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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Submitted February 9, 2018 Decided March 27, 2018

No. 17-5133

PATRICIA SMITH AND CHARLES WOODS,
APPELLANTS

v.

HILLARY RODHAM CLINTON AND UNITED
STATES OF AMERICA,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01606)

Larry E. Klayman was on the briefs for appellants.

David E. Kendall, Katherine M. Turner, and Amy Saharia were on the brief for appellee Hillary Rodham Clinton.

Jessie K. Liu, U.S. Attorney, U.S. Attorney's Office, and Mark B. Stern and Weili J. Shaw, Attorneys, U.S. Department of Justice, were on the brief for appellee United States of America.

Before: ROGERS, MILLETT, and PILLARD, *Circuit Judges.*

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Opinion for the Court filed PER CURIAM.

PER CURIAM: Sean Smith and Tyrone Woods tragically perished in the September 11, 2012, attacks on United States facilities in Benghazi, Libya. Their parents, Patricia Smith and Charles Woods, sued former Secretary of State Hillary Rodham Clinton for common-law torts based on her use of a private email server in conducting State Department affairs while Secretary of State and public statements about the cause of the attacks she made in her personal capacity while a presidential candidate. They appeal the substitution of the United States as the defendant on the claims involving the email server and the dismissal of their complaint for lack of subject matter jurisdiction and failure to state a claim. We affirm.

I.

The genesis of this case is in Clinton's private meeting with Smith and Woods on September 14, 2012, in the wake of their sons' deaths. According to the complaint, Secretary Clinton "lied to [Smith and Woods] and told [them] that the Benghazi Attack was the result of [an] anti-Muslim YouTube video that had been posted online and that the creator of the video would be arrested." Compl. ¶ 19. An entry in Woods's daily journal for September 14, 2012, records that "[Woods] gave Hillary a hug and shook her hand, and she said [they] are going to have the film maker arrested who was responsible for the death of [his] son." *Id.* ¶ 20.

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Four years after this meeting, Smith and Woods sued Clinton for wrongful death, negligence, defamation, false light, intentional infliction of emotional distress, and negligent infliction of emotional distress. Their tort claims stem in part from Clinton’s use of a private email server while she was Secretary of State “to conduct official government business, including but not limited to,” Smith and Woods allege, “sending and receiving thousands of e-mails regarding matters of national security.” *Id.* ¶ 9. This information allegedly included the “location of . . . government operations in Benghazi, Libya” and “was intercepted by foreign powers.” *Id.* ¶ 15. The complaint further alleges that Islamic terrorists acquired this information and “used it to plan, orchestrate, and carry out the horrific and devastating attack on the American diplomatic compound in Benghazi, . . . resulting in the death of four Americans, including Sean Smith and Tyrone Woods.” *Id.* ¶ 16. The remaining claims arise from four statements Clinton made in her personal capacity during the 2016 presidential campaign, in response to Smith and Woods’s accusations that she lied to them during the September 14 meeting about the cause of the attack. They alleged that these statements defamed them by “either directly calling them liars, or [] strongly implying that they are liars.” *Id.* ¶ 23. The complaint alleged:

First, on December 6, 2015, *ABC News*’ George Stephanopoulos asked Clinton about the attack in Benghazi: “Did you tell them it was about the film?” *Id.* ¶ 23(a) (citation omitted). Clinton responded:

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No. You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans. And I did testify, as you know, for 11 hours. And I answered all of these questions. Now, I can't—I can't help it the people think there has to be something else there. I said very clearly there had been a terrorist group, uh, that had taken responsibility on Facebook, um, between the time that, uh, I—you know, when I talked to my daughter, that was the latest information; we were, uh, giving it credibility. And then we learned the next day it wasn't true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.

Id. (internal quotation marks and citation omitted).

Second, on December 30, 2015, in an editorial board meeting, *Conway Daily Sun* columnist Tom McLaughlin referred to Clinton's answer to Stephanopoulos and asked "Somebody is lying. Who is it?" *Id.* ¶ 23(b) (citation omitted). Clinton responded: "Not me, that's all I can tell you." *Id.* (citation omitted).

Third, during the Democratic Presidential Primary Debate on March 9, 2016, "[w]hen asked about [] Smith's allegation that [] Clinton lied to her by blaming the Benghazi Attack on the YouTube video," Clinton responded, "I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can't even imagine the grief that she has for losing her son, but she's wrong. She's absolutely wrong." *Id.* ¶ 23(c) (citation omitted).

Fourth, in a July 31, 2016, interview with Chris Wallace of *Fox News Sunday*, Clinton said,

Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that's not what they heard[.] I don't hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn't said.

Id. ¶ 23(d) (internal quotation marks and citation omitted).

The district court granted the United States' motion to substitute itself for Clinton under the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act"), 28 U.S.C. § 2679, for those claims involving Clinton's use of a private email server while Secretary of State. The district court then dismissed without prejudice the wrongful death, negligence, and intentional infliction of emotional distress counts against Clinton in her official capacity for lack of subject matter jurisdiction due to Smith and Woods's failure to exhaust their administrative remedy under the Federal Tort Claims Act, 28 U.S.C. § 2675(a). The district court also dismissed without prejudice the defamation, false light, and intentional infliction of emotional distress counts against Clinton in her

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personal capacity for failure to state plausible claims for relief. Smith and Woods voluntarily withdrew their claim for negligent infliction of emotional distress.

II.

Smith and Woods appeal the Westfall Act substitution of the United States for Clinton and the dismissal of the remaining tort claims. Our review is *de novo*. *Council on Am. Islamic Rel. v. Ballenger*, 444 F.3d 659, 664 (D.C. Cir. 2006) (*CAIR*); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 623 (D.C. Cir. 2001).

A.

The Justice Department certified that, “with respect to the incidents alleged in the Complaint, . . . Clinton was acting within the scope of her office as the Secretary of State of the United States at the time of the alleged conduct that purportedly occurred while she was in office, *i.e.*, from January 21, 2009 to February 1, 2013.” Westfall Certification at 2, No. 16-cv-1606, ECF. No. 23-1 (Oct. 21, 2016). That certification is *prima facie* evidence that any harm allegedly caused by Clinton’s email communications was within the scope of her employment and thus that the United States was properly substituted. *CAIR*, 444 F.3d at 662. Smith and Woods bore the burden of alleging “specific facts” that could overcome that presumption. *Id.* (internal quotation marks and citation omitted); *see also Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994).

Smith and Woods contend that conducting official business on a private server could not have been within the scope of Clinton’s employment as the Secretary of State because the Department of State’s “general policy [is] that normal day-to-day operations be conducted on an authorized [Automated Information System].” Appellant Br. 24 (quoting Josh Gerstein, *Clinton Private Email Violated “Clear-Cut” State Dept. Rules*, POLITICO, Mar. 5, 2015) (second alteration in original). These allegations, even if true, fall well short of rebutting the United States’ Westfall Certification.

Extensive precedent makes clear that alleging a federal employee violated policy or even laws in the course of her employment—including specific allegations of defamation or of potentially criminal activities—does not take that conduct outside the scope of employment. “The proper inquiry . . . ‘focuses on the underlying dispute or controversy, not on the nature of the tort, and is broad enough to embrace any intentional tort arising out of a dispute that was originally undertaken on the employer’s behalf.’” *CAIR*, 444 F.3d at 664 (D.C. Cir. 2006) (quoting *Weinberg v. Johnson*, 518 A.2d 985, 992 (D.C. 1986)). What matters is whether the underlying activity itself was part of the employee’s duties. For instance, in *CAIR*, 444 F.3d at 664–665, the court held that because responding to media inquiries was one of the congressman’s authorized duties, such responses fell within the scope of employment even when defamatory. *See also, e.g., Wuterich v. Murtha*, 562 F.3d 375, 384–85 (D.C. Cir. 2009) (congressman’s media interviews about military

incident, even if defamatory, were within scope of employment); *Rasul v. Myers*, 512 F.3d 644, 656–659 (D.C. Cir. 2008), *vacated and remanded on other grounds*, 555 U.S. 1083 (2008), *reinstated in relevant part*, 563 F.3d 527, 528–529 (D.C. Cir. 2009) (senior officials alleged to have implemented and supervised systemic torture of Guantanamo Bay detainees acted within the scope of their employment because their responsibilities included detaining and interrogating suspected enemy combatants); *Wilson v. Libby*, 535 F.3d 697, 712 (D.C. Cir. 2008) (Executive officials acted within their scope of employment when disclosing a covert operative’s identity for retributive reasons while speaking to the press); *id.* at 712 n.2 (temporal and spatial scope of employment for important Executive officials not limited to regular working hours or government property).

