IN THE CIRCUIT COURT FOR THE STATE OF OREGON
COUNTY OF WASHINGTON

BEAVERTON GRACE BIBLE CHURCH, an Oregon non-profit organization, and CHARLES O'NEAL, an individual, **Plaintiffs,** **v.** **JULIE ANNE SMITH, HANNAH SMITH, KATHY STEPHENS, and JASON STEPHENS, individuals,** **Defendants**.	**Case No. C121174CV** **MEMORANDUM IN SUPPORT OF SPECIAL MOTIONS TO STRIKE ORS 31.150, *et seq*. JOINTLY FILED BY DEFENDANTS JULIE ANNE SMITH** **HANNAH SMITH** **Hearing Date:** **Recording requested**

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I. INTRODUCTION.

A. STATUS OF THE CASE.

Plaintiffs Beaverton Grace Bible Church ("Church") and its pastor, Charles (Chuck) O'Neal ("Pastor") have sued defendants Julie Anne Smith, her daughter Hannah Smith, and other former members for "defamation." The numerous claims against Julie Anne and Hannah are based on isolated phrases plucked from internet "reviews" during an extended dialogue over church governance initiated by the Plaintiffs. Each Plaintiff seeks $250,000.00 in damages.[1] Plaintiffs also allege they intend to seek "punitive damages." Compl. ¶ 20. This is frivolous. Punitive damages for speech are prohibited. Oregon Constitution, Article I, § 8.[2]

Defendants Julie Anne Smith and Hannah Smith have filed a Special Motion to Strike all of Plaintiffs' claims against them. ORS 31.150, *et seq*., particularly ORS 31.150(2)(c) and (d) (Appendix B):

> (1) A defendant may make a special motion to strike against a claim in a civil action * * *. The court shall grant the motion unless the plaintiff establishes in the manner provided by subsection (3) of this section that there is a probability that the plaintiff will prevail on the claim. * * *.
>
> (2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:
>
> * * *.
>
> > (c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or
> >
> > (d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

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1. The Complaint which is moved against is attached as Appendix A to this Memorandum.

2. In ***Wheeler v. Green***, 286 Or 99, 117-19, 593 P2d 777 (1979), the Oregon Supreme Court held that punitive damages cannot be imposed against any defamation defendant under any circumstances because of the prohibition in Oregon Constitution, Article I, § 8.

> (3) A defendant making a special motion to strike under the provisions of this section has the initial burden of making a prima facie showing that the claim against which the motion is made arises out of a statement, document or conduct described in subsection (2) of this section. If the defendant meets this burden, the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the claim by presenting substantial evidence to support a prima facie case. If the plaintiff meets this burden, the court shall deny the motion.

This is Oregon's "anti-SLAPP" statute, enacted in 2001, adopting California's statute.[3] ORS 31.152(4) states the purpose to:

> provide a defendant with the right to not proceed to trial in cases in which the plaintiff does not meet the burden specified in ORS 31.150(3). This section and ORS 31.150 and 31.155 are to be liberally construed in favor of the exercise of the rights of expression described in ORS 31.150(2).

B. THE COMPLAINT.

The allegedly defamatory statements are cherry-picked sentence fragments and phrases without any of the context necessary to stating and proving defamation. Nonetheless, it is obvious that the phrases refer to a dispute over Church practices, pastoral teaching and personal religious conviction: "[The pastor has] 'chosen to mislead the congregation'" [Comp. ¶ 9.a]; "something is creepy about this church." *Id.*, ¶ 9.c.

"A defamatory publication, in order to be actionable, must be false: RESTATEMENT (2D) TORTS, § 558; 33 AM JUR, *Libel & Slander*, § 110, page 113; 53 CJS *Libel and Slander* § 74, page 124." ***Fowler v. Donnelly***, 225 Or 287, 291, 358 P2d 485, 487-488 (1960). It is the court's role to determine if words are capable of having false and "defamatory" meaning in the "full context" of remarks. ***Underwager v. Channel 9 Australia***, 69 F3d 361, 366 (9th Cir 1995) ("***Underwager***"); ***Slover v. Or. St Bd of Clinical Social Workers***, 144 OrApp 565, 568, 927 P2d 1098, 1100 (1996).

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3. SLAPP is an acronym for "Strategic Litigation Against Public Participation," a term coined in an influential law review article. Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC'Y REV 385 (1988).

But the Court's usual role "enter[s] a forbidden domain" [***United States v. Ballard***, 322 US 78, 87, 64 SCt 882, 886, 88 LEd 1148 (1944)] when the "truth" or "falsity" of religious matters are at issue. "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or belief." *Id.* at 86, 64 SCt at 886. This limit is required by the First Amendment Establishment and Free Exercise guarantees that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The state cannot "lend[] its power to one of the other side in controversies over religious authority or dogma." ***Employment Div. v. Smith***, 494 US 872, 881, 110 SCt 1595, 108 LEd2d 876 (1990). A court cannot decide "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." ***Watson v. Jones***, 13 Wall 679, 80 US 679, 733, 20 LEd 666 (1871), quoted favorably in ***Serbian Eastern Orthodox Diocese v. Milivojevich***, 426 US 696, 714, 96 SCt 2372 ((1976), ("***Serbian***"). The prohibition is known as the "church autonomy" doctrine.

Here Plaintiffs ask this Court to decide that Julie Anne's statements of doctrinal disagreement such as, "The extra-Biblical legalistic teaching is wrong," are "false" statements of fact.[4] Compl. ¶ 9.k. The Court cannot wade into this theological dispute. The church autonomy doctrine protects both orthodox dogma and individual dissent.

> A church is a complex and dynamic organization, often including believers with a variety of views on important questions of faith, morals, and spirituality. The dominant view of what is central to the religion, and of what practices are required by the religion, may gradually change.

Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUMLREV 1373, 1391 (1981). Julie Anne's comments are squarely within that sphere of protected religious dialogue.

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4. The Complaint alleges that all of the phrases and fragments are "false." Compl. ¶ 10.

Plaintiffs Church and the Pastor have protected First Amendment rights to preach that all other belief systems are "cults" (§§ II.B.1 and 3, *post*), other well-known religious figures are "ravenous Wolves" in a literal, Biblical sense (pp. 10-11, *post*), and that Julie Anne is "WARPED AND SINNING" for dissenting (as the Pastor emphatically states in an internet "review" he has removed). Declaration of Counsel, Linda K. Williams, Ex. B. However, Plaintiffs cannot sue former congregants for "false" religious opinions they have prayerfully formed. "[W]hen religious beliefs and doctrines are involved, the truth or falsity of such religious beliefs or doctrines may not be submitted for determination by a jury." ***Christofferson v. Church of Scientology***, 57 OrApp 203, 239, 644 P2d 577, *rev den*, 293 Or 456, 650 P2d 928 (1982), *cert den*, 459 US 1206, 1227, 103 SCt 1196, 1234, 75 LEd2d 439, 468 (1983) ("***Christofferson***").

Even viewed from a secular perspective, Hannah's statement, "[Pastor] Chuck micro-manages every detail, like having EVERY song approved by him" is not defamatory, nor are Julie Anne's opinions that something or someone is "creepy," "legalistic," or "controlling."

> There is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 US 323, 339-40, 94 SCt 2997, 41 LEd2d 789 (1974) ("***Gertz***"). Unflattering opinions are not defamation. Most children hear Thumper say, "If you can't say something nice--don't say nothin' at all" in "Bambi." This is not a legally enforceable rule. A "don't say nothin'" rule would be contrary to Oregon and Federal Constitutional guarantees of free expression. The First Amendment and Oregon Constitution, Article I, § 8, protect free-wheeling opinions and unflattering, even crude, language.

The Complaint generically pleads that the statements are "false in innuendo" [*Id.*, ¶ 12] without pleading any facts to explain the allegedly false "innuendo" to be drawn. The function of pleading innuendo is to explain why a direct statement that is not on its face

capable of being false and defamatory--"creepy," "un-Biblical," "approving EVERY song"--somehow takes on a false, defamatory meaning. ***Marr v. Putnam***, 196 Or 1, 23, 246 P2d 509 (1952); ORCP 18. The Complaint fails to do so.

Plaintiffs concede that they must prove the highest degree of "fault" for Julie Anne and Hannah. They allege that the phrases they complain of were made with "reckless disregard as to whether the accusations * * * were truthful." Comp. ¶ 14. In defamation law this degree of fault is "actual malice" and requires clear and convincing evidence of the subjective intent of the defendant to ignore the truth. ***New York Times Co. v. Sullivan***, 376 US 254, 285-86 (1964) (***New York Times***).

II. SUMMARY OF SPECIAL MOTION PROCEDURE AND FACTS.

A. PROCEDURE UNDER THE SPECIAL MOTION.

ORS 31.150 requires the Court to engage in a two-pronged process in reviewing a Special Motion to Strike. In this case, the Court first decides whether Defendants Julie Anne and Hannah have met the threshold burden of showing that Plaintiffs' claims arise from one of the circumstances set out in ORS 31.150 protecting expression (the "arising out of" prong).

If the Court finds such a showing has been made, the burden here shifts to Plaintiffs to show "that there is a probability that [they] will prevail on the claim by presenting substantial evidence to support a *prima facie* case." ORS 31.150(3). ***Staten v. Steel***, 222 Or App 17, 27, 191 P3d 778 (2008). This "substantial evidence" language was added by the Oregon Legislature to the anti-SLAPP template provided by the California statute.[5] This addition to the template statute demonstrates an intent to require more than a mere "*prima facie* showing," by requiring "substantial evidence."

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5. Cal CCP § 425.16(b)(1) requires plaintiff to demonstrate only a "probability that the plaintiff will prevail on the claim."

B. ADDITIONAL RECORD FACTS FOR THESE SPECIAL MOTIONS.

1. PLAINTIFFS SEEK TO IMPACT THE BROAD PUBLIC.

Organizationally, in this particular church two lay leaders are designated "Elders," and the Pastor preaches the Word, performs sacraments, and officiates at communion.[6] The Pastor and Elders also attend to all the aspects of maintaining the Church, overseeing its membership services, hiring other personnel, planning retreats and revivals and regular proselytizing activities.

Plaintiff Church is associated with the Fellowship of Grace Brethren Churches (FGBC) [Williams Decl, Exs. C and D], a theologically conservative assembly of some of the many loosely related Brethren churches, all of which trace their founding to the Schwarzenau Brethren of Germany, formed in 1708.[7] FGBC claims associates in 250 North American cities, with over 3000 churches worldwide. Williams Decl., Ex. C, p. 1.

