Opinion or Rhetorical Hyperbole.

The *Mother Jones* Defendants take the position that the statements at issue are either non-actionable rhetorical hyperbole, protected opinion, or both.[59] The Plaintiffs respond that the disputed terms "outing" and "gay-bashing" have "fixed and definite" meanings, capable of being proven true or false; the "disclosed facts" do not support the Plaintiffs' opinions, and the statements at issue are not mere hyperbole.[60] The *Mother Jones* Defendants oppose each of the Plaintiffs' responses.[61]

Each statement at issue shall be viewed seriatim, both separately and in context of the article or tweet in which it appears and the hyperlinks provided to readers or recipients.

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[59] Defendants' Memorandum, at pp. 2-8.
[60] Plaintiffs' Opposition, at pp. 20-23.
[61] Defendants' Reply, at pp. 3-6.

1. **The February 6 Article.**

The first disputed statement in the February 6 Article ("In 2005, he took out full-page ads in his hometown newspaper, http://www.pbs.org/wnet/expose/expose_2007/episode215/essay.html the *Post-Register* in Idaho Falls, publicly outing a reporter at the paper as gay.") alerts the reader that the basis for the statement that VanderSloot "outed" a reporter as gay is found in the "2005 ... full-page ads in ... the *Post-Register* in Idaho Falls ...." The hyperlink takes the reader to the summer 2006 Nieman Reports article entitled: "A Local Newspaper Endures a Stormy Backlash" authored by Dean Miller (hereinafter the "Miller Article").[62]

In the Miller Article, a photograph shows the June 5 Community Page Ad to which the statement at issue refers.[63] Beneath the photograph is the tag line: "A local businessman, Frank VanderSloot, bought full-page ads to criticize the paper's reporting on the Boy Scout Story."[64] One of the paragraphs sections of the Miller Article, entitled "Attacks Get Personal" reads:

> One month after the series ran, Stowell, who had served a brief jail term for his scout camp predations, violated his parole and was sent to prison for two to 14 years. Around this same time, Grand Teton Council staff had been telling volunteer scoutmasters that the stories were all lies cobbled together by a gay reporter on a vendetta against the Boy Scouts. Our reporter, Peter Zuckerman, was not "out" to anyone but family, a few colleagues at the paper (including me), and his close friends. When the magnitude of the story became evident, I vetted him thoroughly, making sure he had not been active in the debate over gay scouts and had not been kicked out of a troop.
>
> Peter's personal life and the series itself went under the microscope in June when a local multimillionaire, Frank VanderSloot, began buying full-page ads in our Sunday paper. He devoted several paragraphs to establishing that Zuckerman is gay. He noted the Mormon Church opposes gay marriage and that the Boy Scouts

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[62] See: LaClare Affidavit, at Exhibit 15; Rodewald Declaration, at Exhibits 41 and 42.
[63] LaClare Affidavit, at Exhibit 15, p. 3; Rodewald Declaration, at Exhibit 41, p. 4; and at Exhibit 42, at p. 4.
[64] Id.

no longer allow gay men to lead troops, but briefly added: "We think it would be very unfair for anyone to conclude that is what is behind Zuckerman's motives."[65]

The Plaintiffs contend that the Miller Article "did not state that Plaintiffs outed Peter Zuckerman, engaged in gay-bashing, or gay-bashed Peter Zuckerman (or bashed him in any form)."[66] The point is not whether or not the offending statement mimicked the Miller Article. The point is that the February 6 Article offered the sources (the June 5 Community Page Ad and the Miller Article) for its statement that VanderSloot outed Zuckerman as gay in the June 5 Community Page Ad. Readers of the February 6 Article may decide for themselves whether the June 5 Community Page Ad "outs" Zuckerman. The Miller Article displays a photograph of the June 5 Community Page Ad, giving the reader additional information in the form of a visual depiction of the Ad. In other words, *Mother Jones* pointed the reader not only to the Ad which allegedly "outed" Zuckerman, but also to the Miller Article, which further discussed the Ad. Nothing in the statement, or the paragraph, hints that *Mother Jones* relied upon undisclosed facts.

Likewise, the column headline ("In 2005, VanderSloot took out full-page newspaper ads to out a local reporter as gay."), simply repeats the words used in the sentence analyzed above. The date and source of the ads from which *Mother Jones* drew its conclusion are mentioned, the hyperlink shows a picture of the June 5 Community Page Ad, and the Miller Article states that Zuckerman was not " 'out' to anyone but family, a few colleagues at the paper (including [Dean Miller]), and his close friends' and that "Peter's personal life ... went under the microscope in June when a local multimillionaire, Frank VanderSloot, began buying full-page ads in our Sunday paper. He devoted several paragraphs to establishing that Zuckerman is gay." Whether

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[65] LaClare Affidavit, at Exhibit 15, pp. 3-4; Rodewald Declaration, at Exhibit 41, p. 3; and at Exhibit 42, p. 4.
[66] Plaintiffs' Opposition, at p. 22.

or not the reader agrees with *Mother Jones'* conclusion that VanderSloot "outed" Zuckerman, the reader has the bases upon which *Mother Jones* relied.

The Defendants contend that the third statement at issue in the February 6 Article ("VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership.") is clearly protected rhetorical hyperbole.[67] Hyperbole, or an extravagant exaggeration (See: www.merriam-webster.com (accessed September 10, 2015)), falls into the category of speech which "cannot reasonably be interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Company,* 497 U.S. at 20, 110 S. Ct. at 2706 [citing: *Hustler Magazine, Inc. v. Falwell,* 485 U.S. at 50, 108 S. Ct. at 879].