Therefore, the parts of Count V—intentional infliction of emotional distress—dealing with Clinton’s activities as Secretary of State were properly dismissed. The complaint challenges only Clinton’s use of “her private e-mail server to send and receive confidential and classified government information, often concerning matters of national security” and “other government operations in Benghazi, Libya that the deceased were a part of.” Compl. ¶ 50. Regardless of whether or not these activities were conducted properly or lawfully, those types of communications fall within the heartland of her duties as Secretary of State. *See Schneider v. Kissinger*, 412 F.3d 190, 194–95 (D.C. Cir. 2005) (foreign policy decisions committed to political branches). The same is true for Count I,

wrongful death, which is based upon Clinton's use of "a private email server to send and receive secret, confidential and classified government information," Compl. ¶ 26, and Count IV, negligence, premised on Clinton's "handling of confidential and classified government information via her personal email server," *id.* ¶ 44.

Because the district court properly granted the United States' motion to substitute itself for Clinton on Counts I, IV, V, and VI (now dismissed), those claims were then governed by the Federal Tort Claims Act, which requires exhaustion of administrative remedies before a lawsuit may be brought. 28 U.S.C. § 2675(a). Smith and Woods conceded that they failed to exhaust their administrative remedies. Pls' Opp'n to U.S. Mots. at 7, No. 16-cv-1606, ECF No. 30 (Nov. 18, 2016). The district court thus lacked subject matter jurisdiction over the Westfall Act covered claims. *McNeil v. United States*, 508 U.S. 106, 113 (1993).

B.

Even assuming the truth of the alleged falsity of Clinton's statements, the district court did not err in dismissing the remaining tort claims for defamation, false light, and intentional infliction of emotional distress (in relevant part) for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

1. The district court correctly found that the defamation claim, Count II, does not state a plausible claim for relief. *Smith v. Clinton*, 253 F. Supp. 3d 222,

240–43 (D.D.C. 2017). A plaintiff claiming defamation must allege:

- (1) the defendant made a false and defamatory statement concerning the plaintiff;
- (2) the defendant published the statement without privilege to a third party;
- (3) the defendant's fault in publishing the statement amounted to at least negligence; and
- (4) either the statement was actionable as a matter of law irrespective of special harm, or its publication caused the plaintiff special harm.

Hourani v. Mirtchev, 796 F.3d 1, 16 (D.C. Cir. 2015) (quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)) (internal quotation marks omitted).

Smith and Woods pled neither that Clinton's statements are actionable as a matter of law nor special damages. Federal Rule of Civil Procedure 9(g) requires that special damages "be specifically stated." The complaint merely contains a boilerplate recitation, unaccompanied by any factual detail, that "[a]s a direct and proximate result of Defendant Clinton's statements, [Smith and Woods] have suffered pecuniary damage, as well as injury to reputation, impairment to standing in their community, personal humiliation, pain and suffering, and emotional distress." Compl. ¶ 37. The affidavits of Smith and Woods allege the same harm, almost verbatim. *See Woods Aff.* ¶ 7; *Smith Aff.* ¶ 6.

They also did not plead that the challenged statements are defamatory as a matter [sic] law, a status

reserved for statements about extreme subjects, such as criminal behavior, “serious sexual misconduct,” “a loathsome disease,” or a person’s suitability for his chosen profession, *Carey v. Phipus*, 435 U.S. 247, 262 n.18 (1978); see also *Hall v. District of Columbia*, 867 F.3d 138, 149 (D.C. Cir. 2017). Clinton’s statements are not of that character. In *Weyrich*, this court held that that [sic] an article claiming the plaintiff “‘began to suffer bouts of pessimism and paranoia,’” though “unflattering,” was not actionable. 235 F.3d at 624-25 (citation omitted). Similarly, even if Clinton’s statements could be understood as casting Smith and Woods as liars, this unpleasant portrayal does not amount to defamation *per se*. Smith and Woods do not challenge these aspects of the district court’s decision on appeal, nor did they seek in district court to amend their complaint to provide the required specificity.

Even if Smith and Woods had adequately pled this element, their claim fails because Clinton’s statements are not “‘reasonably capable of any defamatory meaning,’” which is a question of law. *Id.* at 627 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990)). “A statement is defamatory if it tends to injure plaintiff in his trade, profession or community standing, or lower him in the estimation of the community.” *Id.* at 627 (internal quotation marks and citation omitted). “An allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear odious, infamous, or ridiculous.” *Id.* (internal quotation marks and citation omitted).

Clinton has made no such remarks here. In the *ABC News* interview, she contradicted Smith and Woods's version of events but did not state or imply they were lying, instead noting she "underst[ood] [their] continuing grief." Compl. ¶ 23(a). And in the *Conway Daily Sun* interview, it was the reporter, not Clinton, who posits someone is lying; all Clinton did was deny that she was lying. *Id.* ¶ 23(b). In the two subsequent interviews, Clinton bolstered her own version of events by noting that others present at the meeting supported her account and suggesting reasons why her recollection differed from that of Smith and Woods. *Id.* ¶ 23(c) and (d). Clinton did state that Ms. Smith was "absolutely wrong," *id.* ¶ 23(c), but disagreeing with another person's recollection does not necessarily imply that the other person is lying. The D.C. Court of Appeals has refrained from finding disagreement to constitute defamation even where the disagreement was combative, as in *Levant v. Whitley*, 755 A.2d 1036, 1040 (D.C. 2000), where the plaintiff was accused of "bringing shame" to the employer. The court reasoned that "[a]t most" the parties "had an intense disagreement," which did "not rise to the level of defamation." *Id.* at 1046. Here, the facts of disagreement are less "intense" in the sense that Clinton does not accuse Smith and Woods of lying, and instead acknowledges their grief while respectfully disagreeing with their recollection. Because none of her responses stated or could be reasonably understood as implying that either Smith or Woods was lying, the claim fails.

2. The false light claim, Count III, also fails. “Because [defamation and false light] are so similar,” a plaintiff may plead them as alternatives and a reviewing court “must also satisfy itself that the statement does not arguably place [the plaintiff] in a ‘highly offensive’ false light” in addition to finding the statements are not capable of defamatory meaning. *Weyrich*, 235 F.3d at 628. Because Clinton merely disagreed with Smith and Woods’s recollection of events and couched this disagreement in sympathy, no reasonable person could conclude that Clinton’s statements put Smith and Woods in a “highly offensive” false light.

3. With respect to the portion of Count V that survived the Westfall Act jurisdictional dismissal, the complaint is fatally deficient as to, at minimum, the first and third elements of an intentional infliction of emotional distress claim. Under District of Columbia law, “a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.” *Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013) (internal quotation marks and citation omitted). As to the first element, “[t]he conduct must be ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Id.* (quoting *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 n.10 (D.C. 1994)). None of Clinton’s denials of allegations that she lied or her remarks that Smith and Woods are incorrect comes close

to meeting that strict standard. In fact, in *Weaver v. Grafio*, 595 A.2d 983, 985, 991 (D.C. 1991), the D.C. Court of Appeals held that the defendant’s act of mailing his employers a copy of a letter to an ethics committee accusing them of a felony was not outrageous conduct. Here, Clinton did not explicitly accuse Smith and Woods of lying, let alone of committing a crime.

Likewise, as to the third prong, the complaint is silent as to how Smith’s or Woods’s emotional distress manifested itself. The complaint alleges that they suffered “severe emotional distress *stemming from the death of [their] sons.*” Compl. ¶ 52 (emphasis added). But nothing in the factual allegations plausibly suggests that Clinton’s statements, rather than the tragic deaths, triggered “emotional distress of so acute a nature that harmful physical consequences might not be unlikely to result.” *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158, 164 (D.C. 2013) (internal quotation marks and citation omitted).

We affirm the order substituting the United States as a defendant and dismissing the claims for lack of subject matter jurisdiction or failure to state a claim.

So ordered.

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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17-5133

September Term, 2017
FILED ON: MARCH 27, 2018

PATRICIA SMITH AND CHARLES WOODS,
APPELLANTS

v.