Plaintiff Church emphasizes early Christian practice and the inerrancy of the Bible.[8] It prominently displayed the FGBC motto, "The Bible, the whole Bible, and nothing but the Bible," on its website. Williams Decl, Ex. E. The Pastor teaches Biblical literalism. Plaintiff Church has a strong evangelical mission. Pastor O'Neal conducts weekly Evangelical Training classes of several hours in length. Declaration of Julie Anne Smith, ("JAS Decl.") ¶ 9. Plaintiffs recommend materials specifically designed to preach to others (all identified as "cults"): Roman Catholics, Pentecostals, Mormons, Jehovah's Witnesses,

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6. "Doctrinal Statements," § S: "there are two Biblically designated offices serving under Christ in the church. Elders (males, who are also called bishops, overseers, and pastor-teachers and deacons (males), both of whom must meet biblical qualifications." www.beavertongracebible.org/dictrine.html

7. www.fgbc.org/commoncommitment/; Carl F. Bowman, BRETHREN SOCIETY (Johns Hopkins University Press 1995), p. 4 (hereinafter, "Bowman").

8. "Doctrinal Statement" at § E, "The Scriptures;" "Statement of Faith" at II. "The Bible is the Inspired, Infallible, and Inerrant Word of God * * *." www.beavertongracebible.org/doctrine.html

Islam. Williams Decl., Ex. F at p. 2, FF at p. 1. The Pastor organizes "Evangelical Fridays," and sends congregants into the community to canvass door-to-door, distribute literature in public places [JAS Decl., ¶ 9] and approach others at religious gatherings to debate doctrine. Williams Decl., Ex. G, "Mormon Temple Evangelism."[9] "Independence Day JW [Jehovah's Witness] Evangelism."[10]

The Pastor applies his view of Scripture to matters such as divorce and remarriage and personal attire. JAS Decl., ¶ 7. His teachings affect the larger public. He preached against sending children to public schools. He encouraged voting in opposition to legislation allowing abortion and limiting gun ownership. *Id.*, ¶¶ 7-8. Pastor's blog[11] entry, "Homosexual Proliferation, An Open Letter Permanent Notice" (showing in excess of 9000 views), discusses Oregon HB 2007, and SB 2 (2007). Williams Decl., Ex. H. His sermon, "*CALLING DOWN WRATH! The Acceptance and Codification of Homosexuality, Lesbianism, Bisexuality, and Transgender Sinful Lifestyles*," on the same legislation advises (at Minute 24:27):[12]

> Any politician or public official, whether they are president, or senator, or representative, or state legislator, or governor, or judge who supports SB 2 or HB

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9. See also, www.sermonaudio.com/source_albums.asp?GalleryID=gr21911201652: "Would you believe we stood under the shadow of the false archangel Maroni, within steps of the temple doors and had a great Gospel conversion?" One photo.

10. www.sermonaudio.com/source_albums.asp?GalleryID=gr7408154828

> We celebrated Independence Day by exercising our free speech liberty at the Portland Jehovah's Witness regional conference. Praise God for a nation in which we can freely declare the saving Gospel of Jesus Christ publicly and privately.

With 8 video clips.

11. http://www.beavertongracebible.org/blog.html

12. www.sermonaudio.com/sermoninfro.asp?SID=41807185513

2007 has knowingly or unknowingly aligned themselves with the devil against the souls of men.[13]

The Church maintains an interactive web site which provides audio and DVDs of sermons and evangelizing efforts.[14] The audio is available on iTunes as well. Pastor has an interactive blog.[15] For several years he broadcast weekly in the Portland area on radio station, KPDQ. JAS Decl., ¶ 10. As noted, the Church invites public reviews on Google.

2. DISPUTE OVER CHURCH GOVERNANCE COMMENCED IN 2008.

Julie Anne, her husband Steve, and their seven children attended Plaintiff Church for over two years. JAS Decl., ¶ 3. In November of 2008, Plaintiffs dismissed Evangelical Coordinator Don Miller for "subversive conduct" including, holding Bible study in his home, allegedly criticizing the Pastor by saying, "You don't preach the Gospel. * * *. You are proud," and the "sin of 'sowing seeds of discord among the brethren' * * *." Declaration of Don Miller, Ex. A. This conduct was deemed inconsistent with Biblical precepts of Romans 16:17-18, Titus 3:9-11, Proverbs 6:16-19, 16:28 and 26:20. *Id.* In an email to members and after the sermon the following Sunday, the Pastor and Elders repeated the accusations and invited congregant questions. *Id.*, Ex B, p. 2; JAS Decl., ¶ 13.

Julie Anne and her husband had attended other evangelical Christian churches as the family relocated often for Steve's military career and employment. JAS Decl., ¶ 2. They thought the termination was handled in an un-Biblical manner and sought meetings with the Pastor and Elders. *Id.*, ¶¶ 15-17. These meetings lasted a total of 11 hours. *Id.*, ¶ 18. They

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13. Transcription described in Declaration of R.W. Roussel.

14. www.beavertongracebible.org/sermons.html

15. And joins doctrinal discussion on other websites. See, Williams Decl., Ex. I, *Muslim Apostasy Warning--Mclaren, Hybels, Warren, Schuller* on http://echristian.wordprss.com/2008/01/15/muslim-apostasy-warning.

discussed church policies in the termination of Don Miller, possible reasons for the recent departures of others from the Church and related church governance matters. *Id.*, ¶¶ 18, 20. The Pastor made statements to the Smiths about the dismissed employee and his family that seemed to disclose pastoral confidences. *Id.*, ¶ 19. The Smiths' questions were not resolved. In late November 2008, an Elder told Julie Anne she must recant, or the entire family "was no longer welcome" at the Church. *Id.*, ¶ 21. The Smiths stopped attending the Church.

Sometime later Julie Anne learned of an investigation by Oregon authorities into allegations of child molestation against a teenage Church congregant she had often seen in the child care area of the Church. JAS Decl, ¶ 22-23.[16] On January 1, 2009, Pastor O'Neal and the Elders came unannounced to the Smith home to demand whether they knew who had made the abuse report. They recorded part of the conversation without the Smiths' permission. *Id.*, ¶ 28. Pastor O'Neal informed the Smiths they were "excommunicated." The Church discipline of the family included criticisms of them to the congregation and "shunning" Julie Anne, her husband, and the children. *Id.*, ¶ 29.[17]

Julie Anne began posting web reviews in 2009, continuing the dialogue about church governance, employee decisions, the propriety of the various church disciplinary steps, and pastoral decisions. JAS Decl., ¶ 31. The public forum apparently included other congregants, former congregants and the Pastor. Williams Decl., Exs. A, B. Others responded in the freewheeling debate, but Plaintiffs removed many postings. *Id.*, Ex. A. The Pastor continued the debate with the Smiths online and in emails to others who no longer attended Church.

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16. The investigation led to criminal charges in April 2009, and conviction and incarceration of the offender, Kevin Haggerty, as an adult. See Williams Decl., Ex. K, pp. 1-24.

17. This loss of one's membership is also termed "defellowshipping." A related form of discipline is "avoidance" or what some Brethren (and others) term "shunning," which revokes membership and restricts "interchange with the wayward member, placing him or her in social isolation from the faith community." Bowman, pp. 88-89.

Declaration of Meaghan Varela, ¶ 7. He posted this review dated November 19, 2009 (deleted but retrieved from a cache site):

> To Whom it May Concern: Almost a year ago JulieAnne and her husband were Biblically put out of the Beaveront [*sic*] Grace Bible Church with a group of families and individuals that were engaged in divisive slander. * * *. For obvious reasons we exhort you to heed the following Scriptures: Prov 6:16-19:16. These six things the LORD hates, Yes, seven are an abomination to Him: 17. A proud look, A lying tongue, Hands that shed innocent blood, 18. A heart that devises wicked plans, Feet that are swift in running to evil, 19. A false witness who speaks lies, And ONE WHO SOWS DISCORD AMONG BRETHREN. Prov 16:28 A perverse man SOWS STRIFE, And A WHISPERER SEPARATES THE BEST OF FRIENDS. Prov 26:20 Where there is NO WOOD, THE FIRE GOES OUT; And where there is NO TALEBEARER, STRIFE CEASES. Rom 16:17-18 NOW I URGE YOU, BRETHREN, NOTE THOSE WHO CAUSE DIVISIONS AND OFFENSES, contrary to the doctrine which you learned, and AVOID THEM. 18 For those who are such do not serve our Lord Jesus Christ, but their own belly, and by smooth words and flattering speech deceive the hearts of the simple. Titus 3:9-11 But AVOID FOOLISH DISPUTES, genealogies, CONTENTIONS, and strivings about the law; for THEY ARE UNPROFITABLE AND USELESS. 10 REJECT A DIVISIVE MAN AFTER THE FIRST AND SECOND ADMONITION, 11 KNOWING THAT SUCH A PERSON IS WARPED AND SINNING, being self-condemned. * * *. If you have any questions, please contact the pastor and elders. May we be evermore convinced of mankind's sinfulness and of our need for God's amazing grace through faith in His beloved Son, Jesus Christ our Lord. God STILL has the whole world and His Church in His very capable hands. For Christ and His Church, Pastor Chuck O'Neal, Elder Dave Loynes, Elder Dale Weaver.

Williams Decl., Ex. B.

3. PARTICULAR RELIGIOUS EXPRESSIONS IN THIS DISPUTE.

It is important to understand the particular theological terms underlying the debate. Pastor O'Neal teaches that all other belief systems, including other evangelical Christian churches, are Biblically errant "cults," led by the "wolves" of Acts 20:29-30:

> Therefore take heed to yourselves and to all the flock, among which the Holy Spirit has made you overseers, to shepherd the church of God which He purchased with His own blood (29). For I know this, that after my departure savage wolves will come in among you, not sparing the flock (30).

Williams Decl., Ex. I, *Muslim Apostasy Warning--Mclaren, Hybels, Warren, Schuller*, p. 2.

As for the errant ways of others, for example, the Pastor's teaches:

> The Luis Palau Association's unholy ecumenical union with these apostate denominations constitutes "fellowship with the unfruitful works of darkness." Ephesians 5:11 says, "And have no fellowship with the unfruitful works of darkness, but rather expose them." This blog exposes the growing "evangelistic" union between the Luis Palau Association and the Roman Catholic Church. There are a billion precious Roman Catholic souls that need to be saved out from under the damnable doctrines of Pope, Bishop, Council, Priest, and Sacrament. * * *. I urge you to listen to the message I delivered on this subject, titled *Ecumenical Evangelism Exposed* at http://www.sermonaudio.com/sermoninfo.asp?sermonID=81808151397.

