IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-02550-WYD-KMT

KRISTINA HILL,
BRIAN EDWARDS, and
THOMAS PRIVITERE,

Plaintiffs,
v.

PUBLIC ADVOCATE OF THE UNITED STATES,
a District of Columbia corporation,

Defendant.

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant Public Advocate of the United States ("Public Advocate"), by and through undersigned counsel, submits the following reply in support of its motion to dismiss the complaint.

A. Plaintiffs' Misappropriation Claim is Barred by the First Amendment

Plaintiffs have a particular view regarding the issue of same-sex unions; they are in favor of them. Indeed, they celebrate them, which is, of course, their right. No one would try to stop them if they wanted to exercise that right by climbing up on a rooftop and shouting for all the world to hear that they believe same-sex unions are a wonderful thing. And in a manner of speaking they did just that. Actually, they did much more than that. When plaintiffs Edwards and Privitere posted their photograph on the Internet, they increased their potential audience

from the dozens who might be in shouting distance from their rooftop to the millions of people with access to the Internet.

Plaintiffs intimate, without actually saying, that they never sought to make a public statement. ("private individuals"; "private wedding"; "personal wedding blog"). Obviously nothing could be further from the truth. The photograph was not posted in a private forum. Plaintiffs celebrated their same-sex union in a forum open to literally anyone on the planet with access to a computer. Far from being posted in a private forum, it was posted in the most public forum ever known in the history of mankind. Certainly this is their right, but it is absurd now to suggest they never intended to make a public statement. They made a very public statement concerning an issue about which they are passionate, and if they did not want others to comment on their photograph they should never have posted it on the Internet.

Public Advocate also has a particular view regarding the issue of same-sex unions; it deplores them. And just as plaintiffs have a First Amendment right to express their views about same-sex unions, Public Advocate has a First Amendment right to express its disagreement with the views expressed by plaintiffs. That is what this case is about. Plaintiffs made a public statement of their point of view, and Public Advocate made a public comment in opposition to that point of view. This is the sort of give and take in the free market of ideas the protection of which is at the very center of the First Amendment.

Plaintiffs try to deflect the Court's attention from the real issue at hand by seeking radically to narrow the "matter of public concern" about which Public Advocate was expressing its views. They cite *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001), for the proposition that the First Amendment privilege applies when the use of plaintiffs'

likeness is made in the context of, and "**reasonably relates to**," a matter of legitimate public concern. They then assert that the matter of public concern at issue here was whether Jean White or Jeffrey Hare should be elected and that the photograph has nothing to do with that issue.

It is glaringly obvious, however, that the issue of public concern implicated in this case is not that narrow. The issue is whether same-sex unions should be recognized. In this regard, the passage in *Dittmar* immediately after the one quoted by plaintiffs is particularly germane. The court quoted *Haskell v. Stauffer Communications, Inc., 26 Kan. App. 2d 541, 990 P.2d 163, 166 (Kan. App. 1999)*, as follows: "If a communication is about a matter of public interest and there is a real relationship between the plaintiff and the subject matter of the publication, the matter is privileged." *Id*. The issue, therefore, is whether there is a real relationship between these plaintiffs and the subject matter of Public Advocate's speech. Whether it was their purpose or not, Edwards and Privitere injected themselves into the same sex union debate when they posted a photograph celebrating such a union on the Internet. There is obviously a "real relationship" between plaintiffs' public celebration of same-sex unions and Public Advocate's publication in opposition to such unions.

Plaintiffs' reliance on *Gilbert v. Med. Econ. Co.*, 665 F.2d 305 (10th Cir. 1981), is misplaced as the very quotation used by plaintiffs indicates. That case involved the public disclosure of private information. This is not a privacy case. Edwards and Privitere placed their photograph on the Internet, not Public Advocate.