HILLARY RODHAM CLINTON AND
UNITED STATES OF AMERICA,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cv-01606)

Before: ROGERS, MILLETT, and PILLARD, *Circuit
Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and on the briefs of the parties. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

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Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: March 27, 2018

Opinion Per Curiam

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PATRICIA SMITH, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civil Action No.
v.)	16-1606 (ABJ).
HILLARY RODHAM CLINTON,)	
)	
Defendant.)	

MEMORANDUM OPINION

(Filed May 26, 2017)

Plaintiffs Patricia Smith and Charles Woods have brought this action against the former Secretary of State, Hillary Rodham Clinton (“Secretary Clinton”), alleging that Secretary Clinton’s use of a private email server caused the death of their sons Sean Smith and Tyrone Woods. Plaintiffs’ theory is that Secretary Clinton’s use of the private email account when she was serving as Secretary of State exposed confidential information about plaintiffs’ relatives to the terrorists who ultimately took their lives in Benghazi, Libya in September of 2012. *See* Compl. [Dkt. # 1] ¶¶ 26–28, 44–47. Plaintiffs also allege that Secretary Clinton defamed them and placed them in a false light when, as a candidate for the office of President of the United States, she disputed their accounts of conversations that she had with them about the circumstances that led to attack in Benghazi. *Id.* ¶¶ 33–42. Finally, plaintiffs allege that Secretary Clinton’s conduct – both as

Secretary of State and later on the campaign trail – intentionally and negligently caused them to suffer emotional distress. *Id.* ¶¶ 50–56.

The United States has moved to substitute itself as the defendant for any actions that Secretary Clinton took as Secretary of State. In that capacity, it moves to dismiss the claims for wrongful death (Count I) and negligence (Count IV) in their entirety, along with those portions of the claims for intentional and negligent infliction of emotional distress (Counts V and VI, respectively) that are premised on actions secretary Clinton took as Secretary of State.

The law allows the United States to substitute itself as the defendant where a lawsuit challenges acts taken by a government official who was acting in the scope of his or her employment at the time of the alleged torts. To resolve the question of whether Secretary Clinton was acting in the scope of her employment, the relevant inquiry is not whether her use of the private email server was lawful or unlawful. Instead, the only issue to be resolved is whether the Secretary's communication with State Department personnel concerning State Department business through that means fell within the scope of Secretary Clinton's employment. Because the Court finds that Secretary Clinton was acting in the scope of her employment when she transmitted the emails that are alleged to give rise to her liability, the motion to substitute will be granted. And because plaintiffs failed to raise their claims with the State Department before bringing suit as is legally required, the

government's motion to dismiss the counts against the United States will be granted.

In addition, Secretary Clinton has moved to dismiss the defamation and false light claims (Counts II and III), as well as the intentional and negligent infliction of emotional distress claims insofar as they are premised on actions she took after she left office (Count V and VI). Plaintiffs allege that Secretary Clinton lied to them when she allegedly told them that it was a YouTube video that prompted the attack on the consulate in Benghazi. *See* Compl. ¶ 24. They further claim that when Secretary Clinton – then candidate Clinton – was subsequently asked about plaintiffs' allegation that she had lied, she defamed plaintiffs or put them in a false light when she disputed their account of their conversation with her. *See id.* ¶ 23. But because plaintiffs have not stated a claim for defamation or false light, or for intentional infliction of emotional distress, Secretary Clinton's personal motion to dismiss will be granted as well.

The untimely death of plaintiffs' sons is tragic, and the Court does not mean to minimize the unspeakable loss that plaintiffs have suffered in any way. But when one applies the appropriate legal standards, it is clear that plaintiffs have not alleged sufficient facts to rebut the presumption that Secretary Clinton was acting in her official capacity when she used her private email server to communicate with State Department personnel about State Department business, and that they have not stated claims that Secretary Clinton defamed them, put them in a false light, or intentionally

inflicted emotional distress. For those reasons, the case will be dismissed. Nothing about this decision should be construed as making any determination or expressing any opinion about the propriety of the use of the private email server or the content or accuracy of the statements made by the Secretary to the family members or to anyone else in the days following the Benghazi attack.

BACKGROUND

For purposes of this motion, the Court must assume the facts alleged by the plaintiffs to be true.

From 2009 to 2013, Secretary Clinton served as the United States Secretary of State. Compl. ¶ 8. During her tenure – as the world has come to know – she “utilized a private e-mail server to conduct official government business.” *Id.* ¶ 9. Plaintiffs allege that Secretary Clinton used the private server to send and receive “thousands of e-mails regarding matters of national security, including information that has been categorized as ‘top secret,’ ‘secret,’ and ‘confidential.’” *Id.*

Plaintiffs specifically allege that Secretary Clinton used her private e-mail server to “send and receive information about the location of Ambassador Christopher Stevens . . . and other government operations in Benghazi, Libya. Compl. ¶ 15.¹ From there, they posit

¹ For purposes of this motion, the Court must accept the factual allegations set forth in the complaint as true. But the recitation of those allegations in this opinion should not be viewed as a

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that the email server was hacked by a number of foreign countries, that terrorists thereby obtained the emails, and that the terrorists used them to “plan, orchestrate, and carry out the horrific and devastating attack on the American diplomatic compound in Benghazi, Libya on September 11, 2012, resulting in the death of four Americans, including Sean Smith and Tyrone Woods.” *Id.* ¶¶ 15–16.²

finding that Secretary Clinton was in fact communicating about where Ambassador Stevens could be found. In support of this allegation, the complaint cites a Breitbart article which contains a number of emails. *See* Compl. at 2 n.1, citing Aaron Klein, *Hillary Emails Betrayed Whereabouts of Murdered Ambassador Chris Stevens*, Breitbart (Mar. 1, 2016), <http://www.breitbart.com/national-security/2016/03/01/hillary-emails-betrayed-whereabouts-of-murdered-ambassador-chris-stevens/>. However, the emails – from March and April of 2011 – all predate Stevens’s service as the Ambassador, which began in March 2012, *see* Nomination of J. Christopher Stevens, <https://www.congress.gov/nomination/112th-congress/1233>, they discuss his plans in his role as the U.S. envoy to the Libyan rebels, and none divulge his specific location in any event.

² Plaintiffs allege that the private email server was hacked by state actors from Russia, Iran, China, South Korea, and Germany, and they cite a news article to support that factual assertion. Compl. ¶¶ 13 & n.6, citing Josh Gerstein & Rachel Bade, *Clinton Server Faced Hacking from China, South Korea, and Germany*, Politico (Oct. 8, 2015), <http://www.politico.com/story/2015/10/hillary-clinton-email-server-hacked-china-south-korea-germany-214546>. But the article mentions only China, South Korea, and Germany, and more important, it states – in the first sentence – that the hacking attempts from those three countries occurred “after [Clinton] stepped down in 2013.” Meanwhile, plaintiffs point to nothing – not any of the emails that have been made public or any Congressional reports or news accounts – to establish any of the other links in the alleged chain of events, i.e., that “Islamic terrorists obtained the information sent and received by

According to plaintiffs, on the day of the attack, and in the days that followed, Secretary Clinton attempted to blame an anti-Muslim YouTube video for inciting the violence. Compl. ¶ 18. In particular, on September 12, 2012, when Secretary Clinton gave public remarks about the attack, she said: “Some have sought to justify this vicious behavior, along with the protest that took place at our Embassy in Cairo yesterday, as a response to inflammatory material posted on the internet.” *Id.* And the complaint states that, two days after the attack, when Secretary Clinton met with the families of the four Americans who were killed, she “lied to Plaintiffs and told Plaintiffs that the Benghazi attack was the result of the anti-Muslim YouTube video that had been posted online,” and she promised the families that the “creator of the video would be arrested.” *Id.* ¶ 19. According to the complaint, plaintiff Woods “contemporaneously recorded this September 14, 2012 interaction with [Secretary] Clinton by writing in his diary . . . ‘I gave Hillary a hug and shook her hand, and she said we are going to have the film maker arrested who was responsible for the death of my son.’” *Id.* ¶ 20.

The narrative in the complaint then jumps forward more than three years, and it recounts various

[Secretary] Clinton . . . and used it to plan, orchestrate, and carry out the horrific and devastating attack.” Compl. ¶ 16. So while the Court must accept the complaint on its face at this juncture, there is nothing on the face of the complaint that reveals the evidentiary support for the conclusory assertion that there was a causal connection between the Secretary’s use of the private email server – even if it was ill-advised – and the tragic events in Benghazi.

statements that Secretary Clinton made during the Presidential election season in late 2015 and early 2016. Secretary Clinton has long maintained that she never told plaintiffs that the Benghazi attack was caused by the YouTube video; plaintiffs allege that when she advanced those denials, Secretary Clinton lied about their September 2012 interaction and thereby defamed them.