Pastor O'Neal's Blog, "Luis Palau Association's Ecumenical Evangelism Exposed--part 1,"

Tuesday, October 07, 2008 (over 9600 page views). Williams Decl., Ex. J.[18]

Commenting upon an article, "Emerging Churches," in the *Oregonian*, October 15,

2006, he preached in *Emergent Church Apostasy-Wolves in Our Midst!*[19]

> They [emergent churches] are the enemies of the church, they are the enemies of Jesus Christ, enemies of the gospel. They are wolves in sheep's clothing...we have a love affair with wolves ... .
>
> Joel Osteen, a wolf in sheep's clothing with a broad road that leads to destruction... And why is this important? To defame the character of men? No. To pull back the cheeks just a bit and behold the fangs of wolves. To lift up the sheepish wool a little bit and behold the fur of the wolf." Minute 64-65.
>
> Sermon Title: *All Roads Don't Lead to Heaven, Ecumenical Gospel Heresy*.[20]
>
> The false prophets who come in sheep's clothing but inwardly are ravenous wolves, are prophets, are preachers of the broad road. In context, these are men that come saying that the broad road is the way to go, that God is an all-gracious, all-merciful, all-loving God who will take you no matter whom you worship. Minute 21:08
>
> False prophets who come to you in sheep's clothing saying you don't need to repent, forsake all, forsake your sins, forsake self and follow Christ. Minute 22:44.
>
> Mother Teresa was a sinner who did not believe the Gospel. * * *. She was, indeed, a great servant of the Evil One. Minute 39:47
>
> In that declaration, Billy Graham has joined the wolves in sheep's clothing. He has joined the ravenous wolves of Matthew 7... . Minute 57

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18. www.beavertongracebible.org/blog.html.

19. http://www.sermonaudio.com/sermoninfo.asp?Sid=101606115756.

20. http://www.sermonaudio.com/sermoninfo.asp?SID=827081932350.

The same terms ("cult" or "wolves") in Julie Anne's web reviews are drawn from the same doctrinal tradition, but based on her own reading of the Bible and observation of church governance decisions.

III. DEFENDANTS MEET THE "ARISING OUT OF" PRONG.

A. WEB REVIEWS ARE A PUBLIC FORUM.

The allegedly defamatory statements appeared on public, interactive internet forums. Compl. ¶¶ 8, 15. The internet is a "public forum" for defamation purposes. The Internet

> provides relatively unlimited, low-cost capacity for communication of all kinds * * *. This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. American Civil Liberties Union, 521 US 844, 870, 117 SCt 2329, 138 LEd2d 874 (1997). See, ***Gardner v. Martino***, 2005 WL 3465349, *5 (D Or 2005) (applying ORS 31.150) (Appendix C to this Memorandum); ***Gilbert v. Sykes***, 147 CalApp4th 13, 23, 53 CalRptr3d 752 (2007) (web site contributes to public debate, applying California anti-SLAPP law).

B. THE STATEMENTS ARE ON TOPICS OF PUBLIC INTEREST.

The California Supreme Court held that the phrase, "'[A]n issue of public interest' within the meaning of [analogous California law section] 425.16, subdivision (e)(3), is any issue in which the public is interested." ***Nygard, Inc. v. Uusi-Kerttula***, 159 CalApp4th 1027, 1042, 72 CalRptr3d 210 (2008). The statute was the template for what is now ORS 31.150, *et seq.* "Public interest" is thus interpreted broadly under Oregon's anti-SLAPP statute. After a review of Oregon trial court opinions applying ORS 31.150, Magistrate Hubel concluded [***Gardner v. Martino***, 2005 WL 3465349, *5 (Appendix C)] that:

> Given that these courts have applied Oregon's statute [ORS 30.150] to situations involving private companies, and in the case of *Kurdock*,[21] to internal employee or shareholder communications, and to newspaper and Internet publications regarding statements made in a classroom, I agree with defendants that these courts have generally given Oregon's "public issue" or "public interest" concept a broad interpretation.

In this case the complained-of statements are issues of interest to various segments of the public, including (1) members of churches associated with the Fellowship of Grace Brethren (hundreds of churches in the United States and thousands worldwide), (2) great numbers of the public concerned with questions of personal salvation, (3) the public in the greater Portland area in the range radio station KPDX which carried Plaintiff's sermons; (4) the general public which is the focus of the Plaintiffs' intense weekly evangelism to non-congregants by door-to-door canvassing in residential neighborhoods, speaking in public parks, and evangelizing where others worship; (5) a significant segment of the public and counseling professionals debating the impacts of spiritual practices, policies and teachings (including the isolating practice of "shunning") broadly referred to as "spiritual abuse."

Therefore, the burden now shifts to Plaintiffs to produce substantial evidence on each element of their claims for defamation as set out in RESTATEMENT (2D) TORTS, § 613(1):

> (a) the defamatory character of the communication,
>
> * * *.
>
> (f) special harm resulting to the plaintiff from its publication,
>
> (g) the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication, and
>
> (h) the abuse of a conditional privilege.

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21. *Kurdock v. Electro Scientific Indus., Inc.*, Mult. Co. No. 0406-05889, Order at 1-2 (Oct 15, 2004).

IV. PLAINTIFFS' MUST NOW MEET HEAVY BURDENS.

The requirement that Plaintiffs offer "substantial evidence" to establish a "probability" of prevailing couples "probability" to the strength of the evidence. This means Plaintiffs must persuade the Court they have more than some remote statistical "chance" of prevailing. Instead, their evidence must be "substantial" enough that each is more likely than not to prevail on its claims. As the Court of Appeals has explained, Plaintiffs carry a "heav[y] burden" to defeat this Motion:

> If the moving party makes that showing, which it may be able to do based on the pleadings alone, the nonmoving party then has the burden of establishing a prima facie case that is sufficient to show that there is a probability that it will prevail. That burden is potentially much heavier than merely establishing the existence of a disputed issue of fact. In deciding whether the plaintiff has met its burden, the trial court may need to weigh the evidence, something that it cannot do on a motion for summary judgment.

Staten v. Steel, *supra*, 222 Or App at 31 (citations omitted) (emphasis added).

Plaintiffs will not be able to meet their burdens on the first element of defamation. Julie Anne's and Hannah's statements are protected statements of religious conviction and opinions based on stated and known facts (and a hyperlink to supporting information). Hence, no amount of "evidence" can overcome this legal infirmity. The statements are not provably false and not defamatory.

Even if this Court were to find some isolated phrase capable of defamatory meaning, under controlling First Amendment law the Plaintiffs must then still provide substantial evidence on other elements of the tort, including substantial evidence that:

> (1) any potentially defamatory meaning was the meaning intended by Julie Anne or Hannah [***Dodds v. American Broadcasting Co.***, 145 F3d 1053, 1063-4 (9th Cir 1998); and
>
> (2) such "intended" defamatory meaning was made with "actual malice," which is reckless disregard for the truth or falsity or actual knowledge of the falsity of the words [***New York Times***, *supra*, 376 US 254, 285-86, 84 SCt 710, 718, 11 LEd2d 686 (1964)], and what Plaintiffs have pled [Compl. ¶ 14]; and

(3) "actual malice" in that sense of reckless disregard for the truth was the subjective mental state of Julie Anne and Hannah, not some mere formulaic of pleading. ***St. Amant v. Thompson***, 390 US 727, 88 SCt 1323 (1968). This mental state cannot be inferred from a failure to "investigate" (as discussed at pp. 38-40, *post*).

Plaintiffs must prove both the "intention" to convey a defamatory meaning by an ambiguous statement and subjective "actual malice" by "clear and convincing" evidence. ***Dodds***, *supra*; ***New York Times***, *supra*. Therefore, in order to defeat the Special Motions, Plaintiffs must offer substantial evidence that they have a probability of meeting their eventual trial burdens of "clear and convincing" evidence of the subjective intentions of Julie Anne and Hannah in forming their opinions and religious beliefs.

Plaintiffs also have the burden of proving Julie Anne's and Hannah's actual malice as a matter of law for two other distinct reasons:

(1) Plaintiffs are limited purpose public figures (§ VI.B. at pp. 39-42, *post*) for the First Amendment analysis; and

(2) alternatively, as a matter of state law, Plaintiffs must overcome the defendants' Oregon common law privileges of "fair comment," and "mutual concern," which require Plaintiffs to show "abuse" of such privileges at the same level of proof as "actual malice." ***Peck v. Coos Bay Times Pub Co.*** 122 Or 408, 421-2, 259 P 307, 312 (1927), § VI.C. p. 43, *post*.

V. ALL CLAIMS IN ¶ 9 AGAINST JULIE ANN AND HANNAH SHOULD BE DISMISSED.

A. "FEDERALIZATION" OF DEFAMATION LAW.

Defamation is an unprivileged, false statement of *fact*, made with the requisite degree of fault, which injures plaintiff. In ***New York Times***, *supra*, 376 US at 265, the United States Supreme Court held that state libel laws are subject to First Amendment constraints. There followed a series of Supreme Court and Ninth Circuit decisions[22] which have further

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22. Under the Supremacy Clause, United States Constitution, Article VI, cl 2, absent controlling Supreme Court authority, an Oregon state court is bound by the

(continued...)

"federalized" the law of defamation. For example, all allegedly defamatory speech has to be viewed in context to determine whether it is protected opinion. This is Constitutionally required because:

> This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.

Milkovich v. Lorain Journal Co., 497 US 1, 20, 110 SCt 2695, 2706, 111 LEd2d 1 (1990) ("***Milkovich***") (quoting ***Hustler Magazine v. Falwell***, 485 US 46, 53, 108 SCt 876, 99 LEd2d 41 (1988)); see also, ***Gertz***, *supra*.

While offensive opinions are not actionable defamation [***Gertz***, *supra*; ***Milkovich,*** *supra*], there is also a related federal Constitutional rule that a derogatory opinion based on stated facts is nonactionable as defamation, regardless of how unreasonable the opinion drawn from those stated facts might be.[23] ***Standing Committee v. Yagman***, 55 F3d 1430 (9th Cir 1995) ("***Standing Committee***") (decided after and expressly following ***Milkovich***). For example, Yagman, an attorney, was sanctioned by the state bar for stating that Judge Keller, "'has a penchant for sanctioning Jewish lawyers: me, David Kenner and Hugh Manes. I find this to be evidence of anti-semitism.'" *Id.* at 1438. The Ninth Circuit found the first part of the statement was factual and true. *Id.* at 1439.[24] It then held,"'I find this to be evidence of

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22.(...continued)
interpretations of federal constitutional law decided by the highest federal court for the territory in which it is situated--in this case the Ninth Circuit--which is why we rely upon cases primarily from that Court of Appeals.