Examples of publications considered to be rhetorical hyperbole include: the use of the word "blackmail" to describe a public figure's negotiating proposals in public hearings, *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 1542, 26 L.Ed.2d 6 (1970)]; "traitor" when used to describe non-members of a labor union, *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin,* 418 U.S. 264, 284, 94 S. Ct. 2770, 2781, 41 L.Ed.2d 745 (1974); "unfair" or "fascist" used in the course of picketing a cafeteria during a labor strike, *Cafeteria Employees Local 302 v. Angelos,* 320 U.S. 2293, 295, 64 S. Ct. 126, 127, 88 L.Ed.2d 58 (1943); "teeny tyrants" and "three stooges" when used to describe city councilmen whose public actions were under criticism, *Weeks v. M-P Publications, Inc.*, 95 Idaho at 636, 516 P.2d at 195; "gay-basher," "anti-homosexual diatribe," and "homophobia" used to describe the comments of a candidate for public office, *Vail v. The Plain Dealer Publishing Company,* 72 Ohio St.3d 279, 282-3, 649

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[67] Defendants' Memorandum, at pp. 3-4.

N.E.2d 182, 186 (1995); "dishonest," "ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," "a bully," and "one of the worst judges in the United States," published by a lawyer in response to a request by a publisher of the Almanac of the Federal Judiciary, *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1440; "pimp" when viewed in the general tenor of an article rife with slang and non-literal language, *Knievel v. ESPN*, 393 F.3d at 1077; and "bigot" when used to describe a person's political, racial, religious, economic, or sociological philosophies. *Raible v. Newsweek, Inc.*, 341 F.Supp. at 807.

Conversely, a publication that suggested the plaintiff committed perjury in a judicial hearing was deemed not mere hyperbole because it implied that the plaintiff committed the crime of perjury. *Milkovich v. Lorain Journal Company*, 497 U.S. at 21, 110 S. Ct. at 2707. An accusation that a judge was "corrupt" was not protected because it implied the judge had committed illegal acts. *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 951, 366 N.E.2d 1299, 1307 (1977). Allegations of membership in a particular organization or well-defined political affiliation are readily defined and susceptible to proof or disproof of falsity. *Buckley v. Littell*, 539 F.2d at 894.

The February 6 Article's statement that "VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership," in the context of the entire article, is not framed as hyperbole. Instead, it is non-actionable opinion. The "ads" which allegedly bashed Zuckerman are revealed both as to when and where they were published, and the June 5 Community Page Ad is pictured in the Miller Article. Facts underlying the statement are disclosed, leaving readers free to form their

own opinions on the matter. Therefore, the third statement in the February 6 Article is opinion, with disclosed sources, and therefore not actionable.

VanderSloot takes issue with the word "bashed" in this particular statement.[68] The Plaintiffs' expert, Robert A. Leonard, Ph.D., opined that the statement at issue "[c]onveys that, with the Community Page Ad, Mr. VanderSloot and Melaleuca verbally abused Mr. Zuckerman, linking this to the fact that Mr. Zuckerman is gay."[69] Thus, *Mother Jones* offered the source of its opinion that "VanderSloot's ads bashed Zuckerman's reporting:" the June 5 Community Page Ad. The reader of the February 6 Article is directed to the source of the statement, from which the reader can self-determine whether or not the June 5 Community Page Ad "bashed" Zuckerman. Thus, regardless of whether a reader understood the word "bash" to refer to general criticism of Zuckerman,[70] or to verbal abuse,[71] the reader knew the source of the *Mother Jones* article's description and could personally determine the tenor of the ad. Nothing in the context of the February 6 Article suggests that VanderSloot physically assaulted Zuckerman.[72]

For these reasons, the third contested statement in the February 6 Article is protected opinion. The Plaintiffs fail to raise a material issue of fact and summary judgment is appropriate.

2. The February 6 Tweet.

The Defendants posit that the phrase "gay-bashing buddy" in the February 6 Tweet is non-actionable "rhetorical hyperbole" or "vigorous epithet."[73] In the context of the tweet itself, the phrase "gay-bashing buddy" falls well within the ambit of name-calling, which is non-actionable hyperbole. A similar example is found in *Stevens v. Tillman*, 855 F.2d at 402,

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[68] Plaintiffs' Opposition, at pp. 20-23.
[69] Rodewald Declaration, at Exhibit 30, p. 35; LaClare Affidavit, at Exhibit 21, p. 35.
[70] See: Rodewald Declaration at Exhibit 29, p. 29.
[71] Rodewald Declaration, at Exhibit 30, p. 35; LaClare Affidavit, at Exhibit 21, p. 35.
[72] Rodewald Declaration at Exhibit 29, p. 30; and at Exhibit 30, p. 35. LaClare Affidavit, at Exhibit 21, p. 35.

wherein the Seventh Circuit the defendant's allegation that the plaintiff was a "racist" was held not actionable because the emotionally-charged word had been watered down by overuse and had become common coin in political discourse. Id. Judge Easterbrook's description of name-calling is edifying. He wrote:

> Language is subject to levelling forces. When a word acquires a strong meaning it becomes useful in rhetoric. A single word conveys a powerful image. When plantation owners held blacks in chattel slavery, when 100 years later governors declared "segregation now, segregation forever", everyone knew what a "racist" was. The strength of the image invites use. To obtain emotional impact, orators employed the term without the strong justification, shading its meaning just a little. So long as any part of the old meaning lingers, there is a tendency to invoke the word for its impact rather than to convey a precise meaning. We may regret that the language is losing the meaning of a word, especially when there is no ready substitute. But we serve in a court of law rather than of language and cannot insist that speakers cling to older meanings. In daily life "racist" is hurled about so indiscriminately that it is no more than a verbal slap in the face; the target can slap back (as Stevens did). It is not actionable unless it implies the existence of undisclosed, defamatory facts, and Stevens has not relied on any such implication.

Id.