Paragraph 23 of the complaint recounts four specific instances of alleged defamation:

- **December 6, 2015 interview with George Stephanopoulos of ABC:** Stephanopoulos asked Clinton, “[d]id you tell them it was about the film?” Compl. ¶ 23(a). Secretary Clinton replied:

No. You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans. And I did testify, as you know, for 11 hours. And I answered all of these questions. Now, I can’t – I can’t help it the people think there has to be something else there. I said very clearly there had been a terrorist group that had taken responsibility on Facebook between the time that, I – you know, when I talked to my daughter, that was the latest information; we were giving it credibility. And then we

learned the next day it wasn't true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.

Id.

- **December 30, 2015 meeting with the Conway Daily Sun Editorial Board:** The complaint alleges that Conway Daily Sun columnist Tom McLaughlin brought up the ABC interview and asked: "Somebody is lying. Who is it?" Compl. ¶ 23(b). Secretary Clinton responded: "Not me, that's all I can tell you." *Id.*
- **March 9, 2016, during the Democratic Presidential Debate.** Secretary Clinton was asked about plaintiff Smith's allegation that Secretary Clinton lied to her by blaming the Benghazi attack on the YouTube video. Compl. ¶ 23(c). Secretary Clinton responded:

I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can't even imagine the grief that she has for losing her son, but she's wrong. She's absolutely wrong.

Id.

- **July 31, 2016 interview with Chris Wallace of Fox News.** In response to a

question about “why [plaintiffs] would make . . . up” their claims, Secretary Clinton said:

Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that’s not what they heard. I don’t hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn’t said.

Compl. ¶ 23(d).³

Plaintiffs make the conclusory assertion that Secretary Clinton “defamed [p]laintiffs by either directly calling them liars, or by strongly implying that they are liars.” Compl. ¶ 23.

Plaintiffs filed this six-count complaint on August 8, 2016. In Count I, plaintiffs bring a claim for wrongful

³ See also Compl. ¶ 23(d) n.14, citing Tommy Christopher, *Chris Wallace Grills Hillary Clinton About Benghazi Parents’ Claims She Blamed Video*, Mediaite (July 31, 2016), <http://www.mediaite.com/tv/fox-news-chris-wallace-grills-hillary-clinton-about-benghazi-parents-claims-she-blamed-video/>.

death, alleging that “[t]he deaths of Sean Smith and Tyrone Woods were directly and proximately caused by the negligent and reckless actions of [Secretary] Clinton, who used her private email server to send and receive secret, confidential, and classified government information that compromised the location of Ambassador Christopher Stevens and thus the U.S. Department of State . . . in Benghazi, Libya.” Compl. ¶ 26. In Count II, plaintiffs allege that the four statements Secretary Clinton made during the campaign in 2015 and 2016 were defamatory, *id.* ¶¶ 33–37, and in Count III, they allege that those four statements placed them in a false light. *Id.* ¶¶ 39–42. In Count IV, plaintiffs allege that Secretary Clinton acted negligently in the handling of her private email server, and that her negligence directly and proximately caused the deaths of Sean Smith and Tyrone Woods. *Id.* ¶¶ 44–48. In Count V, plaintiffs allege that Secretary Clinton committed the tort of intentional infliction of emotional distress (1) when she “used her private email server to send and receive confidential and classified government information,” and (2) in defaming and holding plaintiffs in a false light during the campaign. *Id.* ¶¶ 50–52. And in Count VI, plaintiffs allege that Secretary Clinton negligently inflicted emotional distress when she (1) was “negligent and reckless” in her “handling of classified government information,” and (2) when she

defamed plaintiffs and held them in a false light. *Id.* ¶¶ 54–56.⁴

On October 21, 2016, the United States filed a motion pursuant to the Westfall Act, 28 U.S.C. § 2679, arguing that the United States should be substituted as a defendant for all counts that arose out of Secretary Clinton’s actions as Secretary of State. U.S. Mot. for Partial Substitution [Dkt. # 23] (“U.S. Mot. to Substitute”) at 3–4. Accordingly, the United States has requested that Counts I and IV be deemed to be against the United States in their entirety, and that Counts V and VI should be deemed to be against the United States insofar as they allege wrongdoing arising out of events that occurred when Secretary Clinton served as an officer of the United States. *Id.* Based on that substitution, the United States filed a motion to dismiss Counts I and IV in their entirety, and to dismiss Counts V and VI in part, for lack of subject matter jurisdiction. United States Mot. to Dismiss [Dkt. # 24] (“U.S. MTD”) at 1–2. The government also moved to dismiss for lack of personal jurisdiction due to a failure to properly serve Secretary Clinton or the United States. *Id.* at 3–4.

On November 14, 2016, Secretary Clinton filed a separate motion to dismiss plaintiffs’ claims based on her conduct as a Presidential candidate for defamation, false light, intentional infliction of emotional

⁴ Plaintiffs have since withdrawn the negligent infliction of emotional distress count. *See* Pl.’s Mem. of Law in Opp. to Def. Clinton’s Mot. [Dkt. # 34] at 3 n.2.

distress, and negligent infliction of emotional distress, for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Def. Hillary Rodham Clinton’s Mot. to Dismiss [Dkt. # 28] (“Clinton MTD”).

Plaintiffs opposed the motions filed by the United States, Pls.’ Opp. to the U.S. Mot. to Substitute & U.S. MTD [Dkt. # 30] (“Pls.’ Opp. to U.S. Mots.”), and they opposed Secretary Clinton’s motion to dismiss as well. Pl.’s Mem. of Law in Opp. to Clinton MTD [Dkt. # 34] (“Pls.’ Opp. to Clinton MTD”). The United States replied in support of its motions, Reply Mem. in Further Supp. of U.S. Mot. to Substitute [Dkt. # 32] (“U.S. Substitution Reply”); U.S. Reply Mem. in Further Supp. of U.S. MTD [Dkt. # 33] (“U.S. MTD Reply”), and Secretary Clinton replied in support of her motion to dismiss as well. Def. Clinton’s Reply in Supp. of Clinton MTD [Dkt. # 35] (“Clinton MTD Reply”).

STANDARD OF REVIEW

In evaluating a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court must “treat the complaint’s factual allegations as true . . . and must grant plaintiff ‘the benefit of all inferences that can be derived from the facts alleged.’” *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) (internal citations omitted), quoting *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979); see also *Am. Nat’l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are

unsupported by facts alleged in the complaint, nor must the Court accept plaintiff's legal conclusions. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002).

I. Subject Matter Jurisdiction

Under Rule 12(b)(1), the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002). Federal courts are courts of limited jurisdiction and the law presumes that “a cause lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (“As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction.”). “[B]ecause subject-matter jurisdiction is ‘an Art[icle] III as well as a statutory requirement . . . no action of the parties can confer subject-matter jurisdiction upon a federal court.’” *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

When considering a motion to dismiss for lack of jurisdiction, unlike when deciding a motion to dismiss under Rule 12(b)(6), the court “is not limited to the allegations of the complaint.” *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Rather, “a court may consider such materials outside the pleadings as it deems

appropriate to resolve the question [of] whether it has jurisdiction to hear the case.” *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), citing *Herbert v. Nat’l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992); see also *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

II. Service of Process

Under Rule 12(b)(5), plaintiffs bear the burden to establish that they have properly effectuated service. *Light v. Wolf*, 816 F.2d 746, 751 (D.C. Cir. 1987). When a defendant challenges the sufficiency of service, the plaintiff “must demonstrate that the procedure employed satisfied the requirements of the relevant portions of Rule 4 and any other applicable provision of law.” *Id.* (citations omitted). If a plaintiff does not meet his burden to show proper service of process, the Court may dismiss the complaint without prejudice for ineffective service of process. See Fed. R. Civ. P. 12(b)(5); *Simpkins v. D.C. Government*, 108 F.3d 366, 368–69 (D.C. Cir. 1997).

III. Failure to State a Claim

“To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the

pleaded factual content “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*, citing *Twombly*, 550 U.S. at 556. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*, quoting *Twombly*, 550 U.S. at 556. A pleading must offer more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action,” *id.*, quoting *Twombly*, 550 U.S. at 555, and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*, citing *Twombly*, 550 U.S. at 555.