Plaintiffs' reliance on Magistrate Judge Hegarty's opinion in *Bustos v. United States*, 08-cv-00153, 2009 U.S.Dist. LEXIS 80496 (D.Colo., June 26, 2009) is also misplaced, because Judge Babcock rejected the magistrate's recommendation. In *Bustos v. United States*, 08-cv-

00153, 2009 U.S.Dist. LEXIS 73426 (D.Colo., Aug. 21, 2009), Judge Babcock held that Magistrate Judge Hegarty's reasoning was flawed and granted the defendant's Rule 12(b)(6) motion to dismiss plaintiff's misappropriation of likeness claim, stating, "I conclude, **as a matter of law**, that AETN's use of plaintiff's image is protected by the First Amendment and Colorado law." *Id.* (emphasis added). Judge Babcock stated further:

> So long as the video clip was newsworthy – as it is undoubtedly alleged to be – AETN's decision to publish the clip in the context of the Gangland program is protected despite the fact that AETN may have published the clip or the Gangland program in order to increase viewership, sell videos, or otherwise make a profit. . . . Dismissal on First Amendment privilege grounds is therefore appropriate.

Id.

Plaintiffs try to save their claim by asserting that they need to conduct discovery on Public Advocate's profit motive. But the Colorado Supreme Court considered and unambiguously rejected exactly that argument. In *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001), the court stated:

> The question of whether a use of plaintiff's identity is primarily commercial or noncommercial is ordinarily decided as a question of law. . . . **A profit motive does not transform a publication regarding a legitimate matter of public concern into commercial speech**. Many news publishers, including newspapers and magazines, are motivated by their desire to make a profit. . . . Further, the fact that the defendant's reason for publishing the newspaper may have been his own commercial benefit does not necessarily render the speech 'commercial.' As noted above, a magazine or newspaper article is protected despite the fact that a publisher may publish a particular article in order to make a profit. **Similarly, the defendant's speech is protected even if he intends it to result in profit to him, so long as the contents of the speech qualify for protection.**

Id., 34 P.3d at 1003-04 (citations omitted; emphasis added).

The New Jersey Supreme Court's decision in *G.D. v. Kenny*, 205 N.J. 275, 15 A.3d 300 (2011), is on all fours with this case. There a public relations firm was engaging in an activity similar to Public Advocate's activity in this case, and it used the criminal history of a political

candidate's aide in a campaign flyer. The aide sued for misappropriation of likeness, but the court rejected the claim, stating:

> We also conclude that defendants did not commit the tort of misappropriation of G.D.'s name and image because the use of his name and image in the campaign flyers was not for a commercial purpose directly benefiting defendants. **That the Shaftan defendants are in the business of public relations and marketing and prepared the campaign flyers does not make publication of the flyers a publication in the commercial sense**. The campaign flyers represented political speech attacking the judgment of a candidate running for public office. **This is the type of speech that is at the heart of First Amendment guarantees**.

Id., 15 A.3d 311-12 (citations omitted; emphasis added).

Finally, plaintiffs attempt to narrow the privilege by asserting there is no independent First Amendment defense separate from news reporting. The Colorado Supreme Court considered and rejected this very argument in *Dittmar*:

> **The fact that the defendant's article did not appear in a traditional newspaper does not change this result**. We have previously stated that 'it is . . . well established that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and 'in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'' *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 593, 296 P.2d 465, 467 (1956) (*citing Lovell v. City of Griffin*, 303 U.S. 444, 452, 82 L. Ed. 949, 58 S. Ct. 666 (1938)). This means that if the contents of an article are newsworthy when published by a local newspaper, then they do not cease to be newsworthy when subsequently communicated by a different sort of publisher.

Id., 34 P.3d at 1004 (emphasis added) *see also, G.D. v. Kenny*, *supra* (First Amendment defense to misappropriation claim applied to political flyer).

B. Plaintiffs' Own Allegations Establish Public Advocate's Fair Use Defense

The Court may dismiss a complaint under Fed.R.Civ.P. 12(b)(6) when the complaint "on its face" shows the existence of an affirmative defense. For example, although a statute of limitations is an affirmative defense, it may be resolved on a Rule 12(b)(6) motion to dismiss

when the dates given in the complaint make clear that the right sued upon has been extinguished. *Aldrich v. McCulloch Props., Inc.,* 627 F.2d 1036, 1041 n. 4 (10th Cir. 1980) (internal citations and quotations omitted). In this case plaintiffs' complaint establishes on its face all four of the fair use factors set forth in 17 U.S.C. §107:

1. Public Advocate's "purpose and character of use" of the Mailers is alleged in paragraphs 5 – 7 and 9 -10 of the complaint. Indeed, plaintiffs' own brief charges that Public Advocate's "purpose in using plaintiffs' likenesses was to harm the candidacies of White and Hare, and indeed [Public Advocate] achieved those purposes: both candidates lost their primaries. Compl. ¶ 5 – 10." Opposition Memorandum, p. 11. The promotion of specific values in a political campaign is a purely non-commercial, non-profit and educational purpose protected under the fair use privilege of the Copyright Act. Thus, the complaint and plaintiffs' own explanation of their allegations support a finding of fair use based on the admitted purpose and character of Public Advocate's use of the portion of the photograph in the Mailers.