According to the Plaintiffs' expert, Robert A. Leonard, Ph.D., the phrase "gay-bashing" has an overwhelming use in the media in reference to "horrendous, and unprovoked, physical violence often characterized as hate crimes and chargeable as a multitude of criminal acts including murder, aggravated assault, substantial batter, and criminal conspiracy and/or instances of face-to-face verbal abuse."[74] Mr. Leonard attached fifty (50) articles, collected through internet searches, to his report, forty-seven (47) of which described physical violence as "gay-bashing."[75] Yet the context of the February 6 Tweet article does not hint at physical violence. Instead, it ascribes the epithet "gay-bashing" to Governor Romney's unnamed "buddy." If the

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[73] Defendants' Memorandum, at p. 3.
[74] LaClare Affidavit, at p. 30.
[75] LaClare Affidavit, at Exhibit 21, attachments C, D.

reader follows the hyperlink (which is an essential element of the contextual overview this Court must undertake for purposes of summary judgment adjudication, *Weeks v. M-P Publications*, 95 Idaho at 636, 516 P.2d at 195), the February 6 Article identifies Governor Romney's buddy as VanderSloot and claims that VanderSloot's ads (particularly the June 5 Community Page Ad) bashed Zuckerman. An ad cannot commit physical violence, and the February 6 Tweet directed the recipient to the ad.

Like the *Stevens v. Tillman* case, the February 6 Tweet used the term (or phrase) "gay bashing" to convey a powerful, emotional image in the midst of a national political campaign season. Both the February 6 Tweet and the accompanying February 6 Article obviously shade the meaning of the phrase toward what Dr. Leonard opined to be a lesser-used meaning, that of verbal abuse of homosexuals.[76] Whether Vandersloot's opinions about Zuckerman and/or homosexuality rise to the level of abuse or simply connote garden-variety criticism is different depending upon a reader's personal perception. Given the political context in which the *Mother Jones* Defendants published both the February 6 Tweet and the February 6 Article, a polarized political climate tends to label political stances as good or evil, rather than healthy, civil discourse. In the end, however, both VanderSloot and the *Mother Jones* Defendants have the privilege of expressing their opinions, in published form or otherwise, for the very reason that the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system." *Weeks v. M-P Publications*, 95 Idaho at 638, 516 P.2d at 197 [citing: *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S.

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[76] LaClare Affidavit, at Exhibit 21, pp. 33-4.

6, 11-2, 90 S. Ct. 1537, 1540, 26 L.Ed.2d 6 (1970); *Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 536, 75 L.Ed.1117 (1931)].

Indeed, calling a candidate for political office a "gay-basher" was found by the Ohio Supreme Court as lacking in precise meaning and "understood by the ordinary reader for just what it is – one person's attempt to persuade public opinion." *Vail v. The Plain Dealer Publishing Company*, 72 Ohio St.3d at 282-3, 649 N.E.2d at 186.[77] The February 6 Tweet is very much in line with *Stevens v. Tillman*, supra, and *Vail v. The Plain Dealer Publishing Company*. Its veiled reference to VanderSloot as Governor Romney's "gay-bashing buddy" and its hyperlink to the February 6 Article was Bauerlein's attempt to persuade public opinion in a presidential election. It is not actionable defamation.

In the alternative, the Defendants argue that the February 6 Tweet is non-actionable opinion based upon disclosed facts.[78] The point is well taken. The February 6 Tweet, brief as it is, contains the hyperlink which shows the basis for its epithet. Whether the reader agrees or disagrees that the February 6 Article and its links supports the label is beside the point. The fact remains that the recipients of the February 6 Tweet were given the basis for Bauerlein's name-calling and could decide for themselves whether or not they agreed with Bauerlein's

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[77] The article at issue in *Vail v. The Plain Dealer Publishing Company* was entitled "Gay-basher takes refuge in the closet." The Ohio Supreme Court described the offending article as follows:

> Dirck stated: "Loren Loving Vail doesn't like gay people" and that she "* * * has added gay-bashing to the repertoire of right-wing, neo-numbskull tactics she is employing * * * in her increasingly distasteful campaign against Democrat Eric Fingerhut." Dirck characterized Vail's comments concerning a speech given by Dagmar Celeste as an "anti-homosexual diatribe," and claimed that "Vail wouldn't be the first candidate to latch onto homophobia as a ticket to Columbus." Finally, Dirck ended his column by writing, "[h]aving learned long ago never to underestimate the neo-numbskull vote, I won't hazard a guess on whether her hate-mongering will work. But although I personally don't have much use for bigots of any sort, I have a particular problem with those who can't even be up front about it. Honesty, it would appear, is one value on which Vail is not so 'pro.'"

Vail v. The Plain Dealer Publishing Company, 72 Ohio St.3d at 279-80, 649 N.E.2d at 183-4.

[78] Defendants' Memorandum, at pp. 4-5.

characterization of VanderSloot. For this additional reason, the February 6 Tweet is not actionable.

3. The February 16 Revision.

The first disputed statement in the February 16 Revision ("In 2005, he took out full-page ads in his hometown newspaper, the *Post-Register* in Idaho Falls, attacking the paper and one of its reporters.") is a watered-down version of the same statement in the February 6 Article. Instead of alleging that VanderSloot "publicly out[ed] a reporter as gay," the February 16 Revision states that VanderSloot "attack[ed] the [*Post Register*] and one of its reporters."

Like the February 6 version, the February 16 Revision offers the reader the source of the alleged "attack:" the 2005 ads VanderSloot took out in his hometown newspaper, the Idaho Falls *Post Register*. Although the hyperlink to the Miller Article is removed, ease of access to supporting material is not required: only identification of the source material. The record suggests that the June 5 Community Page Ad remains on-line to the present. Readers may also look to the *Post Register* archives for the ads described in the February 16 Revision.

For these reasons, the first disputed sentence of the February 16 Revision is non-actionable opinion.