When considering a motion to dismiss under Rule 12(b)(6), the Court is bound to construe a complaint liberally in the plaintiff’s favor, and it should grant the plaintiff “the benefit of all inferences that can be derived from the facts alleged.” *Kowal v. MCI Commc’ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). In ruling upon a motion to dismiss for failure to state a claim, a court may ordinarily consider only “the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice.” *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002), citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624–25 (D.C. Cir. 1997).

ANALYSIS

I. The United States will be substituted as the defendant pursuant to the Westfall Act.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. § 2679, commonly referred to as the Westfall Act, “accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *Osborn v. Haley*, 549 U.S. 225, 229 (2007). The purpose of the Westfall Act “is to relieve covered employees from the cost and effort of defending [a] lawsuit, and to place those burdens on the Government’s shoulders.” *Wuterich v. Murtha*, 562 F.3d 375, 380 (D.C. Cir. 2009), quoting *Osborn*, 549 U.S. at 252.

“When a federal employee is sued for wrongful or negligent conduct,” the Attorney General or his delegate may certify that the employee “was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” *Osborn*, 549 U.S. at 229–30, quoting 28 U.S.C. § 2679(d)(1)–(2). “Upon the Attorney General’s certification, the employee is dismissed from the action, and the United States is substituted as the defendant in place of the employee.” *Id.* at 230. “Thereafter, the suit is governed by the Federal Tort Claims Act (‘FTCA’) and is subject to all of the FTCA’s exceptions for actions in which the Government has not waived sovereign immunity.” *Wuterich*, 562 F.3d at 380, citing *Osborn*, 549 U.S. at 230. Unless one of the exceptions to the waiver of sovereign

immunity set forth in the FTCA applies, the Westfall Act certification “converts the tort suit into a FTCA action over which the federal court lacks subject matter jurisdiction and has the effect of altogether barring plaintiff’s case.” *Id.*; see also *Majano v. United States*, 469 F.3d 138, 139 (D.C. Cir. 2006).

But a district court should not treat a Westfall Act certification as conclusive evidence, and a plaintiff may challenge “the government’s scope of employment determination.” *Stokes v. Cross*, 327 F.3d 1210, 1213 (D.C. Cir. 2003), citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 917, 420 (1995). If a plaintiff mounts that challenge, the certification “constitute[s] *prima facie* evidence that the employee was acting within the scope of his employment,” *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006) (per curiam), and the plaintiff must rebut that presumption by alleging “sufficient facts that, taken as true, would establish that the defendants’ actions exceeded the scope of their employment.” *Stokes*, 327 F.3d at 1215. The court should adhere to the teachings of *Iqbal* and *Twombly* in determining whether the plaintiff has met his or her burden to rebut the presumption. *Jacobs v. Vrobel*, 724 F.3d 217, 221 (D.C. Cir. 2013). Only if the plaintiff satisfies that burden will he or she, “if necessary, attain ‘limited discovery’ to resolve any factual disputes over jurisdiction.” *Id.* at 220–21, quoting *Wuterich*, 562 F.3d at 381.

Here, defendants have filed a Westfall Act certification from James G. Touhey, Jr., the Director of the Torts Branch, Civil Division, Department of Justice.

Certification, Ex. A to U.S. Mot. to Substitute [Dkt. # 23-1]. Touhey certifies that Secretary Clinton “was acting within the scope of her office as the Secretary of State of the United States at the time of the alleged conduct that purportedly occurred while she was in office, *i.e.*, from January 21, 2009 to February 1, 2013.” *Id.*; *see also* 28 C.F.R. § 15.4(a) (delegating the authority to make Westfall Act certifications to “any Director of the Torts Branch, Civil Division, Department of Justice”). Based on that certification, defendant has moved to substitute the United States as the proper defendant for plaintiffs’ claims in Counts I and IV, and as the proper defendant in counts V and VI to the extent that those counts challenge Secretary Clinton’s actions while she was Secretary of State. U.S. Mot. to Substitute at 3–4.

To rebut the presumption created by the Westfall Act certification, plaintiffs bear the burden of pleading sufficient facts that would establish that defendant’s actions exceeded the scope of her employment. *Stokes*, 327 F.3d at 1215. Because plaintiffs have failed to allege sufficient facts to rebut the presumption, the United States will be substituted as the defendant with respect to the counts that relate to Secretary Clinton’s conduct as Secretary of State.

“In determining whether an employee acted within the scope of his employment, [a court must] consider the substantive law of the jurisdiction where the employment relationship exists – here, the law of the District of Columbia.” *Jacobs*, 724 F.3d at 221, citing *Majano*, 469 F.3d at 141. D.C. courts follow the test set

forth in the Second Restatement of Agency, which explains that conduct of a servant is within the scope of employment if: “(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.” *Id.*, citing Restatement (Second) of Agency § 228. “The test is ‘objective’ and is ‘based on all the facts and circumstances,’” *id.*, quoting *Weinberg v. Johnson*, 518 A.2d 985, 991 (D.C. 1986), and it has been “broadly interpreted.” *Id.* Accordingly, under District of Columbia law, “[t]he scope-of-employment test often is akin to asking whether the defendant merely was on duty or on the job when committing the alleged tort.” *Id.*, quoting *Harbury v. Hayden*, 522 F.3d 413, 422 n.4 (D.C. Cir. 2008).

Plaintiffs challenge the certification by asserting that their “claims are being brought against [Secretary] Clinton in her individual capacity and not her capacity as former Secretary of State of the United States.” Pls.’ Opp. to U.S. Mots. at 1. They argue that defendant was acting outside her duties as Secretary of State because she: (1) used a private email server to send and receive emails, (2) retained State Department records after departing office, and (3) failed to preserve certain emails that were sent and received via the private email server. Pls.’ Opp. to U.S. Mots. at 2–3.⁵ And they posit that “using a private email server

⁵ Plaintiffs do not explain how Secretary Clinton’s record-keeping practices after she left office has any bearing on whether

to send and receive classified information, including information that directly led to the Benghazi attack[,] is not the kind [Secretary] Clinton was employed to perform.” Pls.’ Opp. to U.S. Mots. at 4, citing Compl. ¶¶ 9, 15. But the Westfall Act determination is not based on whether the government employee’s actions can be characterized as wrongful or unlawful; the question is whether she was acting within the scope of the position occupied at the time.

Courts have emphasized that “[t]o qualify as conduct of the kind [an employee] was employed to perform, the defendant’s actions must have either been of the same general nature as that authorized or *incidental* to the conduct authorized.” *Ballenger*, 444 F.3d at 664 (emphasis in original), quoting *Haddon v. United States*, 68 F.3d 1420, 1424 (D.C. Cir. 1995). In *Ballenger*, the Court of Appeals upheld the district court’s substitution of the United States as a defendant in a case in which the plaintiff brought an action for defamation and slander against a U.S. Congressman for certain statements he made on the telephone to a reporter. *Id.* at 661–62. The court reasoned that “[t]he appropriate question . . . is whether th[e] telephone conversation” in which the defendant allegedly made a defamatory statement about the plaintiff “was the kind of conduct [the defendant] was employed to perform” – not whether the allegedly defamatory sentence itself was within the scope of the defendant’s employment. *Id.* at 664–65. The court concluded that the

she was acting in the scope of her employment at the time of the Benghazi attack.

congressman's communication with the press fell within the scope of his duties, which require him to have a relationship with the public. *Id.*

Similarly, in *Jacobs*, the Court of Appeals upheld the substitution of the United States as a defendant for a manager at the General Services Administration who allegedly defamed the plaintiff when he received a call for an employment reference from the plaintiff's prospective employer. 724 F.3d at 222. The Court of Appeals, relying on *Ballenger*, focused on the type of act – “responding to a prospective employer's request for a reference” – and concluded that it was “plainly ‘the type of conduct [the defendant] was employed to perform’” as a supervisor. *Id.*, quoting *Ballenger*, 444 F.3d at 664.

