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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND – BALTIMORE DIVISION

ALBERT SNYDER,
Plaintiff,
vs. Case No. 1:06-cv-1389-RDB

FRED W. PHELPS, SR.;
SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS; and,
WESTBORO BAPTIST CHURCH, INC.,
Defendants.

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANTS PHELPS-DAVIS & PHELPS-ROPER TO DISMISS OR FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper, as pro se defendants herein, hereby jointly move the Court for judgment herein, including for an order dismissing this action, or granting summary judgment to them in this action, pursuant to Rule 12(b)(6), Fed.R.Civ.P., Rule 56, Fed.R.Civ.P., or any other applicable law or rules. Defendants also move the Court for an order staying discovery/reconsidering the April 17, 2007 denial. Defendants also move for

an order setting an Answer date and scheduling conference, and discovery schedule, should the Court overrule the motion to dismiss or for summary judgment in whole or in part. Defendants also move to strike any reference to any picket or Web page content unrelated to Lance Cpl. Matthew A. Snyder. Defendants submit the following memorandum in support of this motion.

Introduction

Plaintiff filed this lawsuit on June 5, 2006, against a church (Westboro Baptist Church, Inc. ["WBC"]), its pastor (Pastor Fred Phelps ["Phelps"]), and unnamed members of the church, because of his disagreement with words expressed by some church members, on a public sidewalk on March 10, 2006, and on a public Web page shortly after March 10, 2006.

Plaintiff claims jurisdiction by virtue of diversity of citizenship, and alleges tortious conduct by the church and its members, including defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy.

On February 23, 2007, the Court issued its order allowing plaintiff to add these two defendants, over the objection of the defendants WBC and Phelps. Meanwhile on October 30, 2006, the Court overruled a motion to dismiss filed by WBC and Phelps. On March 26, 2007, these defendants agreed to accept service of the Complaint. On April 16, 2007, these defendants filed motions for additional time to prepare motions to dismiss or for other relief, and a motion for stay of discovery until jurisdictional issues, and more importantly, issues related to the protected nature of their religious activities under the First Amendment, were addressed.

On April 17, 2007, the Court issued two orders. In one the Court allowed these defendants time to April 24, 2007, within which to file motions to dismiss or for other relief, saying that defendants have "raised many issues previously addressed by this Court in its Memorandum Opinion of October 30, 2006" where the Court overruled the other defendants' motion to dismiss. In the second order, the Court summarily denied the motion for stay.

It appears to be well settled in the law, including in the Fourth Circuit, that an issue not raised by a party before the trial court can not be raised on appeal. *Canada Life Assur. Co. v. Estate of Lebowitz*, 185 F.3d 231, 239 (4th Cir. 1999); *U.S. v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 379 (4th Cir. 1995); *Stewart v. Hall*, 770 F.2d 167, 1271 (4th Cir. 1985). The Court noted in its order allowing an amendment to add these two defendants that they are the daughters of defendant Phelps. These defendants are not able to locate any authority for the proposition that the adult children of a party can forego the requirement that they make their own record at the trial court level, nor is it imaginable that this Court or the Fourth Circuit would countenance such an approach. Thus, even though the Court has raised the point that some of the issues raised here were previously addressed, these defendants believe they are required to raise all issues in their own motions and behalf in order to preserve them for appeal. Further, in some instances, as addressed below, these defendants respectfully believe the Court may have overlooked a point of law or fact, and as such respectfully raise it herein.

Defendants are filing herewith their affidavits, with Attachments 1 through 16, in support of their motion. Those affidavits with attachments will be referred to throughout herein, as "Phelps-Roper Affidavit," "Phelps-Davis Affidavit," and "Attachment 1," etc.

Defendants hereby incorporate "Defendants' Motion to Dismiss Complaint" of September 18, 2006; "Defendants' Reply to Plaintiff's Opposition to Motion to Dismiss," of October 19, 2006; and memoranda in support of both; in full, as though set out verbatim; whether or not the specific issues or content from those filings are included herein.

Renewal of Motion to Stay/Motion for Reconsideration

In their motion for Stay of Discovery and memorandum in support, filed April 16, 2007, defendants asked that the Court stop discovery from going forward until jurisdictional and legal issues about the claims made herein were addressed. The issues raised below are substantial, and the claims by plaintiff raise the question of whether religious opinion, lawfully expressed, can form the basis for a civil action. Such seems highly inconsistent with constitutional protections, and as such require serious attention by the Court. Given the substantial First Amendment and other legal issues raised herein, for the reasons set out in the Motion for Stay, these defendants hereby renew their request for stay, and ask the Court to reconsider its summary denial of said motion.

Motion for Establishment of Answer Date and Scheduling Conference if Motions are Overruled

In its April 17, 2007 order, summarily denying these defendants' Motion for Stay of Discovery, the Court stated that the Scheduling Order set out in a Letter Order of February 23,

2007, would remain in effect. These defendants have not filed an Answer, participated in any scheduling conference, or undertaken discovery. While they respectfully believe that the information set out below reflects that they are entitled to judgment as a matter of law, in the event the Court disagrees, they are entitled – as separate parties, separate legal entities, with their own property and rights imperiled by this action – to the opportunity to file an Answer, participate in a scheduling conference, and undertake their own discovery. Thus, should the Court overrule their within motion, in whole or in part, and after all appropriate relief has been exhausted related thereto, defendants request that the Court permit them the procedural and substantive opportunities afforded any other party appearing before this Court.

Facts

1. Defendant Phelps-Roper is 49 years old, and has been a member of WBC since she was 9. Phelps-Roper Affidavit, paragraph 3.
2. Defendant Phelps-Davis is 46 years old, and has been a member of WBC since she was 10. Phelps-Davis Affidavit, paragraph 3.
3. Defendants believe the Bible is the revealed Word of God; they believe all of it, Old and New Testaments, and take it literally. Phelps-Roper Affidavit, paragraph 7. Phelps-Davis Affidavit, paragraph 7.
4. Defendants study the King James (1611) version of the Bible every day. Phelps-Roper Affidavit, paragraph 8. Phelps-Davis Affidavit, paragraph 8.

5. Defendants try every day to live according to the Bible. Phelps-Roper Affidavit, paragraph 9. Phelps-Davis Affidavit, paragraph 9.

6. Defendants believe the Bible teaches doctrines of grace, captured under the acronym T.U.L.I.P, which are described in detail in their affidavits. Phelps-Roper Affidavit, paragraph 10. Phelps-Davis Affidavit, paragraph 10. **Attachment 1**.

7. Defendants also believe the Bible teaches election and predestination. Phelps-Roper Affidavit, paragraph 11. Phelps-Davis Affidavit, paragraph 11.

8. Defendants believe that Jacob is the prototype in the scriptures for God's elect, and God loves His elect; and that Esau is the prototype in the scriptures for reprobates, and God hates all reprobates. Phelps-Roper Affidavit, paragraphs 12 & 13. Phelps-Davis Affidavit, paragraphs 12 & 13.

9. Defendants believe that most people today, in America and the world, claim to believe that God loves everybody, and they hear this statement regularly and have for years. Defendants believe the Bible does not support this conclusion. Phelps-Roper Affidavit, paragraph 14. Phelps-Davis Affidavit, paragraph 14.

10. Defendants believe the Bible teaches that God has made a covenant with all mankind, that if you obey Him, He'll bless you, and if you disobey Him, He'll curse you. Phelps-Roper Affidavit, paragraph 15. Phelps-Davis Affidavit, paragraph 15.

11. Defendants believe that America was formed in gospel light, and had the blessings of God upon her in her early years, but that with time America turned from God,

institutionalized sin, and became proud of her sin. Phelps-Roper Affidavit, paragraphs 16 & 17. Phelps-Davis Affidavit, paragraphs 16 & 17.

12. Defendants believe that America has become a nation of idolaters, and their main idols are the military uniform, the American flag, and patriotism. They believe today the majority of Americans worship these items instead of God. Phelps-Roper Affidavit, paragraph 18. Phelps-Davis Affidavit, paragraph 18.

13. Defendants believe the Bible teaches if, as a nation, you turn your back on God, disobey His commandments, and make it your manner-of-life to be proud sinners, that God will punish you for doing so. Phelps-Roper Affidavit, paragraph 19. Phelps-Davis Affidavit, paragraph 19.