23. RESTATEMENT (2D) TORTS § 566, "Expression of Opinion," *Comment a*:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.

24. A statement is "true" if "substantially" true--this is if the "gist" or "sting" is true, even if (continued...)

anti-Semitism'" protected opinion, regardless of how unreasonable Yagman's opinion of bias was. It was Yagman's personal belief that Judge Keller was anti-Semitic based on those few facts. "Readers were 'free to form another, perhaps contradictory opinion from the same facts' * * * as no doubt they did." *Id.*, 1440 (citation omitted).

RESTATEMENT (2D) TORTS § 566, "Expression of Opinion," *Comment a* (emphasis supplied) summarizes the Constitutional test:

> A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.

B. SOME ASPECTS OF DEFAMATION REMAIN UNDER STATE LAW.

The Oregon Constitution may of course, be *more* protective of speech, and state common law remains robust in areas not directly controlled by federal case law interpreting First Amendment requirements.

For example, the Supreme Court has left to the states to apply certain common law privileges to defamation and the allocation of burdens of proof for such privileges. As a matter of Oregon law, opinions are further conditionally privileged as "fair comment." ***Peck v. Coos Bay Times Pub Co.***, *supra*. A defamation plaintiff can overcome a privilege only upon showing "abuse" (that high degree of fault which was traditionally termed "actual malice"). *Id.,* at 12.

24.(...continued)
the statement contains slight inaccuracies. ***Hickey v. Settlemier***, 116 Or App 436, 440, 841 P2d 675 (1992), *aff'd in part and rev'd in part on other grounds*, 318 Or 196, 864 P2d 372 (1993); ***Skoog v. Clackamas County***, 2004 WL 10249, *26, (D OR 2004), *aff'd in part and rev'd in part on other grounds*, ***Skoog v. County of Clackamas***, 469 F3d 1221 (9th Cir 2006).

C. "CONTEXT" FOR FEDERAL ANALYSIS INCLUDES ENTIRE REVIEWS AND HYPERLINKED INFORMATION.

RESTATEMENT (2D) TORTS, § 563, *Comment d*:

> In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable.

Plaintiffs have cherry-picked phrases for the Complaint. This undermines the role of this Court to consider the meaning of language in context, not isolated words strung together. Any "defamation" plaintiff could claim that only a word or short phrase constitutes that fraction of a much longer writing which makes its allegations actionable.

To determine whether a statement implies an assertion of fact, the Ninth Circuit instructs to examine the "totality of circumstances in which it was made," [***Underwager***, *supra*] summarized in ***Obsidian Finance Group, LLC v. Cox***, 812 FSupp2d 1220, 1223 (D Or 2011):

> The test assesses (1) whether in the broad context, the general tenor of the entire work, including the subject of the statements, the setting, and the format, negates the impression that the defendant was asserting an objective facts; (2) whether the context and content of the specific statements, including the use of figurative and hyperbolic language and the reasonable expectations of the audience, negate that impression; and (3) whether the statement is sufficiently factual to be susceptible of being proved true or false.

As but one example of reading "in context," the Ninth Circuit has held as a matter of law that a sports network's website posting of a photo and caption identifying sports daredevil Evil Knieval as a "pimp" could not be taken literally. ***Knievel v. ESPN***, 393 F3d 1068, 1078 (9th Cir 2005). A word such as "lying" is not always defamatory, because the word applies to a "spectrum of untruths including 'white lies,' 'partial truths,' 'misinterpretation,' and 'deception'" which may be nonactionable opinion. ***Underwager***, *supra*, 69 F3d 361, 366 (9th Cir 1995).

A recent intermediate decision by J. Hernandez in the ***Obsidian*** case offers a helpful summary of context for internet statements. In ***Obsidian Finance Group, LLC v. Cox***, 2011 WL 2745849 at *6 (D Or July 11, 2011),[25] the defendant blogger persisted in posting heated criticisms of financial planners, Umpqua Bank, attorneys, and the bankruptcy system.

> Considering first the broad context in which these statements are made, it is relevant that they are on an obviously critical blog (www.obsidianfinancesucks.com), which expressly discloses its bias against bankruptcy courts, bankruptcy trustees, and what Cox considers the broken and corrupt bankruptcy court system. In a similar case, the Northern District of California noted that when statements are made on "obviously critical blogs, ... readers are less likely to view statements as assertions of fact rather than opinion." ***Art of Living***, 2011 WL 2441898, at *7. The court cited a previous decision which explained that statements made on a personal website, through internet discussion groups, and as part of heated debate are less likely to be viewed as statements of fact. *Id.* (citing ***Nicosia v. DeRooy***, 72 FSupp 2d 1093, 1101 (ND Cal 1999)).

In this case the "broad context," is the internet, where particular norms of expression have evolved. These are recognized for spontaneity, informality, and often exaggerated and hastily written exchanges of opinions. Readers understand the atmosphere of overstatement expressed by web conventions, such as ALL CAPS (a visual representation of shouting), just as they understand a "review" and "take such railings with a grain of salt." ***Moldea v. New York Times Co.***, 22 F3d 310, 313 (1st Cir 1994).

The narrower context of "the medium by which the statement is disseminated and the audience to which it is published" [***Informational Control Corp. v. Genesis One Computer Corp***., 611 F2d 781, 784 (9th Cir 1980)] shows that Julie Anne's statements were made on the Google "review" site for the Church. A "review" is the opinion of the reviewer. MERRIAM-WEBSTER DICTIONARY (2010): "to give a critical evaluation of <review a novel>." The Plaintiffs' review page is headed by the word "Reviews" in bolded, larger typeface than the

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25. Denial of Plaintiffs First Motion for Summary Judgment entered before the decision later entered on the second Motion for Summary Judgment, 812 FSupp2d 1220, *supra*.

following text. It obviously offered a forum for the "audience" to correct, comment or disagree with her.

Even though Plaintiffs have removed reviews and corrupted this context, we are able to recreate the context of some of Julie Anne's postings, refutation by others and overall debates about "religious topics," as well as Julie Anne's hyperlinks upon which she based some of her statements. Williams Decl., Ex. A; JAS Decl., Ex A. Julie Anne also stated that she would supply further context on her blog site (Compl. 9.g), which she did.

Another feature of internet communication is that it allows "click-through" links. Julie Anne supplied a hyperlink (Compl. ¶ 9.a; JAS Decl., ¶ 41) to other materials in one of the complained-of reviews. In internet cases, hyperlinks, as a matter of law, supply context to show that an internet statement of opinion is based on some available facts. ***Agora, Inc. v. Axxess, Inc***., 90 FSupp2d 697, 205 (D Md 2000); ***Franklin v. Dynamic Details, Inc.***, 116 CalApp4th 375, 379, 10 CalRptr3d 429 (2004).

D. CHURCH AUTONOMY DOCTRINE.

As noted, in ***Watson v. Jones***, *supra*, the United States Supreme Court has declared all church governance and theological controversies to be immune from civil jurisdiction. 80 US at 733. The purpose is "to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice." ***Jones v. Wolf***, 443 US 595, 603, 99 SCt 3025, 61 LEd2d 775 (1979).

> Questions of truth, falsity, malice, and the various privileges [to defamation] that exist often take on a different hue when examined in the light of religious precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church.

Downs v. Roman Catholic Archbishop of Baltimore, 111 MdApp 616, 624, 683 A2d 808 (1996). Federal courts apply the same constitutional hands-off approach to doctrinal disputes

in all religious organizations, whether hierarchical or decentralized, "congregational" churches, such as Beaverton Grace Bible Church.[26]

E. OREGON CONSTITUTION'S RELIGIOUS EXERCISE CLAUSES.

Following ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982), our Supreme Court has developed a distinct body of state constitutional law. Oregon's "first things first" methodology requires this Court to analyze the Oregon Constitution before reaching Julie Anne's First Amendment defenses. ***Sterling v. Cupp***, 290 Or 611, 614 (1981). No Oregon case has directly considered whether expressions of religious criticism or dissent by a congregant (or former congregant) can be the basis for a defamation claim under the Oregon Constitution.[27] Neither ***Christofferson*** nor any of the few recent cases deal expressly with Oregon Constitution, Article I, §§ 2 and 3, which are, respectively:

> All men shall be secure in the Natural right, to worship Almighty God according to dictates of their own consciences.
>
> No law shall in any case whatever control the free exercise of, and enjoyment of religeous [*sic*.] freedom, or interfere with the rights of conscience.

We posit that the Oregon Constitution drafters intended these Oregon Free Exercise clauses to be at least as protective of religious expression as the federal Constitution and even more

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26. ***First Baptist Church v. Ohio***, 591 FSupp 676, 682 (SD Ohio 1983) ("because the 'hands off' policy espoused by the ***Serbian*** Court is of constitutional dimension, we find it difficult to justify the application of a different standard where a congregational church is involved").

27. In the few Oregon cases that have involved disputes over allegedly *defamatory* statements involving churches, the appellate courts did not reach the either the First Amendment or Oregon constitutional protection. ***Murphy v. Harty***, 238 Or 228, 239-40, 393 P2d 206 (1964) (defendant church did not file timely demurrer to former minister's defamation action); ***Muresan v. Philadelphia Romanian Pentecostal Church***, 154 OrApp 465, 474, 962 P2d 711, *review denied*, 327 Or 621, 971 P2d 413 (1998) (defendant church failed to preserve argument that allegedly defamatory statements were subject to an absolute constitutional privilege).

absolutely protective of religious doctrines emphasizing personal salvation, which became widely practiced throughout the early 19th Century.

In interpreting the Oregon Constitution, the Court looks to the intent of the drafters and voters. ***State v. Robertson***, *supra*. The terms of Article I, § 2, guarantee an individual right to free expression. Article I, § 3, offers no exception to its prohibition against state interference with religious exercise. This contrasts markedly with the parallel prohibition upon laws limiting expression which does provide a limited exception for permissible legislative action. Article I, § 8 (emphasis supplied):

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

We know that the first two clauses of Article I, § 8, do not allow passage of any

> laws that limit speaking, writing, or printing on any subject. Needless to say, that is a very broad prohibition. It precludes any restraint on most forms of expression as well as laws directed at limiting or restricting any conceivable kind of communication.