Ballenger and *Jacobs* are consistent with other circuit precedent on whether senior Executive Branch officials were acting within the scope of their employment. See *Wilson v. Libby*, 535 F.3d 697, 711–12 (D.C. Cir. 2008) (holding that the defendants – Vice President Cheney, former Chief of Staff I. Lewis Libby, former Senior Advisor to the President Karl C. Rove, and the former Deputy Secretary of State Richard L. Armitage – acted within the scope of their employment when they made comments to the press which revealed a covert agent's identity, because “[i]t can hardly be disputed that such discussions were of the type that the defendants were employed to perform”); *Rasul v. Myers*, 512 F.3d 644, 656–60 (D.C. Cir. 2008) (holding that the alleged “authorization, implementation and supervision of torture” was within the scope of

employment of military officers who interrogated defendants at the United States Naval Base at Guantanamo Bay, Cuba, because “the detention and interrogation of suspected enemy combatants [was] a central part of the [employees’] duties as military officers charged with winning the war on terror,” even notwithstanding “allegations of serious criminality”), *vacated and remanded*, 555 U.S. 1083 (2008), *reinstated in relevant part*, 563 F.3d 527 (D.C. Cir. 2009).

Here, the complaint alleges that Clinton “served as U.S. Secretary of State from 2009 until 2013” and that “[d]uring her tenure as Secretary of State,” she “utilized a private e-mail server to conduct official government business,” which ultimately, plaintiffs allege, led to the death of their sons. Compl. ¶¶ 8, 9, 17. And the “law requires that we focus on the type of act . . . that allegedly gave rise to the tort, not the wrongful character of that act.” *Jacobs*, 724 F.3d at 221. So the question is not whether Secretary Clinton is being sued in her individual or official capacity, and it also does not matter whether Secretary Clinton used a private email server lawfully or unlawfully. Instead, the relevant inquiry is whether Secretary Clinton’s electronic communications with State Department personnel about official business during her tenure were within the scope of her employment as the head of the State Department.

The Court finds that Secretary Clinton was acting within the scope of her employment at the relevant time because her actions – communicating with other State Department personnel and advisors about the

official business of the department – fall squarely within the scope of her duty to run the Department and conduct the foreign affairs of the nation as Secretary of State. So, pursuant to the Westfall Act, the Court will substitute the United States as the sole defendant in Counts I and IV, and as the defendant in Counts V and VI to the extent that those counts relate to actions taken during Secretary Clinton’s tenure as Secretary of State. The claims of wrongful death, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress against Secretary Clinton in her individual capacity will be dismissed.

II. The Court lacks subject matter jurisdiction over plaintiffs’ tort claims because plaintiffs have not exhausted their administrative remedies.

After a Westfall Act substitution in a tort case, “the suit is governed by the Federal Tort Claims Act (‘FTCA’) and is subject to all of the FTCA’s exceptions for actions in which the [g]overnment has not waived sovereign immunity.” *Wuterich*, 562 F.3d at 380, citing *Osborn*, 549 U.S. at 230. The FTCA bars plaintiffs from bringing certain claims against the government, *see* 28 U.S.C. § 2680, and it sets requirements for administrative exhaustion of claims and timely filing of administrative claims. 28 U.S.C. § 2401(b). Here, the government has not waived its sovereign immunity, plaintiffs’ tort claims are specifically excluded under the FTCA, and plaintiffs have failed to exhaust their

administrative remedies. Therefore, the Court lacks subject matter jurisdiction over plaintiffs' tort claims.

Under the FTCA:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the [g]overnment while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency.

28 U.S.C. § 2675(a).⁶ Where a plaintiff does not exhaust administrative remedies, the FTCA bars his tort claims. *McNeil v. United States*, 508 U.S. 106, 113 (1993) (affirming dismissal of plaintiff's FTCA claim for lack of subject matter jurisdiction because "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies").

Plaintiffs concede that they failed to exhaust administrative remedies. Pls.' Opp. to U.S. Mots. at 7–8. But they argue that their failure to exhaust should be excused because they contend that exhaustion would be futile. *Id.* Plaintiffs' argument fails, because the FTCA's exhaustion requirement is jurisdictional and cannot be excused.

⁶ There are a number of exceptions to the requirements of the FTCA, *see* 28 U.S.C. § 2680, but none are applicable here.

An administrative exhaustion requirement can be jurisdictional or it can be non-jurisdictional. *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004). Non-jurisdictional exhaustion refers to “a judicially created doctrine requiring parties who seek to challenge agency action to exhaust available administrative remedies before bringing their case to court.” *Id.* A court may excuse a lack of non-jurisdictional exhaustion for a number of reasons, including where there are no facts in dispute, where the disputed issue is outside of the agency’s expertise, where the agency may not be able to redress the grievance, where exhaustion would prejudice the litigants, or where exhaustion would be futile because of agency bias. *Id.*, citing *McKart v. United States*, 395 U.S. 185, 197–98, 198 n.15 (1969); *McCarthy v. Madigan*, 503 U.S. 140, 146–49 (1992).

There is a presumption that exhaustion is non-jurisdictional “unless ‘Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.’” *Id.* at 1248, quoting *I.A.M. Nat’l Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984). But where “Congress requires resort to the administrative process as a predicate to judicial review . . . a court cannot excuse it.” *Id.* The D.C. Circuit has “treated the FTCA’s requirement of filing an administrative complaint with the appropriate agency prior to instituting an action as jurisdictional.” *Simpkins*, 108 F.3d at 371. Here, because plaintiffs concede that they failed to exhaust

administrative remedies, the Court has no power to hear the claims against the United States at all.⁷ Given this lack of subject matter jurisdiction, Counts I and IV will be dismissed without prejudice in their entirety under Rule 12(b)(1), and Counts V and VI will be similarly dismissed without prejudice to the extent that they allege intentional or negligent infliction of emotional distress due to Secretary Clinton's email practices.⁸

Because the counts against the United States will be dismissed for lack of subject matter jurisdiction, the Court need not consider whether service on the United States was proper.⁹

⁷ In a prior unrelated opinion in an FTCA case, the Court observed that the "only recognized exceptions to the exhaustion requirement are where administrative remedies are inadequate or where irreparable injury would result absent immediate judicial review." *Bannum, Inc. v. Samuels*, No. 15-cv-1233, 2016 WL 6459549, at *8 (D.D.C. Oct. 28, 2016), citing *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986). However, *Randolph-Sheppard* was a case that involved non-jurisdictional exhaustion, and it does not stand for the proposition that failure to exhaust an FTCA claim can be excused.

⁸ The D.C. Circuit has explained that a dismissal for failure to exhaust administrative remedies under the FTCA should be without prejudice, so that a plaintiff can exhaust those claims and refile the lawsuit. *Simpkins*, 108 F.3d at 371.

⁹ The Court notes, though, that plaintiffs admit that they failed to properly effect service on the United States because they failed to strictly comply with Federal Rule of Civil Procedure 4(i). See Pls.' Opp. to U.S. Mots. at 8. "A federal court may assert personal jurisdiction over a defendant only if 'the procedural requirements of effective service of process are satisfied.'" *Freedom Watch, Inc. v. OPEC*, 766 F.3d 74, 78 (D.C. Cir. 2014), quoting

III. Plaintiffs' defamation and false light claims do not state a plausible claim for relief.

In Count II, plaintiffs allege that Secretary Clinton defamed them when she made the statements set forth in paragraph 23 of the complaint and denied telling plaintiffs that the Benghazi Attack was caused by an anti-Muslim YouTube video. According to plaintiffs, with these statements, Secretary Clinton falsely accused them of lying. Compl. ¶ 33. In Count III, they allege that Secretary Clinton's statements "placed [them] in a false light." *Id.* ¶ 41.

A. Legal standard

To state a claim for defamation under District of Columbia law, a plaintiff must allege "(1) that he was the subject of a false and defamatory statement; (2) that the statement was published to a third party; (3) that publishing the statement was at least negligent; and (4) that the plaintiff suffered either actual or legal harm." *Farah v. Esquire Magazine*, 736 F.3d 528, 533–34 (D.C. Cir. 2013). Similarly, "[a] 'false light claim . . . requires a showing of: (1) publicity; (2) about a false

Mann v. Castiel, 681 F.3d 368, 372 (D.C. Cir. 2012). While courts sometimes consider actual notice in cases where service was technically improper but where a plaintiff is otherwise "in substantial compliance with the formal requirements of the Federal Rules," *id.* at 81, quoting *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 924 n.14 (11th Cir. 2003), the Court need not decide whether actual notice is sufficient in this case, in light of its dismissal of the United States on subject matter jurisdiction grounds. But plaintiffs should take care to comply fully with Rule 4 if the matter is re-filed after the claims are exhausted.

statement, representation or imputation; (3) understood to be of and concerning the plaintiff; and (4) which places the plaintiff in a false light that would be offensive to a reasonable person.” *Doe v. Bernabei & Wachtel, PLLC*, 116 A.3d 1262, 1267 (D.C. 2015), quoting *Bean v. Gutierrez*, 980 A.2d 1090, 1094 (D.C. 2009). Because these two torts share similar elements, they are often “analyzed in the same manner,” especially “where the plaintiff rests both his defamation and false light claims on the same allegations.” *Blodgett v. Univ. Club*, 930 A.2d 210, 222–23 (D.C. 2007). While the elements of false light are similar to the elements of defamation, the remedies are distinct. “[A] defamation tort redresses damage to reputation while a false light privacy tort redresses mental distress from having been exposed to public view.” *White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990).