14. Defendants believe in the Bible's directive to love thy neighbor as thyself. Defendants believe that when that directive is given in the Bible, the Bible also tells how to do it, which is to rebuke your neighbor for his or her sin, and warn your neighbor not to sin and bring the wrath of God on himself or herself and their household. They believe that, although many people who see this message parrot "Love thy neighbor," almost no one knows what the Bible actually says about this matter. Phelps-Roper Affidavit, paragraphs 20 & 21. Phelps-Davis Affidavit, paragraphs 20 & 21. **Attachment 2.**

15. Defendants believe people who serve God are rare in the earth today, and that we are living in the Last of the Last days; and that dark apostasy is all over the world, most of all

in America. Phelps-Roper Affidavit, paragraphs 22 & 23. Phelps-Davis Affidavit, paragraphs 22 & 23.

16. Defendants believe that today most Americans know little or nothing about the Bible, do not study it, and do not obey it. Phelps-Roper Affidavit, paragraph 24. Phelps-Davis Affidavit, paragraph 24.

17. Defendants believe God is going to deal with America for her sins, and is already dealing with her for her sins. Phelps-Roper Affidavit, paragraph 25. Phelps-Davis Affidavit, paragraph 25.

18. Defendants believe that we are living in the times described by Christ, the last days, as set out in detail in their affidavits. Phelps-Roper Affidavit, paragraph 26. Phelps-Davis Affidavit, paragraph 26.

19. Defendants believe we are living in the times described by the Apostle Paul in his first epistle to Timothy, when people won't believe the truth. They believe that even so, they have a duty to preach the word on the streets, in a timely, relevant, effective way, so that people hear it. Phelps-Roper Affidavit, paragraphs 27 & 28. Phelps-Davis Affidavit, paragraph 27 & 28.

20. Defendants believe the time of Christ's return is at hand; that Christ will return in power and glory to punish the disobedient; that God is going to judge the world; and that the destruction of the world is drawing nigh. Phelps-Roper Affidavit, paragraphs 29-32. Phelps-Davis Affidavit, paragraphs 29-32.

21. Defendants believe that the destruction of America and the world is prophesied about in the scriptures, in the Old and New Testaments, frequently; with America often being referred to as Babylon. Phelps-Roper Affidavit, paragraph 33. Phelps-Davis Affidavit, paragraph 33.

22. Defendants believe it was necessary for the Iraq war to take place, and that God has caused President Bush and this nation (by its majority and leaders) to get into that war as a precursor to the destruction of this nation and this world. Phelps-Roper Affidavit, paragraph 34. Phelps-Davis Affidavit, paragraph 34.

23. Defendants believe that they have a duty to publish to this nation, and the world, a message that God is punishing them for their proud sins, and because they will not obey His commandments. Phelps-Roper Affidavit, paragraph 35. Phelps-Davis Affidavit, paragraph 35.

24. Defendants believe that members of Westboro Baptist Church are the prophets of God in the earth today, and that prophets have attributes, as described in their affidavits, including the fact that they will judge the world. Phelps-Roper Affidavit, paragraphs 36-38. Phelps-Davis Affidavit, paragraphs 36-38.

25. Defendants believe that God avenges His people, and that one of the things that increases His wrath is when those who receive the message of the prophets respond by rejecting the message and mistreating them. Phelps-Roper Affidavit, paragraph 39. Phelps-Davis Affidavit, paragraph 39.

26. Defendants believe that God has shown great kindness to America by giving her prophets, and that her refusal to hear or obey will cause her to be punished more by God. Phelps-Roper Affidavit, paragraph 40. Phelps-Davis Affidavit, paragraph 40.

27. Defendants believe that no one in America or the world today is going to believe their testimony or their report; that this was common for prophets in the Bible; and that they still have a duty to publish the message. Phelps-Roper Affidavit, paragraphs 41-43. Phelps-Davis Affidavit, paragraphs 41-43.

28. Defendants believe that all humans have a duty to tell their fellow man that their sins will cause them to be destroyed, and that any person's failure to do that duty will cause the blood of the people to be on his and/or her hands. Phelps-Roper Affidavit, paragraph 44. Phelps-Davis Affidavit, paragraph 44.

29. Defendants believe that the duty to obey God's commandments is absolute and applies to every human, elect and reprobate alike. In addition to the duty to obey, defendants believe every human has a duty to rejoice at all of God's judgments, which they believe by definition are perfect and righteous. This is why many of their signs include the phrase "Thank God for …" in reference to the events that occur (e.g., 9/11, Katrina, dead soldiers, etc.). Phelps-Roper Affidavit, paragraphs 45 & 46. Phelps-Davis Affidavit, paragraphs 45 & 46.

30. Defendants believe the duty to prophesy is found in the Old and New Testaments, and the Bible says the people will not heed the words in both testaments. They also believe that

people in America will reject the message and hate WBC members because of it. Phelps-Roper Affidavit, paragraphs 47-50; Phelps-Davis Affidavit, paragraphs 47-50.

31. Defendants' beliefs as described in their affidavits are what motivate them in their picketing, and dictate how they live and teach their children. Phelps-Roper Affidavit, paragraphs 51-53. Phelps-Davis Affidavit, paragraphs 51-53.

32. All of defendants' actions and words which are complained of herein were done by defendants because of their sincerely held religious beliefs. The Kansas Appellate Court has found that defendants sincerely hold these beliefs. Phelps-Roper Affidavit, paragraphs 54-56. Phelps-Davis Affidavit, paragraphs 54-56. **Attachment 3**.

33. Defendants believe when destructive or tragic events happen in this country today, it is God punishing this nation for its proud sin, including homosexuality, adultery (divorce-and-remarriage), fornication, and other sins. Defendants believe these sins are taught in the institutions of America. Phelps-Roper Affidavit, paragraphs 62-65. Phelps-Davis Affidavit, paragraphs 62-65.

34. In early 2005 defendants began seeing news stories about funerals of soldiers. These news stories showed that these events were highly public, attended by many elected officials, military representatives and the media, and were made into public events. Phelps-Roper Affidavit, paragraphs 66-68. Phelps-Davis Affidavit, paragraphs 66-68.

35. Defendants concluded that from their faith it was mandatory that they should go to the public events that were being made of soldiers' funerals, to say the words that the deaths

of the soldiers is the punishment by God of America for her sins, and make related points, because these funerals have become events of national and international attention. Phelps-Roper Affidavit, paragraphs 69&70. Phelps-Davis Affidavit, paragraphs 69&70.

36. Defendants believe they have a duty to deliver the message that God is punishing America for her sins at these public events related to the soldiers' funerals, and to use any lawful means to deliver this message. Phelps-Roper Affidavit, paragraphs 71 & 72. Phelps-Davis Affidavit, paragraph 71 & 72.

37. On March 10, 2006, defendants went to Westminster, Maryland, after learning through public media reports that a soldier's funeral was going to occur there. Phelps-Roper Affidavit, paragraph 73. Phelps-Davis Affidavit, paragraph 73.

38. The funeral of Lance Cpl. Matthew A. Snyder was public, through multiple public notices, inviting the public. Phelps-Roper Affidavit, paragraphs 74-78. Phelps-Davis Affidavit, paragraphs 74-78. **Attachment 4.**

39. In addition to the public notices of the funeral, before they went to Westminster, defendants saw news reports about this deceased soldier, which included numerous statements by family members. All of these reports cast the soldier as a hero. Phelps-Roper Affidavit, paragraph 79. Phelps-Davis Affidavit, paragraph 79. **Attachment 5.**

40. Defendant Phelps-Roper learned that Lance Cpl. Matthew A. Snyder's parents were divorced by public statements by the family, as detailed in her affidavit. Phelps-Roper Affidavit, paragraphs 80-82. **Attachments 4 & 5.**

41. Defendant Phelps-Roper also learned from public notices that Lance Cpl. Matthew A. Snyder had been raised a Catholic, as detailed in her affidavit. Phelps-Roper Affidavit, paragraph 83. **Attachment 4**

42. Defendant Phelps-Roper is familiar with doctrinal practices of the Catholic religion related to divorce and remarriage, as detailed in her affidavit. Phelps-Roper Affidavit, paragraphs 84 & 85. **Attachment 13.**

43. Defendant Phelps-Roper is familiar with the widely published scandal related to Catholic priests sexually abusing young boys in the Catholic Church, of which the Court can take judicial notice. Phelps-Roper Affidavit, paragraph 86. **Attachment 15.**

44. As defendants arrived at Westminster, they were directed by police where to stand during the picket, and that's where they stood the entire time. Phelps-Roper Affidavit, paragraphs 87 & 88. Phelps-Davis Affidavit, paragraphs 80 & 81.