State v. Ciancanelli ("***Ciancanelli***"), 339 Or 282, 293, 121 P3d 613 (2005). ***Ciancanelli*** then proceeded to determine the scope of the exception in Article I, § 8, which allows laws which limit "abuse" of the rights guaranteed in the preceding clauses. There is no such exception in Article I, § 3. The text of the prohibition against state action in Article I, § 3, is stated in the absolute. We learn from ***Ciancanelli***, at 307, that:

> Nineteenth century legal thought, one scholar writes, "was overwhelmingly dominated by categorical thinking." Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 17 (1992). The modern legal notion of balancing, including the idea of balancing in the area of free speech, did not appear until around 1910. *Id.* at 18.

Thus, the drafters' choice of text, allowing no exception to the absolute prohibition in Article I, § 3, and the history of legal thought at the time of the adoption of the Oregon Constitution lead to the conclusion that the Oregon Free Expression clauses are intended to be absolute.

Obviously, the Oregon Constitution is grounded in the same principles of religious freedom as was the First Amendment, set out many times. ***Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC***, ___ US ___, 132 SCt 694, 702-3 (2012). Additionally, by the mid-1850s Oregon voters experienced "the Second Great Awakening" in the first half of the 19th Century. By the mid-1800s there were two prominent cultural and religious-based populations: "camp revivalist Protestants," many aligned with Jason Lee's Mission in the Willamette Valley (founded in 1834) and other Methodist Missions throughout the state; and Catholic missionary priests, including Fr Blanchet, who first celebrated Mass in the French Canadian/Native American community of French Prairie in 1840. Despite obvious doctrinal and cultural differences the early Protestant and Catholic evangelists played leading and collaborative roles in the formation of the Oregon Provisional and Territorial Governments.[28]

By the time of the Constitutional Convention in 1857 and later vote, Oregon had many unchurched settlers, a Jewish community,[29] numerous other missionaries, and autonomous religiously-based communities, such as the Aurora Colony (which was first scouted in 1853 by German followers of revivalist, William Keil.)[30]

At the very least, the Oregon Constitution was drafted and adopted by people who framed their thinking of natural rights in absolute terms, respected both hierarchical and congregational religious organizations, were familiar with the personal salvation traditions of

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28. Jason Lee presided over the Champoeg Conventions, which Fr Blanchet attended. The conventions elected Ira Babcock (of the Methodist Mission) provisional judge; George Abernathy (of the Mission) was elected Provisional Governor in 1845.

29. The first Portland synagogue was formed in 1858. "The Three Rabbis" (Oregon Public Broadcasting) www.opb.org./thethreerabbis/timeline.

30. The Colony was formally founded 1856. "William Keil", *Oregon History Project* (Oregon Historical Society).

the frontier proselytizers, observed the numerous doctrinal and factional distinctions among them, and knew the Territory offered a haven for small communities of unorthodox believers.

F. STATEMENTS BY LAY MEMBERS IN CHURCH DISPUTES ARE PROTECTED FROM DEFAMATION SUITS.

Intrachurch disputes and lay member discussion which is integrally intertwined with such disputes are not subjects for court review or relief. For example, in ***Howard v. Covenant Apostolic Church, Inc.***, 124 Ohio App3d 24, 31, 705 NE2d 385 (1997), the court held that allegedly defamatory statements made by Church members, when terminating another congregant's membership in the Church, were "inextricably intertwined with ecclesiastical or religious issues over which secular courts have no jurisdiction." In ***McNair v. Worldwide Church of God***, 197 CalApp 3d 363, 242, CalRptr 823 (2d Dist 1987), statements made about plaintiff--that she refused to sleep with her husband and turned their children "against him"--were not actionable defamation, because they were made during a doctrinal debate over marriage, divorce and remarriage.[31]

As another example, in ***Singleton v. Christ the Servant Evangelical Lutheran Church***, 541 NW2d 606 (Minn CtApp 1996), a former pastor sued congregants for defamation based on accusations that he had breached a duty of confidentiality to a congregant, discriminated in performing funeral services, and was "paranoid." The court found all these statements so closely to his duties as a pastor that the congregants enjoyed absolute Constitutional privilege under the First Amendment.

Oregon courts follow the First Amendment Free Exercise analysis. In ***Christofferson***, *supra*, this Court explained that "[t]he fundamental qualification for protection based on the

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31. See also, ***Hutchison v. Thomas***, 789 F2d 392, 396 (6th Cir), *cert den*, 479 US 885, 107 SCt 277, 93 LEd2d 253 (1986); ***Yaggie v. Indiana-Kentucky Synod Evangelical Lutheran Church in America***, 860 FSupp 1194, 1199 (WD Ky 1994), *aff'd*, 64 F3d 664 (6th Cir 1995); ***Farley v. Wisconsin Evangelical Lutheran Synod***, 821 FSupp 1286 (D Minn 1993).

Free Exercise Clause of the First Amendment is that that which is sought to be protected must be 'religious.'" 57 Or App at 239. The Court explained that some ideas--"such as 'the nature of a supreme being'" and "the value of prayer and worship"--"must always and in every context be considered religious as a matter of law," while other statements should be evaluated by a court to see if the speaker expressed "a religious purpose" sufficient for absolute First Amendment privilege. *Id*. at 243-44.

Julie Anne's statements based on her interpretation of particular Biblical text are "religious as a matter of law." Statements of religious-based convictions expressed during church governance debates certainly have a "religious purpose" and are protected by the church autonomy doctrine, even if "offensive" to some in the Church.

Particularly relevant here is ***Bryce v. Episcopal Church in the Diocese of Colorado***, 289 F3d 648 (10th Cir 2002), a case where (as here) clergy sued congregants for statements made in a religious context. After a youth minister entered into a civil commitment ceremony, St Aiden's parishioners (and others) attended a series of church "dialogues" about plaintiff Bryce and Sara Smith (Bryce's civil commitment partner).

> [T]he parishioners mainly discussed religious topics, including Biblical interpretation, Christian sexual ethics, the meaning of the Lambeth Resolution, and Episcopal liturgical practices. * * * [I]ndividuals at the meetings made statements that Bryce and Smith found offensive, including comments about the negative influence of homosexuals on children and a question about when Bryce and Smith began having sex.[32]

Id., 289 F3d at 658. The Court continued (*id.*):

> The statements made at the church meetings * * * may be offensive, and some of the statements may be incorrect, but they are not actionable. The defendants' alleged statements fall squarely within the areas of church governance and doctrine protected by the First Amendment.

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32. Secular comments such as: "* * * it worries [me] why gay people want to work with children"; "I am sorry that Lee Ann has chosen this lifestyle which precludes her from working with children"; and "When did you start having sex with Sara?" 289 F3d at 653.

In this similar situation, Plaintiffs began a dialogue on church governance, invited questions and continued the discussion through web "reviews." Julie Anne's statements made during this ongoing virtual church meeting are as protected by the First Amendment as were the statements made by those attending meetings at St Aiden's--even if offensive to Plaintiffs.

> [T]o allow the defamation claims to be litigated would be to allow civil court jurisdiction to enter the back door of the religious entity in question and allow judicial probing of procedure and church polity * * *.

State ex rel. Gaydos v. Blaeuer, 81 SW3d 186, 196 (MoApp 2002).

G. SUMMARY OF LAW.

The following principles should guide the Court in evaluating the defamation claims:

(1) Statements expressed on the internet, especially on publicly accessed websites and interactive platforms, enjoy free speech and free exercise of religion protections of the First Amendment and Oregon Constitution, Article I, §§ 2-3 and 8, [see discussion of internet at p. 10, *ante*].

(2) Only statements which are provably false are actionable as defamation.

(3) Opinion is not actionable. ***Milkovich****, supra*; ***Gertz***, *supra*, 418 US 323, 339-40; ***Partington v. Bugliosi***, 56 F3d 1147, 1153 n10 (9th Cir 1995) (opinions which "do not imply facts capable of being proved true or false" are protected by the First Amendment) (internal quotation omitted).

(4) A court must evaluate alleged "defamatory" meaning in the "full context" of remarks. ***Underwager***, *supra*.

(5) Opinions based on stated or known facts are protected (regardless of whether others would reach different opinions reviewing those same facts). ***Standing Committee***, *supra*.

(5) Rhetorical devices, such as irony, hyperbole and figurative language, are cues that statements are opinion. ***Hustler Magazine v. Falwell***, *supra*.

(7) Statements of religious conviction and belief are not provably true or false and non-actionable (or non-justiciable) under the Free Exercise Clause of the First Amendment and absolutely protected under Oregon Constitution, Article I, §§ 2-3; and the court will not decide "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals." ***Watson v. Jones****, supra*; ***Serbian***, *supra*.

With these guidelines, we ask the Court to hold that no part of Julie Anne's or Hannah's commentary (identified in italics below) contains a "false" statement of fact and, in context, all the statements are protected under the Constitutional principles of "church autonomy" as well a being protected expression.

Further, in each and every motion against every allegedly defamatory phrase, each Defendant claims spoilation of the evidence of context by Plaintiffs by removing posts and quoting meaningless snippets. The presumption arises that the destroyed evidence is unfavorable to the Plaintiffs. ***Booher v. Brown***, 173 Or 464, 475, 146 P2d 71 (1944).[33]

H. HANNAH SMITH'S MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.m SHOULD BE DISMISSED.

Hannah made an internet posting critical of the Pastor's management style, based on her years of church attendance, which includes:

> Chuck micro-manages everything down to the tiniest detail, like having EVERY song approved by him before its sung. But he ignores, or shoves under the carpet dangerous activities and bullies people to get his way.
>
> ...that is no-way Biblical. Grace is the Last thing you'll find at that church.

Compl. ¶ 9.i.

Chuck micro-manages everything down to the tiniest detail, like having EVERY song approved by him before its sung, is protected opinion based on the stated fact. Anyone is free to disagree with that opinion. ***Standing committee***, *supra*. Hannah states the basis for her opinion of "micro-managing."