The Defendants contend that the second statement at issue in the February 16 Revision:

> VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story once that 'it is very difficult for him to be objective on things he feels strongly about.

is clearly protected rhetorical hyperbole.[79] Although the definition and common usage of the term "bash" is far-ranging (from verbal criticism to physical assault), the tenor of the February 16 Revision is not an obvious and intentional exaggeration or an extravagant statement or figure of speech not intended to be taken literally. Instead, the February 16 Revision, in addition to

being political commentary during a national election, is a *revision*; an amendment, alteration, correction, update, or improvement. Had the statement been intended as rhetorical hyperbole, it does not seem logical that it would have been "revised for accuracy."

On the other hand, the statement points directly to its source: VanderSloot's ads (earlier described as full-page ads in the Idaho Falls *Post Register* taken out in 2005). Again the reader is directed to personally discern whether the statement is accurate or exaggerated. Accordingly, the statement is non-actionable opinion.

In their entirety, the paragraphs focusing on VanderSloot, in which the statements at issue appear, read as follows:

> VanderSloot has long been a controversial figure in Idaho politics, particularly when it comes to issues involving gays and lesbians. In 1999, he spent big on advertising in an ultimately unsuccessful effort to force Idaho Public Television to cancel a program that showed gays and lesbians in a favorable light to school children.
>
> In 2005, he took out full-page ads in his hometown newspaper, the *Post Register* in Idaho Falls, attacking the paper and one of its reporters. The reporter, Peter Zuckerman, had rankled VanderSloot by breaking a major story revealing that local officials of the Mormon church, which sponsored local Boy Scout troops, had been aware that several pedophiles were serving as scout leaders or camp employees but did nothing about it.
>
> **VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story once that "it is very difficult for him to be objective on things he feels strongly."** *(2)
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> . . .
>
> **CORRECTION:** The original version of this article contained errors, and it has been revised for accuracy. *Mother Jones* regrets these errors.
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> . . .
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> *(2) The article incorrectly described statements made by VanderSloot, Melaleuca's CEO, in the *Post Register* ad. In the ad, VanderSloot repeated allegations – which he attributed to others – that reporter Peter Zuckerman's sexual orientation had moved him to "attack the Boy Scots and the LDS Church."

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[79] Defendants' Memorandum, at pp. 3-4.

> VanderSloot said it would be "wrong" to draw conclusions about Zuckerman's motives.[80]

Finally, the Defendants take the position that the third disputed sentence sequence in the February 16 Revision are statements of opinion based upon fully disclosed facts.[81]

> UPDATE: The article reported previously published assertions that VanderSloot's ad in the Post-Register outed reporter Peter Zuckerman. In a letter to Mother Jones, Melaleuca general counsel Ryan Nelson maintains that the ad did not out Zuckerman because Zuckerman had discussed his homosexuality publicly while in school in Florida. But Zuckerman's boss at the paper, Dean Miller, has said that in Idaho Falls, Zuckerman "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends.

The Plaintiffs respond that the Miller Article did not accuse them of outing or gay-bashing Zuckerman.[82]

The precise interpretation of the Miller Article does not void the fact that the Update explains to readers that: (1) Melaleuca denies that the ad outed Zuckerman; (2) Zuckerman publicly discussed his sexual orientation while in school in Florida; and (3) Dean Miller said that in Idaho Falls, Zuckerman was not "out" to anyone but family, a few colleagues at the paper (including Miller), and his close friends. The explanation, including its sources, allows the reader to determine if "outing" a homosexual person occurs only once (i.e. the first time a homosexual person ever publicly reveals his or her sexuality), or if it can occur in more than one context. Readers are alerted that the alleged "outing" is disputed, offered both sides of the issue, and allowed to conclude the dispute for themselves. By offering the opposing viewpoints, and the basis for the opposing viewpoint, *Mother Jones* signaled its readers that its statement was opinion, not fact.

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[80] LaClare Affidavit, at Exhibit 6 (emphasis added); Rodewald Declaration, at Exhibit 11 (emphasis added).
[81] Defendants' Memorandum, at p. 7.
[82] Plaintiffs' Opposition, at p. 22.

The Plaintiffs distinguish between non-actionable name-calling, such as "anti-gay," (see: *McCaskill v. Gallaudet University*, 36 F. Supp. 145, 159-60 (D.C.D.C. 2014)); "bigots," (see: *Raible v. Newsweek, Inc.*, supra); "homophobes," (see: *Lester v.* Powers, 596 A.2d 65, 71 (Me. 1991) and *Waterson v. Cleveland State* University, 93 Ohio App.3d 792, 639 N.E.2d 1236, 1237-40 (1994)); or "racists," (see: *Stevens v. Tillman*, supra) and words that signal conduct (such as "outing" or "gay-bashing).[83]

Courts are divided over the "name-calling" versus implied-conduct distinction. For example, in *Vail v. The Plain Dealer Publishing Company*, supra, the Ohio Supreme Court determined that phrases such as engaging in "an anti-homosexual diatribe" and fostering "homophobia" were protected under the Ohio Constitution because such phrases could not be defined with crystal clarity, each term conjuring a vast array of highly emotional responses which would vary from reader to reader. *Vail v. The Plain Dealer Publishing Company*, 72 Ohio St.3d at 283, 649 N.E.2d at 186. The Ninth Circuit determined a lawyer's allegation that a certain judge had "a penchant for sanctioning Jewish lawyers" conveyed personal opinion based on stated facts, and therefore was not actionable. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1438-9.

Moreover, name-calling infers that the target made statements or committed acts which lead to the imposition of the label. Thus, whether a publication employs a definitive label (i.e. "the [target] is a liar") or inferred action (i.e. "the [target] lied on the stand") does not determine whether the alleged defamation is or is not actionable. Instead, the context of the statement, as well as the statement itself, must be adjudicated on a case-by-case basis.

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[83] Id.