“When confronted with a motion to dismiss [a defamation claim], a court must evaluate ‘[w]hether a statement is capable of defamatory meaning,’” which is a threshold “question of law.” *Jankovic v. Int’l Crisis Grp.*, 494 F.3d 1080, 1091 (D.C. Cir. 2007), quoting *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001). A court must also determine the threshold question of law of whether the statement is false. *White*, 909 F.2d at 520 (“Defamatory meaning and falsity are distinct elements of the tort of defamation and are considered separately.”). To evaluate whether a statement is capable of defamatory meaning, courts use a two-part framework that considers “(a) whether a communication is capable of bearing a particular meaning, and

(b) whether that meaning is defamatory.’ The jury then determines whether the communication was in fact so understood by its recipient.” *Moldea v. N.Y. Times Co.*, 15 F.3d 1137, 1142 (D.C. Cir. 1994), quoting Restatement (Second) of Torts § 614 (1977), *modified on reh’g on other grounds*, 22 F.3d 310 (D.C. Cir. 1994). Because the Court finds no defamatory meaning, it will not separately assess whether the statements were provably false.

B. Plaintiffs have failed to plausibly allege that Secretary Clinton made statements capable of a defamatory meaning, so the defamation claims fail as a matter of law.

Plaintiffs allege that Secretary Clinton defamed them when she publicly disputed plaintiffs’ report that the Secretary of State had told them in 2012 that the “Benghazi Attack was caused by an anti-Muslim YouTube video.” Compl. ¶ 33. They state that the defendant defamed them “by either directly calling them liars, or by strongly implying that they are liars.” *Id.* ¶ 23. But in ruling on a motion to dismiss, the Court is only bound by plaintiff’s factual assertions, not their conclusions or characterizations of the facts. *Browning*, 292 F.3d at 242.

Plaintiffs specifically allege that the following statements were defamatory:

- In response to a question, “Did you tell them it was about the film,” Secretary Clinton said,

“No . . . I said very clearly there had been a terrorist group, that had taken responsibility on Facebook . . . And then we learned the next day it wasn’t true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.” Compl. ¶ 23(a).

This statement contradicts plaintiff’s account but it does not state or suggest that they are lying.

- In light of plaintiffs’ allegations, Secretary Clinton was asked, “Somebody is lying. Who is it?” She responded, “Not me, that’s all I can tell you.” *Id.* ¶ 23(b).

Here, it was the reporter who sensationalized the dispute by positing that someone was lying, and the Secretary simply denied that she was.

- When asked about plaintiff Smith’s allegations, Secretary Clinton said, “I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can’t even imagine the grief that she has for losing her son, but she’s wrong. She’s absolutely wrong.” *Id.* ¶ 23(c).

This was a firm denial of plaintiff Smith’s accusation but again, it does not state or suggest that plaintiff Smith was intentionally lying or impugn her character in any way.

- In response to a question about the plaintiffs, Secretary Clinton said “As other members of families who lost loved ones have said, that’s not what they heard. I don’t hold any ill

feeling for someone who in that moment may not fully recall everything that was or wasn't said." *Id.* ¶ 23(d).

Here, the Secretary bolstered her own account of events and offered a reason for why plaintiffs' version differed, it was not that the family members were lying.

"[T]he defamatory meaning inquiry focuses only on whether a reasonable reader could understand a statement as tending to injure a plaintiff's reputation." *Moldea*, 15 F.3d at 1142. Ultimately, "[i]t is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *White*, 909 F.2d at 518, quoting *Levy v. Am. Mutual Ins. Co.*, 196 A.2d 475, 476 (D.C. 1964).

Here, plaintiffs do not point to any statement in which the Secretary directly accused them of lying, so their claim is based upon a claim that such an accusation was implied. In a case involving defamation by implication – where defamation is alleged based “not from what is literally stated, but from what is implied . . . , courts must be vigilant not to allow an implied defamatory meaning to be manufactured from words not reasonably capable of sustaining such meaning.” *White*, 909 F.2d at 518–19. As the D.C. Circuit held in *White*:

[Where] a communication, viewed in its entire context, merely conveys materially true facts

from which a defamatory inference can reasonably be drawn, the libel is not established. But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning.

Id. at 520.

Under District of Columbia law, an “allegedly defamatory remark must be more than unpleasant or offensive; the language must make the plaintiff appear ‘odious, infamous, or ridiculous.’” *Jankovic*, 494 F.3d at 1091, quoting *Howard Univ. v. Best*, 484 A.2d 958, 989 (D.C. 1984).¹⁰ Applying that test, the Court concludes that the statements in question are not capable of a defamatory meaning.

Secretary Clinton did not refer to plaintiffs as liars. While interviewers repeatedly pressed her to answer the question, “who lied,” only once did she answer the question directly, and even then, her comments focused solely on her own conduct, not the plaintiffs’. *See* Compl. ¶ 23(b) (“Not me, that’s all I can tell you.”). And in each of the other responses catalogued in the

¹⁰ Secretary Clinton argued in her motion to dismiss that at least some of the statements at issue did not make plaintiffs appear to be “odious, infamous or ridiculous.” Clinton MTD at 10. Other than noting that defendant’s contention is “wrong,” Pls.’ Opp. to Clinton MTD at 6, plaintiffs do not respond to the argument, so they may have conceded it. LCvR 7(b); *see also Cohen v. Bd. of Trs. of Univ. of D.C.*, 819 F.3d 476, 480 (D.C. Cir. 2016).

complaint, Secretary Clinton expressed empathy and regret. *Id.* ¶¶ 23(a) (“You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans”); *id.* ¶ 23(c) (responding to a question about plaintiff Smith’s allegations, “I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can’t even imagine the grief that she has for losing her son”); *id.* ¶ 23(d) (“Chris, my heart goes out to both of them. Losing a child under any circumstances . . . I understand the grief and the incredible sense of loss that can motivate that.”).

While Secretary Clinton certainly maintained that the plaintiffs were “wrong,” and she noted that others who heard the same exchange supported her version, those comments do not begin to rise to the level of the statements found to be actionable in *Jankovic*. In that case, the D.C. Circuit found a statement defamatory because it “could lead a reasonable reader to conclude” that the plaintiff was “actively in alliance” with an international leader who had committed “war crimes.” *Jankovic*, 494 F.3d at 1091. Plaintiffs may find the candidate’s statements in her own defense to be “unpleasant or offensive,” but Secretary Clinton did not portray plaintiffs as “odious, infamous, or ridiculous.” *See id.*, quoting *Best*, 484 A.2d at 989. To the contrary, the statements portray plaintiffs as normal parents, grieving over the tragic loss of their loved ones.

So Count II will be dismissed on the basis that plaintiffs have not plausibly alleged that Secretary Clinton made defamatory statements about them.

C. Plaintiffs have not alleged that the statements were defamatory as a matter of law, nor have they alleged special harm.

Even if Secretary Clinton had uttered statements that, by implication, could give rise to a defamatory meaning, plaintiffs have not alleged that they suffered harm as a result, and Count II could be dismissed on that ground as well. A claim for defamation requires either a statement that is “actionable as a matter of law” regardless of whether it caused actual harm, or a showing that the “publication caused the plaintiff special harm.” *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1240 (D.C. 2016), quoting *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005). A statement is actionable as a matter of law when it “tend[s] to injure a person’s reputation,” such as when a speaker “input[es] to a person a criminal offense; a loathsome disease; matter affecting adversely a person’s fitness for trade, business, or profession; or serious sexual misconduct.” *Carey v. Piphus*, 435 U.S. 247, 262 n.18 (1978); see also *Franklin v. Pepco Holdings, Inc.*, 875 F. Supp. 2d 66, 75 (D.D.C. 2012) (“A statement is defamatory as a matter of law . . . if it is so likely to cause degrading injury to the subject’s reputation that proof of that harm is not required to recover compensation.”), citing *Carey*, 434 U.S. at 262; *Farnum v. Colbert*, 293 A.2d 279, 282 (D.C.