45. They were required to stand behind a school which was the furthest building away from the church with two additional buildings between the school and the church where the funeral was being held, inside orange plastic fencing. Phelps-Roper Affidavit, paragraphs 89 & 90. Phelps-Davis Affidavit, paragraph 82 & 83. **Attachments 6 and 7.**

46. Defendants were with a group of seven people, including four minors. Between them and the school were dozens of bikers with flags. Phelps-Roper Affidavit, paragraphs 91 & 92. Phelps-Davis Affidavit, paragraphs 84 & 85. **Attachment 7.**

47. During this picket, law enforcement specifically diverted the procession with family away from defendants. Phelps-Roper Affidavit, paragraph 93. Phelps-Davis Affidavit, paragraph 86.

48. Albert Snyder did not see defendants on March 10, 2006. Phelps-Roper Affidavit, paragraphs 94 & 95. Phelps-Davis Affidavit, paragraph 87 & 88. **Attachment 8.**

49. Matthew Snyder's aunt did not see defendants on March 10, 2006. Phelps-Roper Affidavit, paragraph 96. Phelps-Davis Affidavit, paragraph 89. **Attachment 9.**

50. Media members, passers by, Patriot Guard members (bikers), and hundreds of people who have contacted Albert Snyder since he filed this lawsuit, all disagreed with the position of defendants about Albert Snyder and Matthew Snyder. Phelps-Roper Affidavit, paragraphs 97-110. Phelps-Davis Affidavit, paragraphs 90-103. **Attachments 9, 10, 11 and 14.**

51. During the picket of March 10, 2006, defendants stood the entire time in the area designated by law enforcement; held signs which reflected their religious opinions and beliefs about the soldiers dying and other issues related to America and her sin; and sang one song in their natural (unamplified) voices reflecting those same viewpoints. Defendant Phelps-Roper responded to questions from media about her religious viewpoints. Phelps-Roper Affidavit, paragraph 111; Phelps-Davis Affidavit, paragraph 104.

52. Defendants left the area at or before the time the public notice indicated the funeral was scheduled to start. Defendants did not remain in the city, or the area, after the funeral started. Phelps-Roper Affidavit, paragraph 112. Phelps-Davis Affidavit, paragraph 105.

53. Defendants and other WBC picketers did not go into the church where Lance Cpl. Matthew Snyder's funeral was held on March 10, 2006. Phelps-Roper Affidavit, paragraph 113. Phelps-Davis Affidavit, paragraph 106.

54. Defendants and other WBC picketers did not stop any part of the funeral service or procession of Lance Cpl. Matthew Snyder from occurring on March 10, 2006. Phelps-Roper Affidavit, paragraph 114. Phelps-Davis Affidavit, paragraph 107.

55. At no time on March 10, 2006, did defendants or any WBC picketer see the funeral service or procession of Lance Cpl. Matthew Snyder. Phelps-Roper Affidavit, paragraph 115. Phelps-Davis Affidavit, paragraph 108.

56. At no time on March 10, 2006, did defendants or any WBC picketer make any sound that was physically able to reach the ears of those going into the church where the funeral of Lance Cpl. Matthew Snyder was scheduled to occur. Phelps-Roper Affidavit, paragraph 116. Phelps-Davis Affidavit, paragraph 109.

57. Everything defendants did as they stood at a picket in Westminster, Maryland on March 10, 2006, was because of their religious beliefs as detailed in their affidavits. Phelps-Roper Affidavit, paragraph 117. Phelps-Davis Affidavit, paragraph 110.

58. Defendants had no intent in publishing their religious views about the public funerals of soldiers, and how God is dealing with America, to harm anyone; to the contrary, their intent was to help their fellow man by warning him not to incur God's wrath. Phelps-Roper Affidavit, paragraph 118. Phelps-Davis Affidavit, paragraph 111.

59. Defendants were aware on March 10, 2006, that the Maryland legislature was proposing legislation that would put a distance on funeral picketing. The law was passed on May 2, 2006, and limited funeral picketing to 100 feet. Phelps-Roper Affidavit, paragraphs 119-122. Phelps-Davis Affidavit, paragraphs 112-115. **Attachment 12**.

60. By passing this law, the State of Maryland has recognized that the picketing activity defendants engaged in on March 10, 2006, was protected activity. Otherwise, rather than a time, place and manner restriction, the General Assembly would have banned the activity. Phelps-Roper Affidavit, paragraph 123. Phelps-Davis Affidavit, paragraph 116.

61. According to information defendants have tracked about laws in other jurisdictions, Maryland is one of the two least restrictive laws (out of about 40) passed thus far. Distances range from 100 to 1500 feet in these laws. Phelps-Roper Affidavit, paragraph 124. Phelps-Davis Affidavit, paragraph 117.

62. When defendants picketed in Westminster, Maryland, on March 10, 2006, they were more than 1000 feet from the church (a measurement on 12/9/06 found 1203 feet). Phelps-Roper Affidavit, paragraph 125. Phelps-Davis Affidavit, paragraphs 118 & 120.

63. When defendants picketed in Westminster, Maryland on March 10, 2006, they never saw the church, any of its driveway entrances, or any of those going to the funeral, from where they stood. Phelps-Roper Affidavit, paragraph 126; Phelps-Davis Affidavit, paragraph 119.

64. The nearest driveway entrance to where defendants stood on March 10, 2006, was at least 400 feet away, and they did not see it on March 10, 2006, or even know it existed. Phelps-Roper Affidavit, paragraphs 127-131. Phelps-Davis Affidavit, paragraphs 121-124. **Attachments 6 and 16.**

65. Photos of the scene show that from where defendants stood, the driveway entrance some 400 feet to the Northeast is not visible, because of a hill in between these two locations. Phelps-Roper Affidavit, paragraphs 128 & 129. Phelps-Davis Affidavit, paragraphs 121 & 122. **Attachments 6 & 16.**

66. If defendants had stood at the driveway entrance 400 feet to the Northeast of where they did stand, they would have still been 800 feet from the church, well in compliance with Maryland law. Phelps-Roper Affidavit, paragraph 130. Phelps-Davis Affidavit, paragraph 123.

67. Defendant Phelps-Roper wrote the epic regarding the March 10, 2006 picket. Phelps-Roper Affidavit, paragraph 134.

68. Writing the epic was a religious act by defendant Phelps-Roper. Phelps-Roper Affidavit, paragraphs 132-133.

69. Every word defendant Phelps-Roper wrote in the epic is her religious opinion, based on her understanding of the Bible, and its application to these events and public facts. Phelps-Roper Affidavit, paragraph 136.

70. The words in paragraph 24 of the Complaint were written by defendant Phelps-Roper. Phelps-Roper Affidavit, paragraph 137.

71. The words in paragraph 24 of the Complaint reflect defendant Phelps-Roper's religious opinion, applied to the public facts that Albert Snyder divorced his wife, and Matthew Snyder was raised in the Catholic religion. Phelps-Roper Affidavit, paragraphs 138-141.

72. The words of paragraph 25 of the Complaint were written by defendant Phelps-Roper. Phelps-Roper Affidavit, paragraphs 134 & 138.

73. The words of paragraph 25 of the Complaint reflect defendant Phelps-Roper's religious opinion, applied to the public facts that Albert Snyder divorced his wife, and Matthew Snyder was raised in the Catholic religion. Phelps-Roper Affidavit, paragraph 138.

74. Defendant Phelps-Roper holds the religious opinion that when a man divorces his wife that is adultery, based on Bible passages set out in her affidavit. Phelps-Roper Affidavit, paragraphs 139 & 140.

75. The fact that Albert Snyder sued his wife for divorce is a matter of public record, of which the Court can take judicial notice. Phelps-Roper Affidavit, paragraph 141.

76. The fact that Lance Cpl. Matthew A. Snyder was raised in the Catholic religion was published by the Snyder family. Phelps-Roper Affidavit, paragraph 141.

77. Defendant Phelps-Roper did not access any private records or information of any kind to write the epic. Phelps-Roper Affidavit, paragraph 142.

78. Defendant Phelps-Roper did not comment publicly on any issue that wasn't being addressed publicly, including the divorce of the Snyders, the fact that Matthew A. Snyder was raised in the Catholic religion, the deaths of soldiers, the doctrines of the Catholic religion, and the priest sex scandal in the Catholic Church. Phelps-Roper Affidavit, paragraphs 143 & 144.

79. Defendant Phelps-Roper holds the religious opinion that the practices of the Catholic religion are doctrinal error and idolatry. Phelps-Roper Affidavit, paragraphs 145-148.

80. The language of paragraph 20 of the Complaint was not written by either of these defendants, and was not written about Lance Cpl. Matthew A. Snyder or his funeral. Phelps-Roper Affidavit, paragraph 149; Phelps-Davis Affidavit, paragraph 125.