Finally, the Plaintiffs take the position that the *Mother Jones* Defendants' statements at issue are not hyperbole because they are "unquestionably capable of being verified," or the resolution of that issue at least raises a question of material fact.[84] As discussed above, all of the disputed statements offer the source from which they are derived, and therefore constitute protected opinion. Even the February 6 Tweet, which could be considered hyperbole, hyperlinks to its source. Therefore, it offers its reader the ability to determine the truth or exaggeration of the phrase "gay-bashing."

Having determined that the disputed statements are statements of opinion based on fully disclosed facts, the *Mother Jones'* statements can be punished as defamatory only if the underlying stated facts are themselves false and demeaning. *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d at 1439; *Worrell-Payne v. Gannet Company, Inc.*, 134 F.Supp.2d 1167, 1172 (D. Idaho 2000). The Plaintiffs do not argue that the disclosed facts upon which the disputed statements were based were false and demeaning. Instead, the Plaintiffs take the position that the Defendants misconstrued their sources to the point of publishing statements with a high degree of awareness of the probable falsity of those statements.

D. Substantial Truth of Statements.

When a disputed publication involves a public figure and there is a media defendant, the plaintiff must show the falsity of the statements at issue in order to prevail in a defamation suit. *Clark v. The Spokesman-Review*, 144 Idaho at 430, 163 P.3d at 219 [citing: *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. at 775-6, 106 S. Ct. at 1563-4, 89 L.Ed.2d at 791-2].

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[84] Plaintiffs' Opposition, at p. 23.

Melaleuca and VanderSloot do not deny that VanderSloot is a public figure.[85] The *Mother Jones* Defendants are all media defendants.

However, a factual statement need only be substantially true in order to be protected from a suit for defamation. *Unelko Corporation v. Rooney*, 912 F.2d 1049, 1057 (9th Cir. 1990). Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance. *Steele v. The Spokesman-Review*, 138 Idaho at 253, 61 P.3d at 610 [citing: Restatement (Second) of Torts § 581A, comment f (1977)]. So long as the substance, the gist, the sting of the allegedly libelous charge is justified, minor inaccuracies do not amount to falsity.

1. The February 6 Article.

The first statement in contention within the February 6 Article ("In 2005, he took out full-page ads in his hometown newspaper, the *Post Register* in Idaho Falls, publicly outing a reporter at the paper as gay.") hyperlinks to the Miller Article.[86] The Miller Article includes statements that VanderSloot devoted several paragraphs in the June 5 Community Page Ad establishing that Zuckerman is gay.

Clearly, the first disputed statement in the February 6 Article does not quote directly from the Miller Article. In other words, *Mother Jones* put its own slant on the information it received from the Miller Article. But it is beyond contention that in 2005 VanderSloot took out full-page ads in the *Post Register*.[87] In the June 5 Community Page Ad, VanderSloot pointed out that, while in Florida, Zuckerman "declared to the public that he is homosexual" in the *PointsSouth*

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[85] See: Stipulation Regarding Public Figure Status and Limitations on Discovery, *VanderSloot v. The Foundation for National Progress*, Bonneville County case no. CV-2013-532 (field January 26, 2015), at Exhibit B.
[86] See: LaClare Affidavit, at Exhibits 5 and 15; Rodewald Declaration, at Exhibits 41 and 42.
[87] LaClare Affidavit, at Exhibit 84; Rodewald Declaration, at Exhibits 44, 45, 77.

publication.[88] Thus, to the *Post Register* readers, VanderSloot publicly identified Zuckerman's sexual orientation.

The Plaintiffs' expert, Dr. Robert A. Leonard, cited to the *Merriam-Webster's Collegiate Dictionary* (Eleventh edition – 2003) for his conclusion that "outing" involves "exposing, disclosing, revealing, or identifying publicly someone as gay who was *not* previously exposed, disclosed, revealed, or identified *publicly* as gay."[89] Dr. Leonard continued:

> Importantly, given the circumstances of this case, while being "outed" requires that the person not be previously exposed, disclosed, revealed, or identified publicly as gay, it is not part of the definition that *everyone* in the world or in a particular context has already learned that the person is gay. Rather, if someone has already been identified publicly as gay, he cannot be "outed" even if there are some people who have not yet acquired the publicly available knowledge of his sexual orientation. As an example, Anderson Cooper, the well-known anchor of television's *Anderson Cooper 360*, is widely known to be gay. There are doubtless people who do not know this. Nevertheless, informing one of those people that Mr. Cooper is gay would not be said to "out" him, because Mr. Cooper's sexual orientation has already been publicly disclosed on the internet, including on his Wikipedia page.[90]

However, in his deposition, Dr. Leonard conceded that whether or not a person is "outed" "would depend on the actual situation. How many people have found out and how many people have re-tweeted, re-posted or whatever, the information."[91] Thus, to "out" a person's sexual orientation is a fluid concept. If that person has publicly declared his or her sexual orientation previously, whether or not another public declaration can be considered "outing" depends upon how many people previously knew.

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[88] Id.
[89] LaClare Affidavit, at Exhibit 21, p. 22 (emphasis in original); Rodewald Declaration, at Exhibit 30, p. 22 (emphasis in original).
[90] LaClare Affidavit, at Exhibit 21, pp. 22-3 (emphasis in original); Rodewald Declaration, at Exhibit 30, pp. 22-3 (emphasis in original).
[91] LaClare Affidavit, at Exhibit 22, p. 165, lines 11-15; Rodewald Declaration, at Exhibit 13, p. 165, lines 11-15.

Dr. Leonard concluded that the term "outed," when used in the context of a gay person, included publicly identifying that person as homosexual. He clarified in his deposition that whether or not a person is "outed" depends on the situation, and the knowledge base of the audience receiving the information at issue.