But he ignores, or shoves under the carpet dangerous activities and bullies people to get his way, also expresses opinions. The term "bully" or "bullies" is just not "defamatory." For example, in ***Hupp v. Sasser***, 200 WVa 791, 798, 490 SE2d 880, 887 (1997), plaintiff

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33. Overruled in part on other grounds, ***Tanner v. Farmer***, 243 Or 431, 414 P2d 342 (1966), but still good law on spoilation. 1 JONES ON EVIDENCE, § 22, p. 136.

student sued his college Dean for referring to him as "a bully" and "[h]e tried to bully me." These were not defamatory because, "Dean Sasser's opinion that Mr. Hupp is a bully is not provably false as that conclusion is totally subjective."[34]

As for, *...that is no-way Biblical. Grace is the Last thing you'll find at that church*, this Court cannot decide what is either "way Biblical" or "no-way Biblical," since that is a matter of subjective religious belief. Similarly, the question of any absence of "grace" is not capable of being proven false. The statements by Hannah Smith enjoy First Amendment and Oregon Constitutional protections. This claim should be dismissed as to Hannah Smith.

I. JULIE ANNE SMITH'S MOTIONS AGAINST EACH OF PLAINTIFFS' CLAIMS AGAINST HER.

1. FIRST MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.a SHOULD BE DISMISSED.

Plaintiff alleges the following incomplete sentences and phrases, all posted on the internet are "defamatory"

> April 8, 2011: [The pastor has] "chosen to mislead the congregation" and "destroy relationships," and "accuses the pastor of 'narcissism in the pulpit.'" Compl. ¶ 9.a.

As discussed earlier, this is a dispute over church governance and pastoral conduct and theology. The phrase, *mislead the congregation*, is part of a dispute about who is preaching "true" scripture and is protected by the Free Exercise clause of the First Amendment and Oregon Constitution, Article I, §§ 2-3. It cannot be the basis for a defamation claim. *Destroy relationships* is devoid of context and is clearly opinion about the divisions among members and former congregants. See, ***Singleton v. Christ the Servant Evangelical Lutheran Church***, *supra*, where a former pastor's defamation claims against congregants that

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34. See also, ***Wainman v. Bowler***, 176 Mont 91, 96, 576 P2d 268 (1978), "The words 'bully boy' are of doubtful significance and their injurious character does not appear on their face." Rodney A. Smolla, LAW OF DEFAMATION § 6.12[10] (2012) (noting that "[n]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable").

he performed his duties poorly and was "paranoid" failed, because the speakers enjoyed Free Exercise privilege to speak their conscience and religious convictions.

The reference to "*Narcissism in the Pulpit*" was actually a hyperlink to resources identifying characteristics of clergy who may not minister appropriately. JAS Decl., ¶ 41.[35] In context, (1) the reference is to an article anyone could read, and (2) no one would take this as a medical diagnosis. It is just not defamatory.

Weyrich v. New Republic, Inc., 235 F3d 617 (DC Cir 2001), held that the magazine article's references to plaintiff's "bouts of pessimism and paranoia" and "habits of suspicion, pessimism, and antagonism," were not defamatory, since "these comments cannot reasonably be understood as verifiably false, and, therefore potentially actionable, assertions of mental derangement" [*Id.* at 620] and "[n]ever does the article claim to make a psychological pronouncement, nor would a reasonable reader understand it to do so." *Id.* at 625. See also, ***Lieberman v. Fieger***, 338 F3d 1076, 1081 (9th Cir 2003) (attorney's comments that psychiatrist was "Looney Tunes," "crazy," "nuts," and "unbalanced" were protected under First Amendment as statements of opinion).

2. SECOND MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.b AND 9.c SHOULD BE DISMISSED.

> September 29, 2011: "[The church uses] 'control tactics' and "You will be fine at this church if you never question the elders or pastor." Compl. ¶ 9.b
>
> December 14, 2011: "Something creepy about this church." Compl. ¶ 9.c.

These statements were made in the course of the ongoing church governance discussion initiated by Plaintiffs and are subject to the church autonomy doctrine. Julie Anne's statements enjoy the protections of the First Amendment Free Exercise clause and Oregon Constitution, Article I, §§ 2-3. The statements obviously relate to the pastoral techniques,

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35. http://power2serve.net/narcissim_in_the_pulpit.htm,

teaching style and suggested life choices instructed by the Plaintiffs and have thus have "a religious purpose." ***Christofferson***, *supra*, 57 OrApp at 243-44. Further, the statements are protected expression under the First Amendment and Oregon Constitution, Article I, § 8.

3. THIRD MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.d-f SHOULD BE DISMISSED.

December 20, 2011: "[The pastor] of this church thrives on control;"

"sadly BGBC is more about the reputation of the pastor than the real church;"

"It is important for people to have an understanding of why this church is not a healthy place and would shout from the rooftop if my review prevents another family from getting sucked in to the spiritually abusive environment and false teaching presented by the current pastor;"

"To Chuck: if you would have manned up and acknowledged that we were parting was because we weren't seeing eye-to-eye on certain issues, you never would have heard form us again. But for you to lie to the congregation ..."

"I am calling you out as a Wolf for lying . . ."

"we had information that be damaging to you reputation ..."

"You are really brilliant, Chuck, but not so brilliant. Quite a few people can see through the false teaching and self-aggrandizement." Compl. ¶ 9.d

Paragraphs 9.e and 9.f allege reposting the same fragments.

[T]he pastor of this church thrives on control and *sadly BGBC is more about the reputation of the pastor than the real church*, are also statements of opinion about the pastoral techniques, teaching style and suggested life choices advocated by the Plaintiffs and have a "religious purpose" for Julie Anne and the "audience." This Court cannot decide the truth or falsity of what constitutes the "real church." First Amendment; Oregon Constitution, Article I, §§ 2-3.

To Chuck: if you would have manned up and acknowledged that we were parting ways because we weren't seeing eye-to-eye on certain issues, you never would have heard form us again, expresses personal dissatisfaction with the response to the Smiths' dissent, but nothing

in that statement is provably false or "defamatory." The following phrase, *But for you to lie to the congregation ...*, and *I am calling you out as a Wolf for lying*, and *spiritually abusive environment and false teaching*, are all made in the context of a doctrinal dispute and protected by the church autonomy doctrine.

We have demonstrated that the references to false religious leaders as "wolves" is from Matthew 7:15, and is a religiously-based conviction. Julie Anne's statement of conviction that the Pastor has been a "Wolf" is in same theological context as the Pastor's denunciations of "emergent" evangelism, Billy Graham, the Pope, and dozens of other historical and contemporary religious figures as "wolves." This Court cannot decide the truth or falsity of Julie Anne's scriptural reference and her belief that the Pastor's Biblical teaching is "false." Free Exercise clause; Oregon Constitution, Article I, §§ 2-3.

Even in a secular sense, "lying" is not defamatory. See the number of accusations of "lying" or "liar" found to not be defamatory in context in the several ***Obsidian v. Co***x opinions [2011 WL 2745849812 and FSupp2d 1220]. In ***Underwager***, *supra*, defendant TV station had rebroadcast a television interview in which a speaker said the plaintiff had been "lying" about his credentials as a child psychologist. The Ninth Circuit noted that the word "lying" applies to a "spectrum of untruths." *Id*. Since the plaintiff failed to show that "lying" meant actual perjury, the statement about "lying" was protected First Amendment opinion. *Id.*

While the statements, *we had information that be damaging to you reputation ...*, *You are really brilliant, Chuck, but not so brilliant. Quite a few people can see through the false teaching and self-aggrandizement*, are obviously critical of the Pastor, none of these remarks is defamatory and none states a provable "fact." Negative opinions are not defamation.

4. FOURTH MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.g AND REPOSTING ¶ 9.j SHOULD BE DISMISSED.

5. FIFTH MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.h and REPOSTING ¶ 9.j SHOULD BE DISMISSED.

Defendant combines her discussion of these two claims.

Compl. ¶ 9.g:

> January 4, 2012: "Leaders of cults convince their people that their church is the only true place to be ..."
>
> "turn a blind eye to know sex offenders in the church"
>
> "spiritual abuse"
>
> "I am working on compiling numerous pages of notes that were taken over the time we were active at this church ...this will be posted to a website for all to see."

Compl. ¶ 9.h:

> January 5, 2012: "What we had was indoctrination ...That is how cult leaders work. Don't waste your precious lives and relationships by being held emotionally/spiritually captive a this so-called church."

Despite Plaintiffs' spoilation of evidence, the foregoing fragments appear to be from the following full statement, with the complained-of phrases italicized.

> A reviewer here and long-time church member used a revealing phrase in her review. While parts of the review are masked in pseudo-humility, a key sentence is alarming to those who have studied cults and churches that abuse: "Come and be a part of the true narrow path". *Leaders of cults convince their people that their church is the only true place to be* and cultivate an atmosphere of pastor worship. They elevate themselves/church to an elitist status of being the only one who preaches the truth. This was preached from the pulpit countless times in our 2 yrs. No other church in the area could ever measure up to this church and his preaching. Leaders of cults refuse to put themselves under anyone's authority, do not allow anyone to question them without repercussions, they shun former members (including family), make extra-biblical rules, *turn a blind eye to known sex offenders* in the church, behave in odd ways (recording conversations without permission) in order to "protect their reputation". The Bible talks about false teachers like this. This is *spiritual abuse*. *I am working on compiling numerous pages of notes that were taken over the time we were active at this church*. My pages of comments will include comments that current members told me while we were there. *This will be posted to a website for all to see* because of space limitations here. Stay tuned for the link. * * * * Another reviewer said the "whole counsel of God, which is taught . . . " No, not the whole counsel of God. In our 2 yrs, Children's Church consisted of Eph 1: 1-13. Sunday sermons consisted of Romans 12 through Romans 13:6. That's not much of the Bible AT

> ALL. If we stayed there for 18 yrs, my children wouldn't have scratched the surface of the whole counsel of God. *What we had was indoctrination*, previous sermons regurgitated and spit out again, misapplied to modern events, etc. *That is how cult leaders work. Don't waste your precious lives and relationships by being held emotionally/spiritually captive at this so-called church*. . . . . Bren mentioned beautiful children's nursery - - how can she forget that her own beloved pastor knew about a sex offender in the church who had access to the nursery and children on a weekly basis and did not have any safeguards in place. We found out about the sex offender after we left, but were shocked because we saw this person in the nursery on a regular basis when we had our baby there.

JAS Decl., Ex. A.

In context, Julie Anne here continues the dialogue on church-related concerns protected by the Free Exercise clause and Oregon Constitution, Article I, §§ 2-3 and 8. She states specific concerns, such as preaching that the Church is the "only" truth and the slow progress of Biblical study in Sunday school. She forms an opinion from the stated facts that the practices were "indoctrination." In sum, all the foregoing are both protected religious expression and opinions based on the stated facts.