81. During the March 10, 2006 picket, defendant Phelps-Roper held two signs. One sign said "God Hates You" on one side and "God Hates America" on the other side. The other sign said "America is Doomed" on both sides. She also had an American flag hanging from her waist to the ground. The content of her signs and her use of the flag, and holding the signs in public, were all acts of religious practice and expressions of religious beliefs which she holds sincerely. Phelps-Roper Affidavit, paragraph 150.

82. During the March 10, 2006 picket, defendant Phelps-Davis held two signs. One sign said "Semper Fi Fags," on both sides, and one said "God's View" [with a graphic of a cross

hairs and Uncle Sam] on one side, and "Not Blessed, Just Cursed" on the other side. The content of these signs, and defendant holding these signs up on a public right of way, were all acts of religious practice and expressions of religious beliefs which she holds sincerely. Phelps-Davis Affidavit, paragraph 126.

83. March 10, 2006, is the first time defendant Phelps-Roper went to Maryland to picket or for any other reason to her best memory. Phelps-Roper Affidavit, paragraph 151.

84. Since March 10, 2006, defendant Phelps-Roper has picketed in Maryland twice, on April 29, 2006, and December 8 and 9, 2006. Phelps-Roper Affidavit, paragraph 152.

85. Defendant Phelps-Davis has been in Maryland on four occasions to her best memory. The dates were April 28-29, 2002; August 7-8, 2002; March 10, 2006 (the incident at issue here); and December 8-9, 2006. Phelps-Davis Affidavit, paragraphs 127 & 128.

86. Every time defendants have picketed in Maryland, they stood on public sidewalks or rights of way, and did not go on private property to picket. Phelps-Roper Affidavit, paragraph 153; Phelps-Davis Affidavit, paragraph 129.

87. Neither defendant owns land or property in Maryland; defendants do not routinely do business in Maryland, beyond the minimal amount related to short trips for picketing. Phelps-Roper Affidavit, paragraph 154; Phelps-Davis Affidavit, paragraph 130.

88. When picketing in Maryland, defendants have fully complied with all existing laws and law enforcement directives. Phelps-Roper Affidavit, paragraph 155; Phelps-Davis Affidavit, paragraph 131.

89. When picketing in Maryland defendants have engaged in protected religious activity. Phelps-Roper Affidavit, paragraph 155; Phelps-Davis Affidavit, paragraph 131.

Legal Authorities & Arguments

I. Basis for Relief – Rule 12 and Rule 56

This motion is made pursuant to Rule 12(b)(1), (2), (3) and (6); and given the material submitted herewith, Rule 56, including Rule 56(f), see *Amirmokri v. Abraham*, 437 F.Supp.2d 414, 419-421 (D.Md. 2006); as well as all other applicable rules and principles of law.

II. Lack of Subject Matter Jurisdiction – Excessive Entanglement Contrary to the First Amendment's Free Exercise and Establishment Clauses

The facts set out above reflect that plaintiff is not claiming he was injured by virtue of bodies being located over 1000 feet, out of sound and sight, on March 10, 2006. If that were the case, he would have sued the Patriot Guard and the St. John's school. He also is not claiming he was injured by virtue of the presence of signs being located over 1000 feet, out of sound and sight, on March 10, 2006. If that were the case, he would have sued the Patriot Guard and the St. John's school. The Patriot Guard members and students of St. John's school were physically closer, holding flags and signs. Not only did plaintiff not sue them, he has thanked and praised them publicly.

That means that the injury is claimed based on plaintiff not liking the content of the words. Plaintiff's allegations, and public statements regarding his lawsuit, reflect that he simply disagrees with defendants about what they believe about God and His relationship with America, particularly as it pertains to the death of soldiers in Iraq and the deaths of American

citizens in various tragedies at home. Plaintiff speaks of God; defendants speak of God. Clearly they have conflicting views. The courts do not have jurisdiction to decide whose religion is correct – even if all of the judges in the land agree with plaintiff's view, and even if every citizen of America besides the members of WBC agree with plaintiff's view – because that is not a matter for the courts. See *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116, 73 S.Ct. 143, 154, 97 L.Ed. 120 (1952) (Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government **as well as those of faith and doctrine**" [emphasis added]).

Concerns of excessive entanglement by the government in church affairs often arise in the context of a church employee bringing employment discrimination claims, e.g., *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002); *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 770 A.2d 111 (Md. 2001); in the context of litigation against churches for sexual abuse by church staff, including clergy, e.g., *JC2 v. Grammond*, 232 F.Supp.2d 1166 (D.Or. 2002); or in the context of disputes over property belonging to the church, e.g., *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 842 (Bkrtcy.D.Or. 2005). The issue the courts have to address in those cases is whether, in order to decide the case, the courts have to involve themselves in determining doctrinal issues. If they do, the case is not allowed to go forward, because for courts to decide doctrinal issues is a violation of the First Amendment.

In *Dixon v. Edwards*, 290 F.3d 699, 715 (4th Cir. 2002), the Court said: "The Court has consistently recognized that First Amendment values are jeopardized when church litigation turns on the resolution by civil courts of controversies over religious doctrine and practice. *See Milivojevich,* 426 U.S. at 709-10, 96 S.Ct. 2372. As Justice Brennan observed, '...'[t]he First Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.' *This principle applies with equal force to church disputes over church polity and church administration.' Id.* (emphasis added) (quoting *Presbyterian Church v. Hull Church,* 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969))."

In *United Sates v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972), the Court reversed convictions under a government regulation for what was essentially disorderly conduct. The convictions resulted from the defendants engaging in leafleting and prayer on government property. Even though there was "substantial evidence to support the ... findings that the defendants created loud and unusual noise and obstructed the usual use of entrances, corridors, etc.," 456 F.2d at 1078, the Court reversed because there was a strong suggestion that the regulation was being enforced selectively, based on the content of the viewpoint being expressed, "to inhibit the expression of an unpopular viewpoint," *id.* "It is established beyond all argument that the government may not favor one religion over another. It may not choose to permit an Episcopal prayer service for the health of the President and in support of the Armed Forces and deny a Quaker (or Episcopal) prayer service to end all war or even the Vietnam War.

It may no more dictate the content of a religious service than it may establish a state religion." 456 F.2d at 1079.

Similarly, here, in order to decide this case, the Court would have to determine whether the "God bless America," or "God is cursing America" religious viewpoint is accurate. The only way plaintiff can establish liability is if the Court finds that the content of defendants' words was tortious, either as defamatory, as giving publicity to private life, or as outrageous. That determination can only be made based on the content. To make this decision, the Court must determine which religious viewpoint is valid, and which is invalid. The First Amendment prohibits the courts making such decisions.

Defendants respectfully submit that this Court lacks subject matter jurisdiction over all the claims in this matter, because no matter how characterized by plaintiff, ultimately in order to determine the outcome of this case, the Court or jury would be required to determine whose religious viewpoint is right. There is no evidence that defendants were disruptive; physically entered the funeral; physically went on any private property; or addressed or spoke to any fact, information or issue that was not fully public before they addressed it. All of the claims in this matter rest on the ultimate position by plaintiff that defendants' religion is wrong. That is not a valid issue for the Court to take up, meaning that the Court either lacks jurisdiction to hear this matter, and/or judgment should be granted for the defendants for failure to state a claim upon which relief can be granted. Thus, the claims should be dismissed or summary judgment awarded, in full.

III. Lack of Subject Matter Jurisdiction on the Defamation Claim

In addition to the general lack of jurisdiction or failure to state a claim, because of the necessity for the Court to make doctrinal decisions to do so; specifically on the defamation claims, the Court should find it lacks jurisdiction and/or that plaintiff has failed to state a claim on the defamation claims, because they in particular require a decision about doctrine to resolve the claim.

The gravaman of the defamation claim is found at paragraphs 30-32 of the Complaint. Plaintiff complains that it is untrue that he committed adultery and taught his son to commit adultery; that it is untrue that he raised his son for the devil; and that it is untrue that he taught his son to defy his Creator, to divorce, and to commit adultery. To resolve this issue, the Court would have to decide whether defendants' understanding and application of the Bible is accurate or not. As the facts above reflect, defendant Phelps-Roper made these statements as her religious opinion, applying scriptures (many examples of which are included in her affidavit herewith) to the public and published facts that plaintiff divorced his wife (a public record, and a fact that he told the media), and that his son was raised in the Catholic religion (a fact that was released by the family to the media). Plaintiff does not deny that he divorced his wife. Plaintiff does not deny that his son was raised in the Catholic religion. He just *disagrees* with defendant's conclusion that these facts constitute adultery, teaching your children adultery, raising your child for the devil, and teaching your child to defy his Creator, according to the scriptures. Even if defendant is completely wrong in her understanding of the Bible – raising

the question of who can call that question (certainly not the plaintiff, who reportedly said in his deposition that he has never read the Old or the New Testament and doesn't believe in the Bible) – that is not a matter to be resolved by the courts.