The Plaintiffs' cite numerous circumstances of public awareness of Zuckerman's sexual orientation: the *PointsSouth* publication;[92] the National Lesbian & Gay Journalists Association;[93] "many" of Zuckerman's coworkers;[94] persons who called or e-mailed the *Post Register* regarding Zuckerman's sexual orientation *before* the June 5 Community Page Ad;[95] some of the people on his news beat knew he was gay;[96] his sexual orientation was discussed on a local radio show[97] with a potentially wide-ranging coverage[98] but a very small average listening audience;[99] and Zuckerman's attendance at events sponsored by the Idaho Falls chapter of Parents and Friends of Lesbians and Gays (PFLAG).[100] It is beyond question that certain persons knew Zuckerman was gay. But that does not change the fact that the June 5 Community Page Ad identified publicly, to a particular audience, that Zuckerman was gay. Thus, *Mother Jones'* statement that the June 5 Community Page Ad publicly outed a reporter at the paper as gay was not false. A reasonable jury could not find that the Plaintiffs met their burden of proving falsity by a preponderance of the evidence.

Indeed, *Mother Jones'* statement was substantially true. The June 5 Community Page Ad raised Zuckerman's sexual orientation by pointing out Zuckerman's 2003 article in *PointsSouth*

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[92] See: LaClare Affidavit, at Exhibit 8.
[93] See: LaClare Affidavit, at Exhibit 10.
[94] LaClare Affidavit, at Exhibit 9, pp. 204-205.
[95] LaClare Affidavit, at Exhibit 9, pp. 208-9.
[96] LaClare Affidavit, at Exhibit 9, pp. 213-5.
[97] LaClare Affidavit, at Exhibit 9, pp. 207-8.
[98] LaClare Affidavit, at Exhibit 12.
[99] Rodewald Declaration, at Exhibit 48, p. 4, ¶¶ 13.

and by chiding a local radio show for linking the Boy Scout's policy on gay scout leaders to Zuckerman's motive for his "Scout's Honor" series regarding pedophiles and local Boy Scouts. In so doing, the June 5 Community Page Ad put Zuckerman's sexual orientation squarely at issue and publicly identified to the readers of the *Post Register* that Zuckerman is gay.

The same analysis applies to the second disputed statement in the February 6 Article ("In 2005, VanderSloot took out full-page newspaper ads to out a local reporter as gay.") Although the apparent purpose of the June 5 Community Page Ad was not to out Zuckeman, the Ad did publicly identify that Zuckerman is gay. Like the first statement in the February 6 Article, the second statement is not false and is substantially true.

The third statement in the February 6 Article ("VanderSloot's ads bashed Zuckerman, claiming that his story was an effort to smear the Boy Scouts because the organization doesn't allow gays in its membership.") is also not false. According to the Plaintiffs' expert Dr. Leonard, the range of meaning for the word "bash" swings from physical assault to verbal abuse based on the target's sexual orientation.[101] In his deposition, Dr. Leonard testified that "gay-bashing" certainly entails criticism of homosexuality as an orientation, or homosexuals as a group.[102] The word "bash" does not have to comprehend threatening behavior.[103]

Indeed the record reveals that in his June 19, 2005 Community Page Ad, VanderSloot used the term "Frank-bashing" to describe the June 12 editorials in the *Post Register.*[104] Whether the June 12 editorials rank as fair comment, "criticism," or as "verbal abuse" of VanderSloot lies in the mind of the reader, but VanderSloot illustrates how "bashing" connotes

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[100] LaClare Affidavit, at Exhibit 16, p. 44.
[101] LaClare Affidavit, at Exhibit 21, p. 35; Rodewald Declaration, at Exhibit 30, p. 35.
[102] LaClare Affidavit, at Exhibit 22, p. 260, lines 14-21; Rodewald Declaration, at p. 260, lines 14-21.
[103] LaClare Affidavit, at Exhibit 22, pp. 263-4; Rodewald Declaration, at pp. 263-4.
[104] Rodewald Declaration, at Exhibits 8 and 77.

many shades of the written or spoken word, depending upon the perspective of the reader or listener.

The June 5 Community Page Ad criticized Zuckerman's reporting as "unfair" and "without merit" and described Zuckerman as "a fairly new reporter," as having publicly declared that he is homosexual, and as having admitted that "it is very difficult for him to be objective on things he feels strongly about." Given the far-ranging interpretations of such language, whether as fair comment, criticism, or verbal abuse, the application of the word "bash" to the paragraph about Zuckerman is not false. "Bash" falls within the shades of verbal commentary which can be attributed to the June 5 Community Page Ad's commentary upon Zuckerman.

As for whether or not the disputed statement is substantially true, whether or not a particular commentary "bashes" a person cannot be tested for truth or falsity since the meaning of the terms is both highly personal and emotional. Every person will have a slightly different concept of both the tenor of the June 5 Community Page Ad, as it related to Zuckerman, and the meaning of "bash."

Since the statement is not false it does not subject to the *Mother Jones* defendants to liability.

2. The February 6 Tweet.

Akin to the third disputed statement in the February 6 Article, the February 6 Tweet ("Romney's gay-bashing buddy runs a company that targets stay-at-home moms for misleading marketing scheme. Charming!") is not false. In addition to the nuances which attach to the phrase "gay-bashing," the February 6 Tweet hyperlinks to the February 6 Article.

In addition to the previously discussed hyperlinks within the February 6 Article, the paragraphs about VanderSloot also include a hyperlink to the October 21, 2007 article by Jody

May-Chang published on PrideDEPOT.com (hereinafter the "May-Chang Article").[105] The May-Chang Article discusses VanderSloot's efforts to pull a documentary entitled "It's Elementary: Talking About Gay Issues in School" from airing on Idaho Public Television and his use of Idaho billboards to project his opinion about the "It's Elementary" documentary.