Similarly, in context, the statement, *Leaders of cults convince their people that their church is the only true place to be ...*, is part of a discussion about pastoral practices Julie Anne observed and which formed the basis for her opinion that the practices were *spiritual abuse*. Since the Plaintiffs proclaim that other belief systems are "counerfeit" [*sic*] [Williams Decl., Ex. F, p. 2 and FF at p. 1] and provide resources to evangelize "specific cults," including Catholicism, Jehovah's Witnesses, Islam, Latter Day Saints, and Pentecostals, it is clear that "cult" involves a conclusion about whether a belief system is true. No doubt Plaintiffs find "cult" improper when directed at them, but asking the Court to decide whether the practices Julie Anne recites are indicative of a "cult" and are defamatory of Plaintiffs and their "true" religious beliefs would engage the Court in deciding the "truth" or "falsity" of those beliefs.

In ***Sands v. Living Word Fellowship***, 34 P3d 955, 960 (Alaska 2001), *reh'g den*, (2001), Plaintiff alleged that the Fellowship and a member falsely accused Wasilla Ministries of being a "cult" and Sands of being a "cult recruiter." The Court specifically found that:

> Living Word's allegedly defamatory statements in this case--that Wasilla Ministries is a "cult" and that Sands is a "cult recruiter"--are pronouncements of religious belief and opinion.

The statements were nonactionable and "barred by the First Amendment to the U.S. Constitution." *Id.*

In ***Harvest House Publishers v. Local Church***, 190 SW3d 204 (TexApp 2006), dozens of churches sued the publisher of AN OVERVIEW OF THE ENCYCLOPEDIA OF CULTS AND NEW RELIGIONS for defamation because they were included as "cults" in the work. The "Introduction" defined a

> "cult" as "a separate religious group generally claiming compatibility with Christianity but whose doctrines contradict those of historic Christianity and whose practices and ethical standards violate those of biblical Christianity."

Id. at 211. The Court held that "'cult' is not actionable, because the truth or falsity of the statement depends upon one's religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law." *Id*. at 212.

The vague term, "spiritual abuse" is not capable of defamatory meaning. For example:

> The term "lawsuit abuse" is vague and does not have a definite meaning. It is a hyperbolic expression of opinion, not a verifiable statement of fact.The sign may have offended Plaintiffs or caused them discomfort, but it was not actionable.

Fall & Mayfield L.L.P. v. Molzan, 974 SW2d 821, 827 (TexApp 14 Dist 1998).

Turn a blind eye to known sex offenders in the church and other references to the investigation and conviction of a teenage church member on criminal charges of rape of a child and other counts of sexual abuse are discussed together, below. This statement is protected as commentary on church policies about the role of family and the state in dealing with a minor congregant accused of abuse. It is also "pure" opinion based on facts known to

the congregants and Plaintiffs, since the offender was tried as an adult and the records are public.

6. SIXTH MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.i SHOULD BE DISMISSED.

Combined with discussion of ¶ 9.k.

7. SEVENTH MOTION: ANY AND ALL CLAIMS BASED ON COMPLAINT ¶ 9.k SHOULD BE DISMISSED.

Compl. ¶ 9.i.

> January 9, 2012: "how can she forget that her own beloved pastor knew about a sex offender in the church who had access to the nursery and children on a weekly basis and did not have any safeguards in place."

Compl. ¶ 9.k.

> January 20, 2012:
>
> "This is a very destructive and disturbing 'church.'"
>
> "The extra-Biblical legalistic teaching is wrong. The gossip/slander, disclosure of what goes on in private counseling sessions, sex offenders having free reign in childrens' area with no disclosure to parents ... ."
>
> "This is not a safe place.".[36]

This is a very destructive and disturbing 'church,' This is not a safe place, and *The gossip/slander, disclosure of what goes on in private counseling sessions * * *,* are clearly opinions based on facts stated by Julie Anne and facts known to the congregants. *The extra-Biblical legalistic teaching is wrong,* is speech protected by the church autonomy doctrine, as this Court cannot determine whether the teaching is extra-Biblical or wrong. First Amendment Free Exercise clause; Oregon Constitution, Article I, §§ 2-3. All the foregoing italicized statements are all closely intertwined with the ongoing discussion of termination of the Evangelical Coordinator and church governance and are also "pure" opinion based on

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36. Paragraphs 9.e-f, 9.i-j, allege "republication" of some (apparently) deleted posts but do not allege new matter other than allegations above.

stated facts and facts known to the congregants. Web "[r]eaders were 'free to form another, perhaps contradictory opinion from the same facts' * * * as no doubt they did." ***Standing Committee***, *supra*, 59 F3d at 1440. As Professor Smolla explains:

> With "pure" opinion, as that term is used in the RESTATEMENT, either the maker of the comment states the facts on which the opinion is based, or the recipient of the communication is already aware of the facts upon which the opinion is based. A pure opinion does not lose its protected status merely because it is ostensibly cast in factual form, if it is clear from the context that the maker does not intend to assert another objective fact, but only his personal view on the objective facts already stated.

Smolla, LAW OF DEFAMATION (Westlaw online data base current to March 11, 2012) § 6:29.

All of Julie Anne's statements referencing the Church's practices and decisions concerning the (now) convicted child molester were based on circumstances known to the congregation. The alleged perpetrator was the son of a congregant who regularly oversaw the Church children's nursery. The offender freely visited the childrens' area.[37] Apparently, Church leaders knew of the molestation accusations in June of 2008. Varela Decl., ¶¶ 3-5. The teenager continued to frequent the Church child care center for months thereafter. Julie Anne saw him there when she nursed her youngest child in late November 2008. JAS Decl., ¶ 25.

For whatever reasons, an investigation by state authorities did not commence until late December 2008, after the Smiths had stopped attending Church. The Pastor and Elders soon came unannounced to the Smith home and the Varela home. Their hostile questioning suggested that someone *other* than Church leaders had made the report to authorities. JAS Decl., ¶ 26; Varela Decl., ¶ 8. The eventual arrest, conviction and incarceration of the offender in 2009 are public records.

Plaintiffs complain about Julie Anne's comments made in January 2012--almost 3 years after such facts became public by indictment. In 2008 Plaintiffs made decisions about

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37. We phrase this discussion to avoid any identifying details about the victims.

responding to the accusations of abuse against the offender, ministering to him and maintaining the security of the child care area. Such facts about Plaintiffs' handling of the abuse allegations were known to congregants long prior to Julie Anne's reviews in 20*12*. Congregants could draw their own conclusions about the Biblical propriety and wisdom of Plaintiffs' choices. Julie Anne's opinion that Plaintiffs were not vigilant enough certainly stings, but her opinion is not provably false.

VI. EVEN IF ANY PHRASE *MIGHT* BE DEFAMATORY, THE SPECIAL MOTIONS SHOULD BE GRANTED BECAUSE PLAINTIFF CANNOT PROVIDE SUBSTANTIAL EVIDENCE OF SUBJECTIVE "ACTUAL MALICE."

A. PLAINTIFF ALLEGES MALICE AND MUST NOW SHOW SUBSTANTIAL EVIDENCE.

We have shown that in this case it would not be possible to show even negligence on the part of Julie Anne or Hannah, since each their statements were religious beliefs, opinions and opinions based on stated information. However, in their Complaint, Plaintiffs have alleged and taken on the burden of proving "malice" as the level of fault.

RESTATEMENT (2D) TORTS, § 613 states:

> (1) In an action for defamation the plaintiff has the burden of proving, when the issue is properly raised
>
> * * *
>
> > (g) the defendant's negligence, reckless disregard or knowledge regarding the truth or falsity and the defamatory character of the communication * * *.

"Malice" has a particularized meaning in defamation law. To defeat the Special Motion, Plaintiffs must offer substantial evidence of "actual malice" as that phrase is used in the RESTATEMENT, the United States Supreme Court, and Oregon Constitutional jurisprudence, which is: that Defendant had reckless disregard for the truth or falsity or actual knowledge of the falsity of her statements (to the extent any statement is "factual"). ***Gardner***

v. Martino, 563 F3d 981, 989 (9th Cir 2009), explains that a radio talk show host's criticism of an Oregon business, based only upon facts he heard from a caller, was not even "negligent" and did not reach the level of recklessness required for "malice." He had no duty to investigate further. The Court upheld dismissal under ORS 31.150, *et seq*.

Actual malice in its constitutional sense is a subjective factual standard, not a pleading. ***St. Amant v. Thompson***, 390 US 727, 88 SCt 1323 (1968).[38] St. Amant, a candidate for sheriff, accused the current sheriff, plaintiff Thompson, of official corruption. St. Amant had no personal knowledge. He relied solely on an affidavit from another and did not investigate further. The United States Supreme Court reversed a defamation verdict, because there was insufficient evidence of St. Amant's subjective reckless "disregard" for the truth or falsity of the affiant's statements.

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. Thompson, 390 US at 731. Malice does not mean subjective ill-will or here Julie Anne's intention to "prevent other families from joining." Instead, it means her subjective knowledge that some of her statements were "false." She had no duty to "investigate" or doubt the words of others as she heard or understood them.

The Constitutional mandate is, of course, followed in Oregon.

> [P]laintiffs' allegations in actions for libel that defendants "rel[ied] on statements made by a single source," or failed to verify statements received from an

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38. Despite the passage of time this case remains the standard for actual malice.

> By far the most important Supreme Court explication of the actual malice standard came in its 1968 decision in ***St. Amant v. Thompson***. To this date the ***St. Amant*** case remains the governing law in the area, and it is well worth parsing the opinion carefully.

Smolla, LAW OF DEFAMATION §3:40 (West database updated March 2012).

> "adequate news source," or performed "slipshod investigation," have all been rejected as bases for inferring actual malice. In short, reckless conduct amounting to actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." Rather, "'knowledge'" or "'reckless disregard'" is a subjective matter, a question of state of mind, quite distinct from any question of objective reasonableness or prudence.'"

McNabb v. Oregonian Publishing Co., 69 OrApp 136, 140-41, 685 P2d 458, *rev den*, 297 Or 824, 687 P2d 797 (1984), *cert den*, 469 US 1216, 105 SCt 1193, 84 LEd2d 339 (1985). (citations omitted; emphasis supplied, brackets in original).