In *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D.N.J. 1999), the Court granted summary judgment to defendants on a defamation claim, saying the Establishment Clause prohibited the Court from adjudicating the action because it implicated concerns which were ecclesiastical in nature. Plaintiff and his second wife sued a group of Orthodox rabbis, saying they defamed him when they said he had committed bigamy, had failed to comply with an order of a rabbinical court, and had failed to submit to the jurisdiction of a rabbinical court, 53 F.Supp.2d at 740-741. The Court found that to determine whether the statements were false, the Court would be required to inquire into areas of clear ecclesiastical concern, which would "clearly involve [the Court] in questions of religious doctrine," 53 F.Supp.2d at 741. Plaintiff suggested the Court could simply determine whether he had committed bigamy or not, but the Court said the issue was whether plaintiff had "engaged in bigamy *within the meaning of the Orthodox Jewish faith*," 53 F.Supp.2d at 742.

In *Hartwig v. Albertus Magnus College*, 93 F.Supp.2d 200 (D.Conn. 2000), the Court reached a similar conclusion on the defamation claims brought by plaintiff. There, plaintiff alleged the defendants defamed him by publicly stating that he had been terminated from employment because he had misrepresented his priestly status. The Court said "these claims

will require a trier of fact to choose between two conflicting ecclesiastical definitions of the term 'priest' and thus would violate the Establishment Clause," 93 F.Supp.2d at 218.

Defendants are entitled to assert truth as a defense to the defamation claims (in addition to the defense that they are statements of opinion, not fact). To resolve the question of truth, the Court would have to resolve doctrinal issues, related to divorce, adultery and remarriage, the doctrines of the Catholic religion, and various passages in the scriptures about raising children, serving God, and so forth. The issues presented are whether, in the Old School Baptist religion, plaintiff's act of divorcing his wife constitutes adultery; whether the same act constitutes teaching his child adultery, teaching him to live for the devil, and teaching him to defy his Creator; and whether the act of raising his son in the Catholic religion constitutes teaching him adultery, raising him to live for the devil, teaching him to defy his Creator, and teaching him to divorce. These are all doctrinal issues, going to the heart of defendants' religious beliefs. The fact that defendants' viewpoints are clearly unpopular in this generation and age further compounds the wrong of letting a court decide whether these religious beliefs are accurate.

To the extent the Court's language in its order denying defendants WBC and Phelps's motion to dismiss, at 2006 WL 3081106 at 1, quoting from the www.godhatesfags.com Web site, constitutes adding additional claims of defamation, defendants assert the same arguments related to those statements. Commentary about the religious import of raising a child in the Catholic religion – especially today with the high profile public nature of the priest sex scandal – is clearly commentary of a religious nature, and any resolution would require the Court to

determine substantial doctrinal issues. The defamation claims should be dismissed, and/or defendants should be awarded summary judgment on these claims, for lack of subject matter jurisdiction and/or failure to state a claim for relief.

IV. Lack of Subject Matter Jurisdiction to Adjudicate Statements of Opinion

The Court stated in its order denying WBC and Phelps's motion to dismiss that whether the statements alleged to be defamatory are statements of fact or opinion is an issue for the trier of fact, 2006 WL 3081106 at 9. Defendants respectfully submit that, instead, it is a question of law. First, it would defeat the purpose of the rule of law to allow the issue to go to a jury. The point is not to put people on trial for their opinions. Second, other courts have held that it is a question of law. "The distinction between alleged fact and opinion is a question of federal law, reviewable de novo. *Lewis v. Time, Inc.,* 710 F.2d 549, 553, 555 (9th Cir.1983)," *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 893 (9th Cir. 1988). See also *Church of Scientology Intern v. Eli Lily & Co.*, 778 F.Supp. 661, 667 (S.D.N.Y. 1991); *Carr v. Brasher*, 776 S.W.2d 567, 570 (Tex. 1989). Third, the Supreme Court and Fourth Circuit have suggested it's a question of law. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 110 S.Ct. 2695, 2705 111 L.Ed.2d 1 (1990), the Court said, "The Court has also determined that 'in cases raising First Amendment issues … an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"" In *Gibson v. Boy Scouts of America*, 163 Fed.Appx. 206, 324, 2006 WL 73345 at 4 (4th Cir. 2006), and *Biospherics, Incorporated v. Forbes, Incorporated*, 151 F.3d 180

(4th Cir. 1998), the Fourth Circuit upheld dismissal of defamation claims because the words complained of were opinion instead of fact.

Defendants submit that as an alternative to, and/or in addition to, their argument that the claims in this case require the Court to delve into doctrinal issues that the language alleged to be defamatory constitutes expressions of opinion, which are not actionable. To determine whether words are opinion, the Court looks at four things: 1) choice of words; 2) whether the challenged statement is capable of being objectively characterized – or proven – as true or false; 3) the context of the speech, and 4) the broader social context into which the speech fits. *Biospherics, Incorporated, supra*, 151 F.3d at 183.

Applying those factors here, 1) defendants' words are clearly rhetorical, hypothetical, religious and laced with opinion; 2) it is impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions (e.g., it is not possible to prove or disprove that plaintiff raised his son for the devil, or to defy His creator; plaintiff will say he didn't in his opinion; defendant Phelps-Roper will say her view of the Bible leads her to conclude he did; nothing can break that tie but opinion and doctrinal perspective); 3) the context of the speech is religious expression related to highly public matters, including the war, the deaths of soldiers, whether God is cursing or blessing America, the priest sex scandal, etc.; and 4) the broader social context is much bigger than plaintiff's opinions, to wit, the very soul of the nation from defendants' perspective, and at least the outcome of the war, the deaths of more soldiers, and the actions of the extremely influential Roman Catholic Church. Defendant's

language is the strong language of rebuking sin, unique to that situation; it pertains to the conscience and how a person is going to serve God; it is utterly impossible to put it to proof; and it is religious opinion in the highest form. The fact statements – whether plaintiff divorced his wife; whether Matthew Snyder's parents raised him in the Catholic religion – are not the dispute. The opinions drawn from those facts are the dispute, and those opinions can not be put to the test of truth. Alternatively, as noted above, if they can, doctrinal issues control the answers.

V. Lack of Personal Jurisdiction – No Minimum Contacts

The Court previously discussed personal jurisdiction, see 2006 WL 3081106 at 6-8. After concluding that specific, not general jurisdiction, was the basis for plaintiff claiming jurisdiction, the Court concluded that by coming to Maryland and "attending Lance Corporal Snyder's funeral and making comments about Plaintiff and Maryland in particular," defendants availed themselves of the privilege of conducting activities in Maryland, and thus could fairly be subject to this Court's jurisdiction. The Court also said, "The state has a particular interest in applying Maryland law to the type of conduct at issue in this case in order to deter Defendants or others from conducting similar activities in Maryland," 2006 WL 3081106 at 8.

The record evidence and Maryland law show that the activities in which defendants engaged in Maryland were protected activities. Maryland has passed a law permitting picketing to occur not within 100 feet of a funeral, whereas defendants were more than 1000 feet away. Certainly Maryland's interest in this matter is reflected in this law, which by its nature

demonstrates that Maryland considers the activity to be protected. Further, if defendants' activity is protected, Maryland would not be interested in deterring it – the opposite would be true.

These defendants have had negligible contact with Maryland, in their entire lives. The picketing they have done in that state is very limited, with defendant Phelps-Roper making a total of three trips to Maryland, and defendant Phelps-Davis making a total of four trips (two in 2002). The March 10, 2006 event was the first trip defendant Phelps-Roper ever made to Maryland. These are not sufficient contacts to justify requiring these defendants to answer in a Maryland federal court. The Court states at 2006 WL 3081106 at 8 that since defendants were able to come to Maryland to protest a funeral, and willing and able to expend resources and time necessary to spread their message, they would not be unduly inconvenienced by returning to Maryland. The fact that a party has some resources, and chooses to use them to engage in religious expression in the form of picketing, does not seem to be a valid legal basis for imposing jurisdiction with such limited contacts with the state. This is another means by which this action is being used to punish protected activity. See, by analogy, *OpenLCR.com, Inc. v. Rates Technology, Inc.,* 112 F.Supp.2d 1223, 1228 (D.Colo. 2000) (reference to protected patent enforcement activities which can not be used to satisfy minimum contacts); *Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 813 (D.C. 1976) (en banc) (recognizing government contacts doctrine that bars courts in the District of Columbia from exercising personal jurisdiction based solely on the defendant's contacts with a federal

instrumentality); *Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 787 (D.C.Cir.1983) (citing *Rose v. Silver,* 394 A.2d 1368, 1373-74 [D.C.1978]) (government contacts doctrine has its roots in the right of citizens to petition the federal government for redress of grievances; doctrine extended to protect defendants whose only contact with the District is lobbying activity before federal agencies to secure their own proprietary interests). The same reasoning applies here; engaging in constitutionally protected activity should not be treated as the basis for finding minimum contacts, particularly when that is the only thing the defendants have done in the jurisdiction, and that to a very limited degree.