Again, given the broad range of interpretations elicited by any political action or stance, the February 6 Tweet's choice of wording, which links to the February 6 Article (which in turn links to the May-Chang Article, the Miller Article, and the first installment to the "Scout's Honor" series authored by Zuckerman), may be an exaggeration to some, accurate to others. The broad spectrum of interpretation for the phrase "gay-bashing" precludes it from being "proved" true or false. Instead, the recipients of the February 6 Tweet were given the means to make the determination themselves.

Bauerlein's statement of opinion relating to a matter of public concern does not support a claim for liability under the law of defamation in Idaho.

3. The February 16 Revision.

The first disputed sentence within the February 16 Revision ("In 2005, he took out full-page ads in his hometown newspaper, the *Post Register* in Idaho Falls, attacking the paper and one of its reporters.") is substantially true. It is beyond question that the June 5 Community Page Ad criticized Zuckerman's reporting in the "Scout's Honor" series as "unfair" and "without merit." Merriam Webster dictionary defines "attack" to include: acting violently against (someone or something); trying to hurt, injure, or destroy (something or someone); criticizing (someone or something) in a very harsh and severe way; and beginning to work on or deal with (something, such as a problem) in a determined and eager way. (See: www.merriam-

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[105] See: Rodewald Declaration, at Exhibit 32.

webster.com (accessed October 1, 2015)). Whether the June 5 Community Page Ad is interpreted as harsh or severe criticism of Zuckerman and the *Post Register* or is viewed as VanderSloot's efforts to deal with a perceived problem, the operative word "attack" falls within the spectrum of substantial truth.

Likewise, the second disputed sentence ("VanderSloot's ads bashed Zuckerman's reporting, while noting that he was a gay man who had admitted in a story onece that 'it is very difficult for him to be objective on things he feels stronglyabout.' ") is well-within the broad interpretation of the word "bash." Even VanderSloot coined the phrase "Frank-bashing" to describe what he interpreted as unfair criticism of his political opinions and actions. Therefore, the second sentence at issue in the February 16 Revision does not run afoul of the laws of defamation.

As for the final questioned sentences in the February 16 Revision

> UPDATE: The article reported previously published assertions that VanderSloot's ad in the Post-Register outed reporter Peter Zuckerman. In a letter to Mother Jones, Melaleuca general counsel Ryan Nelson maintains that the ad did not out Zuckerman because Zuckerman had discussed his homosexuality publicly while in school in Florida. But Zuckerman's boss as the paper, Dean Miller, has said that in Idaho Falls, Zuckerman "was not 'out' to anyone but family, a few colleagues at the paper (including me), and his close friends.

Plaintiffs' expert conceded that whether or not a person is publicly "outed" depends on the circumstances. Furthermore, the June 5 Community Page Ad's information about Zuckerman's sexual orientation falls within Dr. Leonard's definition of "outing." VanderSloot publicly identified Zuckerman as gay. Therefore, the last disputed sentences within the February 16 Revision are substantially true and therefore non-actionable.

E. Actual Malice.

Since VanderSloot is a public figure, the *New York Times v. Sullivan* (376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964)) standard applies. The Plaintiffs may recover damages only if they can establish liability by clear and convincing evidence of proof of actual malice. *Clark v. The Spokesman-Review*, 144 Idaho at 430, 163 P.3d at 219. Actual malice consists of knowledge of falsity or reckless disregard of truth by clear and convincing evidence. Id. Disputed issues of fact that, if resolved in the Plaintiffs' favor, would still fall short of establishing malice with convincing clarity, are not material. *Clark v. The Spokesman-Review*, 144 Idaho at 431, 163 P.3d at 220.

As discussed at length above, the statements at issue in this lawsuit are statements of opinion which cite to their sources, giving the readers (or recipients, in the case of the February 6 Tweet) ample opportunity to agree or disagree with them. Furthermore, the operative words used by the Defendants ("out," "bash," and "attack") all fit within the broad definitions given by current dictionaries and by the Plaintiffs' expert, Dr. Leonard. In light of the breadth of meaning applicable to the disputed words, the statements are substantially true. The far-reaching definitions and interpretations for the operative words also leave them incapable of being proven false, since the precise meaning of each of the words depends inherently upon the perspective of the reader/recipient. Finally, the statements were published in the context of political rhetoric, in the emotionally-charged milieu of a presidential campaign, and involved the politically relevant and equally as emotional topic of sexual orientation, with all its baggage.

A statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection. *Milkovich v. Lorain Journal Company*, 497 U.S. at 20, 110 S. Ct. at 2706. The *Mother Jones'* statements of opinion on matters of public concern do not contain provable false connotations. For these reasons, the

statements at issue are protected by the First Amendment to the United States Constitution. Accordingly, the question of actual malice in this case becomes moot.

F. Defamation *Per Se*.

The Restatement (Second) of Torts (1977) defines defamation *per se*, or defamation which subjects the speaker or publisher to liability regardless of whether or not special harm results, as publication of the following types of information: a criminal offense, Restatement (Second) of Torts § 571 (1977); a loathsome disease, Id., at § 572; a matter incompatible with the target's business, trade, profession, or office, Id., at § 572; or serious sexual misconduct, Id., at § 574. Idaho had adopted, at a minimum, the determination that the following types of false information constitute defamation *per se*: a false publication imputing a person's guilt of a serious crime, *Weimer v. Rankin*, 117 Idaho at 570, 790 P.2d at 351; and a false statement regarding a person's or corporation's conduct, characteristics, or a condition incompatible with the proper conduct of its lawful business, trade, or profession. *Barlow v. International Harvester Company*, 95 Idaho at 890, 522 P.2d at 1111.

The Defendants' statements, viewed in the context of their publication, did not impute VanderSloot's (or Melaleuca's) guilt as to any crime, much less a serious one. Neither did those statements accuse VanderSloot (or Melaleuca) of carrying a loathsome disease; acting in a manner incompatible with his business, trade, profession, or office; or serious sexual misconduct. As such, the statements do not come within the Restatement's definition of defamation *per se*.