Plaintiffs' burden of proof of "actual malice" is greater than the usual "preponderance of the evidence" standard in civil litigation. Their proof must be made with "convincing clarity." ***New York Times***, *supra*, 376 US at 285-86. Given this heightened evidentiary burden at trial, to defeat the Special Motions Plaintiffs must now show substantial evidence that they have a probability of being able to meet that trial burden of clear and convincing evidence of subjective actual malice of Julie Anne and Hannah.

B. PLAINTIFFS ARE PUBLIC FIGURES; EACH MUST SHOW ACTUAL MALICE UNDER THE FIRST AMENDMENT.

Even if Plaintiffs had not affirmatively undertaken the burden of showing actual malice in their Complaint, in this case the evidentiary record shows the Church to be a public figure and O'Neal to be a public figure or "limited purpose public figure" for any controversy concerning doctrinal disputes and his views on controversial policy issues he wishes to impact. The public figure and limited purpose public figure analysis is a matter of First Amendment law. A public figure plaintiff must show that the defendant acted with "actual malice." ***New York Times***, *supra*, 376 US at 280; ***Anderson v. Liberty Lobby, Inc.***, 477 US 242, 255-56, 106 SCt 2505, 91 LEd2d 202 (1986). The Ninth Circuit has explained:

> The prospect of liability for defamation has the obvious potential of chilling public debate. First Amendment concerns are particularly acute when the plaintiff

is a public figure--someone who, for example, "voluntarily injects himself or is drawn into a particular public controversy."

Flowers v. Carville, 310 F3d 1118, 1129 (9th Cir 2002).[39]

1. THE CHURCH IS A PUBLIC FIGURE.

Religious organizations may be public figures because of their prominence and influence. In ***Church of Scientology v. Siegelman***, 475 FSupp 950, 954, *reh'g denied*, 481 FSupp 866 (SD NY 1979), the Church and its California branch were found to be public figures, because the church was "a large world-wide religious movement," "plaintiffs have taken affirmative steps to attract public attention, and actively seek new members and financial contributions," and plaintiffs had "thrust itself onto the public scene, and accordingly should be held to the stringent ***New York Times*** burden of proof in attempting to make out its case for defamation."

In ***Gospel Spreading Church v. Johnson Publishing Co***., 147 USApp DC 207, 208, 454 F2d 1050, 1051 (DC Cir 1971), the Church was a public figure "[a]s an established church with substantial congregations it seeks to play 'an influential role in ordering society.'"[40] See also, ***Holy Spirit Ass'n v. Sequoia Elsevier***, 4 Media L Rep (BNA) 1744 (NYSupCt 1978), modified on other grounds, 75 AD2d 523, 426 NYS2d 759 (1980).

Here the Fellowship of Brethren Churches claims to have 3000 churches in 25 countries. The Fellowship and Plaintiff Church practice a particular from of evangelism, and the Church and Pastor take affirmative steps to attract public attention to their particular

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39. This upheld the lower court in ***Flowers v. Carville***, 112 FSupp2d 1202, 1211 (D Nev 2000), where trial court held that language used by Defendant George Stephanopolous "making reference to 'trash,' 'crap,' and 'garbage'" relating to Ginnifer Flowers was "rhetorical hyperbole."

40. Quoting, ***Curtis Publishing Co. v. Butts***, 388 US 130, 164, 87 SCt 1975, 18 LEd2d 1094 (1967) (Warren, CJ, concurring).

scriptural beliefs by canvassing door-to-door and distributing literature in public places. See, §§ II.B(1) and

(3), *ante*. The Church speaks through the Pastor, who has joined a number of controversies.

2. PASTOR O'NEAL IS A PUBLIC FIGURE.

A "limited" public figure is an otherwise private person who becomes a public figure for a specific range of issues. Such plaintiffs voluntarily seek publicity on particular issues. ***Wolston v. Reader's Digest Ass'n***, 443 US 157 (1979). Persons who have "voluntarily injected" themselves or have been "drawn into a particular public controversy" or seek pervasive involvement in the affairs of society are deemed "limited public figures" for purposes of a defamation claim. ***Bank of Oregon v. Independent News, Inc.***, 298 Or 434, 443-44, 693 P2d 35, *reh'g denied*, 298 Or 819, *cert den*, 474 US 826 (1985). They, too, are be held to the stringent standard of proving actual malice.

To the extent a pre-existing "controversy" has existed for millennia on Christian doctrine, the Pastor has joined it and adds a particular interpretation of scripture and particular approaches and teachings to that controversy. He and the Church practice a form of "shunning," which many find controversial because of its psychological impact on those cut-off from former church associates. Pastor O'Neal has voluntarily interjected himself and his Church's scriptural views into the public square to proselytize. He holds weekly meetings of several hours in length to train in evangelistic techniques, so brethren can discuss and debate scripture with adherents of other faiths. He assigns members neighborhoods to canvass, public places to visit, and locations to confront other proselytizing groups, such as Mormons and Jehovah's Witnesses. He has had a regular weekly radio show in the Portland media market.

Pastor joins legislative and civil law controversies as well. He advises congregants to vote according to his views of Scripture on controversial legislative subjects. He voluntarily involves himself and the Church pulpit in the affairs of larger society by taking stands against specific civil legislation and against political figures who support particular legislation. Abortion, gun control legislation, gay marriage are all matters of longstanding, serious public debate.

According to the commentators, virtually every lower court discussion of the public figure/private figure dichotomy since ***Wolston***

> has treated the voluntariness requirement as central to the determination, and it is probably the most firmly entrenched of all the factors courts consider. Voluntariness in fact appears to be almost the exclusive preoccupation in some decisions.

Smolla, LAW OF DEFAMATION §2:31 (West database updated March 2012).

> [T]he plaintiff is not permitted to avoid the strictures of the actual malice standard by protesting, "I didn't want the attention." The proper question is not whether the plaintiff volunteered for the publicity but whether the plaintiff volunteered for an activity out of which publicity would foreseeably arise.

Id. § 2:32 (emphasis supplied).

Plaintiffs voluntarily and aggressively proclaim, disseminate and join all of the foregoing controversies in print, public places, and through web-based video and audio. It is entirely foreseeable that people, including former congregants, will have opinions about the Biblical interpretations of the Church and the Pastor. It is entirely foreseeable that some of the reactions will be placed on the Google review page the Plaintiffs maintain. These Plaintiffs cannot object to being "public figures" by claiming they seek only positive reviews and willing converts but do not invite criticism and dissent which accompany controversial views.

Therefore, the Church and O'Neal are public figures (or at least limited purpose public figures) for First Amendment analysis and must present substantial evidence to show each can

meet the clear and convincing evidence standard regarding whether Julie Anne acted with "reckless disregard" or intentionally. RESTATEMENT (2D) TORTS § 613(1)(g)*;* ***New York Times***, *supra;* ***Fodor v. Leeman***, 179 OrApp 697, 41 P3d 446 (2002) (lecturer on land use a limited public figure who had to prove actual malice in defamation suit against a person who placed paid advertisements critical of lecturer's publications).

C. THE OREGON CONSTITUTIONAL PRIVILEGE OF FAIR COMMENT REQUIRES EACH PLAINTIFF TO PRODUCE EVIDENCE OF ACTUAL MALICE.

Even if ***Gertz, Milkovich*** and ***Wolston*** did not control the requirement to prove "actual malice" in this case, and even if each Plaintiff was a private figure for the purposes of First Amendment analysis, Oregon Constitution, Article I, § 8, does not depend upon the public or private status of the plaintiff in defamation cases. Instead, the Oregon Constitution protects statements made in privileged situations. Here the privileged occasions are what the common law termed occasions of "mutual concern" and "fair comment."[41] RESTATEMENT (2D) TORTS; *see* § 613(1)(h).

Speech on "matters of public concern" and "fair comment" are privileged occasions under Oregon common law. The defamation plaintiff has the burden of showing "abuse" of the privilege (that degree of fault which was traditionally termed "actual malice"). ***Peck v. Coos Bay Times Pub Co.,*** *supra*, 122 Or at 421-2; ***Bank of Oregon v. Independent News,***

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41. If the expression of opinion was on a matter of public concern, it was a form of privileged criticism, customarily known by the name of fair comment. The privilege extended to an expression of opinion on a matter of public concern so long as it was the actual opinion of the critic and was not made solely for the purpose of causing harm to the person about whom the comment was made, regardless of whether the opinion was reasonable or not. According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.

RESTATEMENT (2D) TORTS § 566, "Expression of Opinion," *Comment a*.

Inc., 298 Or 434, 437, 693 P2d 35 (1985). The kinds of comments made by Hannah and Julie Anne have always been privileged situations for speech in Oregon and remain so. See, ORS 31.155(2).

VII. PLAINTIFFS MUST PROVIDE EVIDENCE OF DAMAGES.

Plaintiffs immediately removed Hannah's and Julie Anne's complained-of reviews from the site. Plaintiffs must now provide substantial evidence of the probability that any damages they claim were the "result" of Hannah's one statement in December 2011 or any of Julie Anne's statements. They have the burden of showing that any "damages" were not the result of some other negative comments they have also removed, negative comments that appear in response to Pastor's blogging on other websites [Williams Decl., Ex. I], reactions to Plaintiffs' shunning practices, or for any other reason, such as a drop in donations during an economic downturn. It is unlikely that Plaintiffs can come forward with any proof of "damages" suffered as a result of any of the particular "reviews" they removed.

VIII. CONCLUSION.

Based on the foregoing discussion and the materials submitted by Defendants in the record of this case, Defendants' Special Motion to Strike should be granted as to the claims against them in the Plaintiffs' Complaint, and the Complaint should be dismissed as to Julie Anne Smith and Hannah Smith. ORS 31.150, *et seq*.

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Defendants will each request her reasonable attorney fees. ORS 31.152(3).

Dated: April 26, 2012

Respectfully Submitted,

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Hannah Smith

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing:

[ ] DEFENDANTS' MOTIONS TO STRIKE

[ ] DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTIONS TO STRIKE

[ ] APPENDIX TO DEFENDANTS' MEMORANDUM IN SUPPORT

[ ] DECLARATION OF LINDA K. WILLIAMS

[ ] DECLARATION OF JULIE ANNE SMITH

[ ] DECLARATION OF MEAGHAN VARELA

[ ] DECLARATION OF DON MILLER

[ ] DECLARATION OF R.W. ROUSSEL

by depositing a true copy, first class postage prepaid, in a sealed envelope in the US Mail at Portland, Oregon, this date addressed to

Roger Hennagin, Esq.
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Dated: April 26, 2012

_____
Linda K. Williams