The Court also says it would be efficient to try the case in Maryland, because events occurred there, and evidence and witnesses are there. In fact, plaintiff lives in Pennsylvania, most of his attorneys are in Pennsylvania; his retained experts are in Pennsylvania; his activities are in Pennsylvania. Defendants are in Kansas; the epic was written in Kansas; the Web site is maintained in Kansas. The only thing that happened in Maryland was a 45-minute picket by defendants, 1000 feet away from the funeral. To tell parties they can be hailed into court, for federal litigation, because of 45 minutes of protected activity violates traditional notions of fair play and substantial justice. It is doing through the back door what the law does not permit through the front. This activity – according to Maryland – is lawful and protected. Defendants fully complied with all laws. They did nothing that any reasonable person would think would cause them to be embroiled in federal litigation.

VI. Improper Venue

Defendants incorporate all arguments, authorities and content of defendants WBC and Phelps's motion to dismiss and reply thereto regarding improper venue, to thereby preserve the issue. As noted above, very little about this case is in or happened in Maryland. None of the parties are in Maryland; plaintiff lives in Pennsylvania; his expert witnesses are in Pennsylvania; most of his attorneys are in Pennsylvania; he holds his interviews with the media from Pennsylvania. It is unduly inconvenient to hold the trial in Maryland. The punitive perspective that since defendants have used their personal financial resources and time to engage in religious expression and activity in Maryland (on very few occasions), this means it is equitable to put them on trial in Maryland, does not support the conclusion that a substantial part of the events or omissions giving rise to the claim occurred in Maryland.

VII. No Statement of Claim Upon Which Relief Can be Granted or On the Undisputed Facts Defendants are Entitled to Judgment as a Matter of Law

Defendants incorporate here all arguments made in all other sections of this motion, by this reference, as though fully set out here. For all the reasons defendants contend the Court lacks subject matter jurisdiction, defendants submit in addition or in the alternative, that plaintiff has failed to state a claim upon which relief can be granted. In addition to all of the reasons otherwise stated in this motion, defendants submit that plaintiff has not stated a claim for relief for the additional reasons set out below in this section VII.

A. Invasion of Privacy

i. **No intrusion on seclusion**
ii. **No publication of private facts**

Given that both theories of invasion of privacy rely on the same factual claims, and the closely related nature of these two theories, they will be addressed by defendants together. All of the discussion in the record about invasion of privacy, in the Complaint, in the Court's order denying the motion to dismiss of defendants WBC and Phelps, and in various filings by plaintiff, all rest upon the false claim that defendants "attended" the funeral of Lance Cpl. Matthew A. Snyder. This is simply not true. They didn't go to the funeral; they didn't go into the church; they never got closer than 1000 feet to the funeral; no one going to the funeral saw or heard them; they had no impact on the funeral or the procession whatsoever. These facts are undisputed. Defendants stood on a public right of way, as directed by law enforcement, in full compliance with the law. Even if there was a remote chance someone going to the funeral might have seen or heard them – which would not be unlawful – scores of bikers and students blocked the view. By design, law enforcement and the Patriot Guard guaranteed that no one saw defendants. (Even if someone had seen them, that would not constitute invasion of privacy given where they were located.) When the funeral was scheduled to start, defendants left. "'Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal records to support a claim for invasion of privacy by intrusion,'" *Jennings v. University of North Carolina, at Chapel Hill*, 444 F.3d 255, 281 (4th Cir. 2006). There was no physical or sensory intrusion of any kind, at the funeral, or into any personal records or

information of the plaintiff. The evidence simply doesn't support this claim. See *Bailer v. Erie Insurance Exchange*, 344 Md. 515, 525-526, 687 A.2d 1375, 1380-1381 (Md. 1997); *McCauley v. Suls*, 123 Md.App. 179, 189-190, 716 A.2d 1129, 1134-1135 (Md. App. 1998); *New Summit Associates Limited Partnership v. Nistle*, 73 Md.App. 351, 360, 533 A.2d 1350, 1354 (Md.App. 1987); *Klipa v. Board of Education of Anne Arundel County*, 54 Md.App. 644, 654-656, 460 A.2d 601, 607-608 (Md.App. 1983). "[T]he gist of the offense is the intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs.' ... Furthermore, the intrusion must be of a nature that is 'highly offensive to a reasonable person,'" *Crosten v. Kamauf*, 932 F.Supp. 676, 684 (D.Md. 1996).

In *Trundle v. Homeside Lending, Inc.*, 162 F.Supp.2d 396 (D.Md. 2001), the Court granted summary judgment on an invasion of privacy claim, where plaintiff complained about a credit report saying her mortgage loan had been involved in bankruptcy being given to a potential lender, saying that there was no evidence that any information about the mortgage loan came from a private source, and plaintiff had no expectation of privacy.

In *Barnhart v. Paisano Publications, L.L.C.*, --- F.Supp.2d ---, 2006 WL 2986531 (D.Md. 2006), this Court held that where a woman bared her breasts at a private fund raiser, and a photographer took a picture and published it, there was no intrusion upon seclusion. "An intrusion upon seclusion claim requires that the matter into which there was an intrusion is entitled to be private and is kept private by the plaintiff. [Citation omitted.] Likewise, an unreasonable publicity claim requires that the matter that is publicized is private in nature. In

that regard the Maryland Court of Appeals has ruled that 'anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone would be free to see." *Hollander [v. Lubow*, 351 A.2d 421] at 426 (*quoting* W. Prosser, *The Law of Torts*, 810 (4th ed. 1971). The court went on to say that 'facts disclosed to the public must be private facts, and not public ones. Certainly no one can complain when publicity is given to information about him which he himself leaves open to the public eye," 2006 WL 2986531 at 2.

Plaintiff published the details of his son's funeral. Assuming the right of the family and attendees is equal to the right of the picketers – which Maryland's General Assembly balanced – plaintiff could still have had a private funeral, and not published the details of the funeral. Instead, he invited the public at large, and media reports indicate hundreds attended. Plaintiff invited the Patriot Guard, who came by the dozens. Plaintiff and other family members spoke freely with the media before and after the funeral, revealing multiple details about themselves, their son, and their lives. Defendants did not enter any private place or record, and instead only commented on what was already public.

The Tenth Circuit Court of Appeals recently upheld summary judgment on a claim of invasion of privacy related to a soldier's funeral. In *Showler v. Harper's Magazine Foundation*, 2007 WL 867188 (10th Cir. 2007), plaintiffs sued a photographer for taking a photo of the deceased soldier's open casket at his funeral and publishing, promoting and selling the

photograph. In that case, the family announced the funeral, and asked the funeral home to inform the media that they would be allowed to attend but the family did not want anyone taking pictures of the open casket and did not want to be interviewed. Over 1200 people attended the funeral, including the Governor of Oklahoma. Toward the end of the funeral, the casket was moved to the back of the auditorium, and as a line of people exited past the open casket on the way out, the defendant took a photograph. The photograph appeared as part of a photo essay about the war in the August 2004 edition of *Harper's*. Plaintiffs sued in diversity, including for intentional infliction of emotional distress and invasion of privacy (including intrusion into seclusion and publication of private facts), 2007 WL 867188 at 1-2.

In upholding summary judgment on the invasion of privacy claims, the Court said that the photographs were just accurate images of the deceased soldier, which was the same image seen by those attending the funeral. "Coupled with the public nature of this funeral, the photographs are distinguishable from those at issue in *[National Archives & Records Administration v.] Favish*, 541 U.S. 157, 124 S.Ct. 1570 (2004)," 2007 WL 867188 at 5. (*Favish* held that the privacy exemption in the Freedom of Information Act recognized surviving family members' right to personal privacy with respect to their close relative's death-scene images, which the Court found inapplicable because it relied on the statutory privacy right, which is broader than the common law and the Constitution, *id.*) The Court also said, "Sgt. Brinlee's funeral was a matter of public interest. Local and regional newspapers printed stories and photographs about his death and funeral," 2007 WL 867188 at 6.