Furthermore, in light of the nature of and broad interpretations given to the contested words, and the political context in which they were published, the words and sentences at issue did not presumptively as a matter of law tend to disgrace or degrade VanderSloot or hold him up to public hatred, contempt, or ridicule such as to cause him to be shunned or avoided. The words

impute a political position taken by VanderSloot critical of gay-oriented issues, and accuse VanderSloot of publicly identifying Zuckerman's sexual orientation, all in the heat of a national political campaign.

Even if the Court assumes the statements were false, which it did not so find, the question of whether those statements defamed VanderSloot would be a question for the factfinder. The statements are not defamatory as a matter of law.

G. Proof of Damages.

Finally, the issue of damages does not present a basis for the grant of summary judgment in this particular case. The Court finds questions of material fact exist as to damages and if the jury were to find actual malice by clear and convincing evidence, then the Plaintiffs need not prove actual injury in order to recover damages. Idaho Civil Jury Instruction 4.84.5.

VI. FURTHER DISCUSSION

This decision grants summary judgment in favor of the *Mother Jones* Defendants. Even so, the Court finds Mother Jones' reporting styles, and indeed the general trend in political journalism, troubling. The Court record, and in particular, Plaintiffs' Exhibit 27 to the LaClare Affidavit, illustrates Mother Jones' determination to present a biased article by offering a skewed view of the Plaintiffs. Exhibit 27 is an e-mail from Mencimer to Jon M. Taylor and states:

> Very quick question for you. Do you know much about Melaleuca? I'm doing a crash course on the company because they gave an enormous amount of money to Mitt Romney's super pac. The filings were just released last night and I have to get a story up asap. So just wanted to pick your brains to see if you know much about them and whether they've ever lost big lawsuits, gotten in trouble with the FTS, etc. I see that they are a typical MLM company, with lots of complaints about them, *but so far haven't found anything extra juicy.* If you happen to know any background, could you please let me know asap. . . Stephanie[106]

[106] LaClare Affidavit, at Exhibit 27 (emphasis added).

Mother Jones describes its articles as "smart, fearless journalism," "ahead of the curve,"[107] and "about reporting."[108] Contrary to its perception of itself, this case illustrates the non-objective bias of *Mother Jones* and its approach in seeking out only the negative to support its position; resorting to sophomoric bullying and name-calling to lead the reader to adopt its particular agenda.

Mother Jones position that Vandersloot outed Zuckerman in the Idaho Falls area pales in comparison to the outing of Zuckerman by Mother Jones on its world wide website and in its tweets. Apparently Mother Jones found this acceptable, but not acceptable for Vandersloot to question the fairness of a gay reporter reporting on issues of pedophiles and the Boy Scouts. Mother Jones used Zuckerman's homosexuality to promote its anti-Romney agenda, without apparent regard for Zuckerman's feelings.

In 1791, the First United States Congress proposed the first twelve amendments to the United States Constitution, including the clause (in what later became the First Amendment) guaranteeing that Congress would make no law abridging the freedom of the press. The Founders of this country expected that democracy would thrive only if the press was not hindered in its reporting upon the actions of government and the governors. James Madison, in 1825, wrote: "The diffusion of knowledge is the only guardian of true liberty."

But the journalistic model revealed to the Court in the record of this lawsuit is anything but a "guardian of true liberty." Instead, it is little more than mud-slinging, advertised as journalistic fearlessness, which offers very little in the way of a complete or balanced picture for its readers. Instead of being a leader in educating the people about civil discourse in an era of increased political polarization, the press in general, and *Mother Jones* in particular, leads the

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[107] LaClare Affidavit, at Exhibit 42, p. 1.

way in demonizing, rather than fairly discussing, those whose points of view differ from its own. Instead of the robust debate which characterized the state ratifying conventions in 1787 and 1788, and should have been the beacon for future political discourse, Mencimer's e-mail sheds a sad light upon the media's bitter practices of *ad hominem* attacks to boost revenue and to focus the reader's attention only upon the negative, without any balance of any kind. True fearlessness in reporting would allow the readers of this nation to decide the issues for themselves by being given a well-rounded picture of the issue at hand. Slanted journalism fuels only divisiveness. Unlike the Founders' dreams for this nation, such journalism does not act as a guardian of the democratic republic which gave the press its freedom.

VII. CONCLUSIONS OF LAW

Based upon the foregoing findings and analyses, the Court concludes as follows:

1. The February 6, 2012 tweet referred with particularity to Melaleuca. None of the other statements at issue are "of and concerning" Melaleuca.

2. All of the statements at issue are protected as opinion or rhetorical hyperbole.

3. All of the statements at issue are non-actionable truth or substantial truth.

4. None of the statements at issue are defamatory *per se*.

5. This action was not brought frivolously or without foundation. The First Amendment's application can be difficult and subject to varying interpretations. This was a proper case to resolve the issues.

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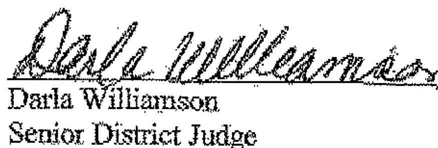
[103] Id.

VII. ORDER OF THE COURT

The Defendants' Motion for Summary Judgment is **granted** as to the Mother Jones' defendants. The Plaintiffs shall take nothing by their claims against these Defendants. This is an interlocutory decision and not subject to appeal until a final judgment is entered. The Court will not enter a final judgment in this case until plaintiffs' case against defendant Peter Zuckerman has been concluded.

IT IS SO ORDERED.

DATED: October 6, 2015.



Darla Williamson
Senior District Judge

CLERK'S CERTIFICATE OF MAILING

I hereby certify that I served a true and correct copy of the foregoing document upon the following this 6th day of October, 2015.

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