Moreover, plaintiffs acknowledge that the Copyright Act contains "built-in First Amendment accommodations." Opposition Memorandum, p. 10. The fair use defense is one of "copyright's built-in First Amendment accommodations," protecting the public's First Amendment interest in copyrighted works. *Eldred v. Ashcroft*, 537 U.S. 186, 219-20, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003). The fair use defense allows individuals to use expression contained in a copyrighted work for such purposes as "criticism, comment, news reporting, teaching . . . scholarship, or research . . . and even for parody." *Golan v. Holder*, 609 F.3d 1076, 1091 (10th Cir. 2010) (*quoting Eldred*, 537 U.S. at 219-20). As discussed in detail above, the

"purpose and character" of Public Advocate's Mailers clearly fall within the scope of this recognized First Amendment accommodation of fair use.

2. The "nature of the copyrighted work" refers not only to the manner in which the copyrighted work was created, but also to how the elements of the work are employed in the allegedly infringing use. Plaintiffs admit that the photograph was publicly and freely available from the time it was posted on plaintiffs Edwards' and Privitere's blog in 2010. Plaintiffs also admit that plaintiff Hill granted plaintiffs Edwards and Privitere "permission" to post the photograph on the blog. Complaint, paragraph 30. Plaintiffs admit that the Mailers use only the image of the two individuals in the photograph and that Public Advocate reconstituted the photograph with entirely an different background, composition and messaging. *See* Complaint, paragraphs 3, 5 – 7 and 9 – 10. A complete view of the Mailers, front and back, is provided by Public Advocate as Exhibits B and C to its opening brief. Viewing the Mailers in their full context, it is immediately apparent that Public Advocate used part of the original image to make a political statement about same-sex unions.

3. Public Advocate's use of only a subset of the original photograph is admitted by plaintiffs. Plaintiffs allege that Public Advocate used only that portion of the photograph which contains images of a same-sex couple holding hands and kissing. They thereby implicitly acknowledge that Public Advocate did not use much if not most of the stylistic and creative elements of the original photograph. This is self-evident when one compares the front of the Mailers, shown at complaint paragraphs 5 and 9, with the original photograph as shown in paragraph 3 of the complaint. On the face of their complaint, therefore, plaintiffs acknowledge that only a single element of the image showing the couple in the photograph is repeated in the

Mailers. All other creative elements are removed and replaced in order to focus on the factual point: the image of a same-sex couple with the corresponding commentary on same-sex unions.

4. There is no impact on the potential market or value of the copyrighted work. Plaintiffs assert they are not required to plead facts to negate possible affirmative defenses. Memorandum in Opposition, p. 9. This is true as far as it goes. However, the facts they do allege demonstrate that the copyright owner, plaintiff Hill, gave permission to the other plaintiffs to post the photograph on their blog so that it could be shared with “friends and family” for free. In fact, the photograph was being shared for free with anyone who has access to the Internet. The complaint is devoid of any factual allegations that plaintiff Hill suffered lost income or diminution of the value in this particular work, other than the conclusory allegation of damage to plaintiff Hill “in the form, *for example*, of lost license fees.” Complaint, paragraph 47. Plaintiff Hill’s failure to allege facts regarding any negative impact on the “potential market for or value of” the photograph betrays a lack of actual damages. Under these circumstances, therefore, a claim of damages due to Public Advocate’s use of an element of the photograph in the Mailers is simply not plausible under the *Twombly* standard of pleading.

D. Conclusion

Public Advocate’s motion to dismiss the complaint should be granted in full because it is obvious from the face of the complaint that plaintiffs’ misappropriate claim is barred by the First Amendment privilege, and plaintiffs’ copyright claim is barred by the fair use defense.

Respectfully submitted December 24, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 24, 2012 a true and correct copy of the foregoing was served via the Court's the CM/ECF system on:

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