Concerning the claim of publication of private facts, the Court noted that plaintiffs argued that Sgt. Brinlee's death was a deeply private matter, but that defendant argued that plaintiffs left themselves open to the public eye. "We agree with Defendants that Plaintiffs opened up the funeral scene to the public eye and can not, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo. The local newspaper notified the public in advance of the time and place of Sgt. Brinlee's funeral, and it was held in a high school gymnasium to accommodate the large crowd expected to attend. ... Numerous area newspapers published stories about Sgt. Brinlee's death and funeral. These facts belie the notion that the Turnley Photo revealed information that was private and summary judgment is appropriate on this claim," 2007 WL 867188 at 7.

There is no evidence that defendants went anywhere near anything private, whether it was the funeral, or information about plaintiff and his son. Instead, they commented on public information and issues of intense public interest. The Court can take judicial notice of the fact that there is wide coverage of soldiers' funerals, and the matter of the death rate is of international interest. Plaintiff made the funeral a public event, and made the facts about his son and family available to the public. He wanted everyone to come and hail his son as a hero – which no one is trying to stop him or any other family member from doing. But they want these events to be public spectacles, and then decide who can attend or not, based on their viewpoint. This case is not about invasion of privacy; it's about a difference in fundamental theology and views about God and man. Everyone is talking about the topics defendants addressed; indeed,

by setting up a Web page, plaintiff has guaranteed that more talk is occurring, specifically about him, his son, his son's funeral, and defendants' religious expressions related thereto (see Attachment 14, showing nearly 800 communications, mostly by e-mail to the Web page, to/from [mostly to] plaintiff about these topics). Everyone is talking about the priest sex scandal and the Catholic Church. Everyone is talking about the war and dying soldiers. It is simply beyond the legal pale to suggest when defendants express their views about these matters of intense public interest and concern, that they have invaded anyone's privacy.

B. Defamation

i. No sufficient pleading or evidence of defamation

Plaintiff has failed to sufficiently plead, and/or the evidence does not support a finding, that plaintiff suffered harm by any allegedly defamatory statements; or that defendants acted with malice.

Substantial evidence exists that rather than *anyone* agreeing with defendants' statements about plaintiff or his son, they all adamantly disagreed, and responded by heaping praise upon plaintiff and his son. The record is thick with evidence of this fact, see, e.g., Attachments 7, 8, 9, 10 and 14. There is zero evidence that plaintiff's reputation was harmed one whit by defendants' words.

Even if defendants' statements about plaintiff were false and/or not opinion, they are not libelous per se at common law, as they do not impair or hurt his trade or livelihood, see *Szot v. Allstate Insurance Company*, 161 F.Supp.2d 596, 606-607 (D. Md. 2001). Thus, plaintiff must

prove actual malice. Defendants have described in detail in their affidavits their purpose in making the statements they made. There is no evidence that they had any other purpose; and plaintiff does not allege they had any other purpose. Indeed, the full content of the Complaint reflects that the topic is religious, and the purpose is to rebuke sin. While this may be a concept everyone involved in this case dislikes, the simple fact is that if the law can make rebuke of a sin – or just calling a sin a sin – a tort, there is no religious freedom left.

ii. **Plaintiff is a public figure**

This Court previously stated that there was nothing in the record on which the Court could find that plaintiff is a public figure, 2006 WL 3081106 at 9 and 10. The evidence defendants have included with this motion, however, reflects that plaintiff is a public figure, at least for a limited purpose. When plaintiff's son died, he used that occasion to express his disagreement with the war, but his support of the troops in general, which is a topic of intense public interest. Plaintiff alleges that his injury is ongoing (Complaint, p. 51), yet plaintiff set up a Web site at www.matthewsnyder.org to solicit feedback, spreading information about the very issues he claims are private. Plaintiff and his family issued public notices inviting the public at-large to their son's funeral, and he and other family members spoke to the media at length about various details of their lives, including the topics he claims are private (i.e., divorce and raising his son in the Catholic religion). Plaintiff has appeared in many media stories, and on national stories (including Fox news) talking about the issues related to his son's death and defendants' picketing. Plaintiff has solicited and received hundreds of e-mails about the war, his son's

death, the soldiers, and defendants' public religious expressions. Plaintiff invited a high-profile group whom he reasonably knew was a major media draw, the Patriot Guard, to the funeral. Plaintiff has fully thrust himself into the vortex of several controversies, including the war, the deaths of soldiers, defendants' highly public religious picketing, and Catholic doctrine. See Attachments 4, 5, 7, 8, 9, 10, 11 and 14. Plaintiff always had the choice of making no comment to the media and having a private funeral, which could have easily been attended by family and friends; instead he chose to make a large public spectacle of his son's funeral and life. Thus he can't be heard to complain when people comment on what he made and continues to make public. See *Carr v. Forbes, Incorporated*, 259 F.3d 273 (4th Cir. 2001).

Plaintiff had substantial access to alternative channels of effective communication, and indeed has used the media to rally support for his cause. Plaintiff voluntarily assumed a role of special prominence in this controversy. Plaintiff is seeking to influence the resolution of this controversy, stating repeatedly in the media and on his Web site that his goal in this litigation is to stop defendants from publishing their religious message. Issues related to the war, the soldiers dying, and defendants' picketing were already underway, as well as issues related to the priest sex scandal, and plaintiff jumped in with full vigor. From the time plaintiff learned of his son's death, he made a public cause of the matter, and hasn't stopped since.

iii. **Truth is a defense; this implicates religious matters**

See discussion at Section III above.

iv. **Conditional/qualified privilege**

"In Maryland, a defendant in a defamation suit may assert a qualified or conditional privilege. … 'The common law conditional privileges rest upon the notion that a defendant may escape liability for an otherwise actionable defamatory statement, if publication of the utterance advances social policies of greater importance than the vindication of a plaintiff's reputation interest, [including where the defendant's] declaration would be of interest to the public in general," *Bharadwaja v. O'Malley*, 2006 WL 2811257 at 14 (D.Md. 2006). See also *Rabinowitz v. Oates*, 955 F.Supp. 485, 487-489 (D.Md. 1996). In *Bharadwaja* this Court granted summary judgment in that case on the defamation claims, on the basis of a conditional privilege, where the defendant made allegations that plaintiff took a bribe and shredded official documents. Both parties to the conversation where the statements occurred, defendant and a government official, had a mutual and legitimate interest in this subject matter. The evidence showed that the statement was made for the purpose of protecting that interest, with a reasonable basis for the statements, and no probative evidence of malice. Here, certainly if defendants are right – that America's sins are causing her soldiers to die – that is a matter of great interest to the public. Defendants have articulated in detail in their affidavits their purpose and basis for their statements, and there is no evidence to dispute that purpose or basis. There is only plaintiff's disagreement. Defendants are entitled to the qualified privilege.

C. Intentional Infliction of Emotional Distress

First, for the same reasons stated on the claims herein in general, and on the defamation claims specifically, this Court lacks jurisdiction and/or plaintiff has failed to state a claim upon which relief can be granted on the claims of intentional infliction of emotional distress, because the only way to resolve those claims is by deciding doctrinal or religious issues. There is no doubt that in defendants' view most Americans are "outraged" at the mention of the hatred of God, or the judgment or wrath of God, or sin. But that is not an "outrage" for which the law gives relief. See *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992) (claims dismissed, including claims for intentional infliction of emotional distress, because Court would have to determine ecclesiastical law to resolve claim, which First Amendment forbids).

Second, if a person is doing something the law gives them the right to do, in the absence of some extreme conduct *in addition to the legal act*, liability cannot be imposed under the claim of intentional infliction of emotional distress. See *Public Finance Corporation v. Davis*, 66 Ill.2d 85, 93-94, 360 N.Ed.2d 765, 768-769 (Ill. 1976).

Third, Maryland requires that to sustain a claim for emotional distress, "[o]ne must be unable to function; one must be unable to tend to necessary matters," *Mitchell v. Baltimore Sun Company*, 164 Md.App. 497, 525-526, 883 A.2d 1008, 1024-1025 (Md.App. 2005). This does not describe plaintiff. He has become an activist over this, and is fully functioning. He's maintaining a thriving Web page, raising money, and receiving and answering e-mails. He's

holding interviews with the media and appearing on talk shows. He's working and functioning. There is no evidence in this record to sustain the level of emotional distress required for this claim.

No matter how much plaintiff or anyone else associated with this case, attending the funeral, driving by, or reading about the picket, disagree with the words and religious message of defendants, the fact is that engaging in picketing on a public sidewalk 1000 feet away from the church, out of sight and sound, and writing an epic about a picket to post on a church's Web page, are not acts that go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Nor is commenting on public information and issues of public interest. The only way defendants' actions can be characterized as outrageous is by going to the content of the religious expression. The mere fact that the zeitgeist of society today is heavily against any mention of accountability for sin does not constitute a legal basis for treating these acts – which are protected – as outrageous. The only discomfort plaintiff has experienced *at defendants' hands* is strong disagreement with what they believe. The law does not permit turning that disagreement into intentional infliction of emotional distress. Otherwise all expression with which anyone disagreed, religious or otherwise, could be banned by treating it as this tort. Public comment on important public issues is in the highest and best interest of the public and cannot be treated as actionable, see *Showler v. Harper's Magazine Foundation*, *supra*, 2007 WL 867188 at 4.

For all these reasons defendants submit that the Court does not have subject matter jurisdiction over these claims, and/or plaintiff has failed to state a claim upon which relief can be granted, and/or on the undisputed facts, defendants are entitled to summary judgment.

C. Civil Conspiracy

i. Must be other torts for a conspiracy

The Court said in its order denying defendants WBC and Phelps's motion to dismiss, that "[i]f none of Plaintiff's other claims could survive a 12(b)(6) challenge, then his civil conspiracy claim would likewise fail," 2006 WL 3081106 at 11. Based on the arguments set forth in this motion, and all items which are incorporated or referenced herein, defendants submit that there are no claims on which plaintiff is entitled to relief. Parties can not conspire to do that which is legal and protected. Further, where the activity engaged in is protected, there cannot, as a matter of law, be a claim for civil conspiracy to engage in those acts. See *Barr v. Clinton*, 370 F.3d 1196, 1203 (D.C.Cir. 2004); *Barnes Foundation v. Township of Lower Merion*, 242 F.3d 151, 159-160 (3rd Cir. 2001) (immune from liability for civil conspiracy because of boycott because of the First Amendment).

ii. Corporation can not conspire with its members

In the order denying defendant WBC and Phelps's motion to dismiss, the Court said at footnote 8, that a conspiracy between a corporation and its agents acting within the scope of their employment is a legal impossibility, citing Maryland law. The Court also said that without discovery this issue could not be resolved. The Complaint, at paragraph 11, alleges that

defendants acted as agents of WBC. These defendants have stated in their affidavits that when they engage in picketing and related religious activity, they do so as a member of WBC, based on their viewpoint from the Bible that the people of God come together in an identifiable body, called a church, and act in that capacity. There is nothing in the record that suggests the defendants were acting independent of WBC. See also *Elliott v. Tilton*, 89 F.3d 260 (5th Cir. 1996) (defendants as corporate agents of nonprofit church corporation could not be held individually liable for alleged civil conspiracy under Texas law, since corporation could not conspire with itself).

VIII. No Subject Matter Jurisdiction – Lack of Diversity

A. Amount in Controversy

In a defamation case, a plaintiff must go beyond conclusory allegations of injury, including emotional damages, and damage to reputation. See *Hugger v. Rutherford Institute*, 94 Fed.Appx. 162, 167-168, 2004 WL 765067 at 5 (4th Cir. 2004) (conclusory allegations insufficient to survive summary judgment; evidence that insomnia was caused by defendants' actions insufficient). Plaintiff has waived any claim for lost wages, so the only damages he is claiming are emotional damages and reputation. As discussed above, *all* of the evidence indicates that his reputation, if anything, was enhanced by defendants' words. Plaintiff himself routinely refers to defendants and their message in the most perjorative language, indicating that he himself does not find their words credible. There is insufficient evidence to sustain a claim for damages. Further, given the context, that plaintiff was grieving for his lost son, it is

impossible to sustain a claim that additional emotional injury was occasioned by defendants' words. The real issue here is that plaintiff doesn't like defendants' words, which is insufficient to establish damages. Therefore, defendants submit that there is not a basis for an award of $75,000 in this case. Further, as discussed under "Motion to Strike" below, any effort to seek damages based on the general religious viewpoints of WBC and her members, or on behalf of any other individual, is not allowed in the law. The Complaint in this case goes far beyond any specific statement of defamation, invasion of privacy or intentional infliction of emotional distress, with language in several places related to the general beliefs and expressions of defendants. This is improper, and has the effect of creating an illusion that there are damages in this case, when in fact there are not.

B. Diversity of Citizenship

Defendants hereby incorporate the arguments of defendants WBC and Phelps pertaining to failure to allege diversity, and preserve that issue in the record.

Motion to Strike

Throughout the Complaint plaintiff makes reference to other pickets, Web pages other than www.godhatesfags.com, and other religious commentary by WBC, none of which pertain to plaintiff's allegations that his privacy was invaded, he was defamed, or he was subjected to intentional infliction of emotional distress. These references have no possible relationship to the controversy and are prejudicial. They are also further indication of the impropriety of this action, which is in fact an effort to penalize and silence defendants because of their controversial

dissenting religious viewpoints on topics of public importance. The plaintiff is, in reality, asking the Court to find that defendants' religious beliefs are wrong, and to bar them from expressing these viewpoints, in content and manner. That likely is the purpose behind the irrelevant and prejudicial language in the Complaint. Even so, though motions to strike are not highly favored in the law, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter; and if the language has no possible relation to the controversy and may prejudice the other party, they may be granted," *Steuart Inv. Co. v. Bauer Dredging Constr. Co.*, 323 F.Supp. 907, 909 (D.Md. 1971).

Defendants request that the Court strike from the Complaint and record all references to funeral pickets, religious expressions, commentary by WBC members, or Web pages, which do not mention or refer to plaintiff or his son, and which do not directly relate to the funeral of Lance Cpl. Matthew A. Snyder and plaintiff. Specifically, defendants request that the Court strike the following provisions of the Complaint herein, pursuant to Rule 12(b):

Paragraph 1, the final words, "and to deter the defendants from further reprehensible conduct;"

Paragraph 17, from "several websites" through "(7)," which includes references to all Web sites other than www.godhatesfags.com which is the only one with any reference to plaintiff or his son;

Paragraph 19, in full; the general content of signs are not alleged to constitute invasion of privacy (nor could they given that they are not referring to any private matter of any person, let alone plaintiff or his son);

Paragraph 20, in full; this response to a FAQ (frequently asked question), which was not written by these defendants, makes no reference to anything private about plaintiff or his son, or any matter at all pertaining to either of them, or the funeral at issue in this case; rather it is a general expression of religious opinion by the church;

Paragraph 21, "proclaiming similar outrageous and defamatory comments," as it is a reference to paragraph 20, which is not about plaintiff or his son or his son's funeral;

Paragraph 27 in full, again because general references to general sign content by WBC picketers has nothing to do with plaintiff's claims of invasion of privacy, defamation or intentional infliction of emotional distress, and do not pertain to plaintiff, his son, or the funeral;

Paragraph 38, first full sentence; pickets at funerals or any other location have nothing to do with claims about plaintiff, and his son's funeral;

Paragraph 39, in full; same reason

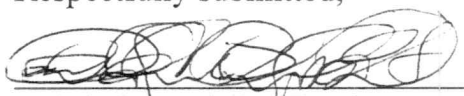
Paragraph 40, in full; same reason, and whatever funds defendants or other WBC members spend or don't spend on their religious expression is not at issue in this case.

This motion to strike is made in the alternative to other relief sought herein, in that defendants believe the law supports a finding that this action is an improper attempt to circumvent the Free Exercise and Establishment Clauses of the First Amendment, and to punish

and silence defendants for their religious expressions; and that the claims cannot be resolved without the Court or jury determining whose religion is right, which the law prohibits.

WHEREFORE, based upon all of the foregoing, as well as Affidavits and Attachments submitted herewith, as well as all matters incorporated herein, defendants respectfully request that the Court enter its order dismissing this action, and/or granting summary judgment in this action; staying discovery in this case pending resolution of the motion to dismiss or for summary judgment; and in the event any part of the motion to dismiss or for summary judgment is overruled, an order striking the itemized portions of the Complaint set out above; an order setting an Answer date; and an order setting a Scheduling Conference for these defendants, from which a Scheduling Order will be established.

Respectfully submitted,



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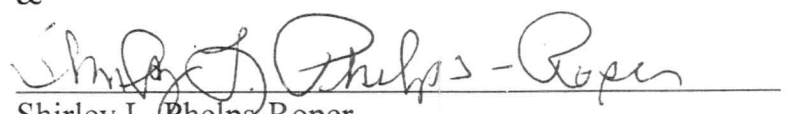

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CERTIFICATE OF SERVICE

We hereby certify that the foregoing Memorandum in Support of Motion of Defendants Phelps-Davis and Phelps-Roper to Dismiss or for Summary Judgment and For Other Relief was served on April 23, 2007, as follows:

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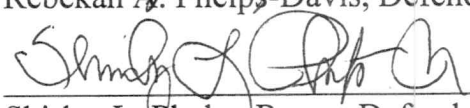

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