1972) (a court can overlook an absence of facts related to damages if the slanderous words “inherently tend to damage a person’s reputation”), citing Restatement of Torts § 569 (1938).

Plaintiffs allege that Secretary Clinton’s suggestion that they lied has caused them to suffer “injury to reputation,” Compl. ¶ 37, but the alleged instances of defamation in this case do not satisfy the legal test for statements that are inherently actionable as a matter of law. Plaintiffs maintain in response to the motion to dismiss that the statements are actionable *per se* because they “clearly adversely affect [p]laintiffs’ ability to be employed.” Pls.’ Opp. to Clinton MTD at 13. But that is not clear at all, and plaintiffs’ bald assertion is not sufficient to liken Secretary Clinton’s statements to the sorts of utterances that courts consider to be defamatory *per se*. There are no facts alleged that would support an inference that the statements by Secretary Clinton, even if they had implied or suggested that the plaintiffs had not been truthful about this one very specific, highly personal matter, would have any impact on the plaintiffs’ ability to secure or maintain employment; indeed, the complaint makes no mention of whether the plaintiffs are engaged in any profession at all, or if they are seeking work. And the statements do not rise to the level of a criminal accusation or a public charge of sexual misconduct.

In the absence of a published statement that is defamatory *per se*, plaintiffs were bound to allege actual or pecuniary harm. Again, in opposition to the motion, plaintiffs point to a purely conclusory allegation. Pls.’

Opp. to Clinton MTD at 13 (“As a direct and proximate result of [Secretary] Clinton’s statements, [p]laintiffs have suffered pecuniary damage. . . .”), quoting Compl. ¶ 37. But plaintiffs must offer more than labels and conclusions to state a claim, *see Iqbal*, 556 U.S. at 668, quoting *Twombly*, 550 U.S. at 555, and this is insufficient. *See Xereas v. Heiss*, 933 F. Supp. 2d 1, 19 (D.D.C. 2013) (holding that the plaintiff in a defamation case “must allege some specific harm and the actual pecuniary loss arising from that harm”), citing *Franklin*, 875 F. Supp. 2d at 75 (granting a motion to dismiss a defamation claim where a plaintiff alleged harm stemming from the “risk [of] having her credit suffer,” because the plaintiff did “not say that this harm has actually occurred, or that she has sustained any pecuniary loss as a result.”).

Because plaintiffs have not adequately pled that they suffered harm, the defamation count could be dismissed on that independent basis as well.¹¹

D. Plaintiffs’ false light claim fails to state a claim for the same reasons.

In Count III, plaintiffs allege that the allegedly defamatory statements set forth in paragraph 23 of the complaint “placed Plaintiffs in a false light that would be offensive to a reasonable person.” Compl. ¶¶ 39–42.

¹¹ In light of the Court’s findings on the lack of any defamatory meaning or special harm, the Court need not address the question of whether the statements are provably false or whether they were made without privilege. *See Clinton MTD* at 11–15.

Because plaintiffs rest “both [their] defamation and false light claims on the same allegations . . . the claims will be analyzed in the same manner.” *Blodgett*, 930 A.2d at 222–23. The Court finds that the statements at issue, which did not portray plaintiffs as “odious, infamous, or ridiculous,” *Jankovic*, 494 F.3d at 1091, quoting *Best*, 484 A.2d at 989, would not be highly offensive to a reasonable person. See *Weyrich*, 235 F.3d at 628 (recognizing that the “highly offensive” and “odious, infamous, and ridiculous” inquiries are “similar,” but noting that the two tests “may sometimes produce different results”), citing Restatement (Second) of Torts § 652E cmt b. So Count III will be dismissed for failure to state a claim.

IV. Plaintiffs have not stated a claim for intentional infliction of emotional distress caused by the allegedly defamatory statements.

In Count V, plaintiffs allege that Secretary Clinton’s actions in using the private email server, and in “defaming and holding [them] in a false light . . . on information and belief, directly caused [p]laintiffs severe emotional distress.” Compl. ¶¶ 50–52. “The elements of [the tort of intentional infliction of emotional distress] are ‘(1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress.’” *Smith v. United States*, 843 F.3d 509, 515 (D.C. Cir. 2016), quoting *Minch v. District of Columbia*, 952 A.2d 929, 940 (D.C. 2008). To qualify as sufficiently extreme and outrageous, the conduct at issue must be “so

outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013), quoting *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 n.10 (D.C. 1994).

The portion of the count dealing with the email server was dismissed once the United States was substituted as a defendant. As for the portion of the count that deals with Secretary Clinton’s statements as a private citizen, the fact that the Secretary disputed the plaintiffs’ account of events does not rise to the level of being “utterly intolerable in a civilized community.” *Armstrong*, 80 A.3d at 189. So Count V does not state a plausible claim for intentional infliction of emotional distress.

CONCLUSION

The Court finds for purposes of the Westfall Act that Secretary Clinton was acting in the scope of her employment when she communicated with State Department personnel via the private email server as Secretary of State, and it finds that she did not defame the plaintiffs or hold them in a false light when she disputed their public allegations that she had lied to them in 2012. So judgment will be entered for the United States on Counts I and IV, and on Counts V and VI to the extent that they relate to the actions that Secretary Clinton took as Secretary of State, and judgment will be entered for Secretary Clinton on Counts

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II and III, and on Counts V and VI to the extent that those counts are premised on the alleged defamation.

A separate order will issue.

/s/ Amy B. Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: May 26, 2017

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PATRICIA SMITH, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	16-1606 (ABJ)
HILLARY RODHAM CLINTON,)	
)	
Defendant.)	

ORDER

(Filed May 26, 2017)

Pursuant to Federal Rules of Civil Procedure 12 and 58, and for the reasons stated in the accompanying memorandum opinion, it is hereby

ORDERED that the United States' Motion for Partial Substitution of the United States [Dkt. # 23] is **GRANTED**. The United States is substituted as a defendant with respect to Counts I and IV, and with respect to Counts V and VI to the extent that those counts relate to actions that Secretary Clinton took as Secretary of State. It is

FUTHER ORDERED that the United States' Motion to Dismiss [Dkt. # 24] is **GRANTED**. Counts I and IV are dismissed without prejudice in their entirety, and Counts V and VI are dismissed without prejudice to the extent that those counts relate to actions that Secretary Clinton took as Secretary of State. It is

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FURTHER ORDERED that Secretary Clinton's motion to dismiss [Dkt. # 28] is **GRANTED**. Counts II and III are dismissed in their entirety, and Counts V and VI are dismissed to the extent that those counts are premised on the alleged defamation.

This is a final appealable order.

SO ORDERED.

/s/ Amy B. Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: May 26, 2017

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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17-5133

September Term, 2017

1:16-cv-01606-ABJ

Filed On: June 1, 2018

Patricia Smith and Charles Woods,

Appellants

v.

Hillary Rodham Clinton and
United States of America,

Appellees

BEFORE: Garland, Chief Judge; Henderson,
Rogers, Tatel, Griffith, Kavanaugh,
Srinivasan, Millett, Pillard, Wilkins,
and Katsas, Circuit Judges

ORDER

Upon consideration of appellants' petition for re-hearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

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Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ _____

Ken R. Meadows

Deputy Clerk

AFFIDAVIT OF PLAINTIFF CHARLES WOODS

I, Charles Woods, declare as follows:

1. I am the father of Tyrone Woods, the American American Navy SEAL who was killed during the September 11, 2012 Benghazi Attack (“Benghazi Attack”)

2. On September 14, 2012, Defendant Hillary Clinton (“Defendant Clinton”) met privately with the family members of the four Americans who were killed during the Benghazi Attack, including Plaintiff Patricia Smith and myself, at Joint Base Andrews in Maryland.

3. During the September 14 meeting, Defendant Clinton falsely told me that the Benghazi Attack was the result of an anti-Muslim video that had been posted online and that the creator of the video would be arrested.

4. During the September 14 meeting, I contemporaneously recorded my interaction with Defendant Clinton by writing in my diary, stating that, “I gave Hillary a hug and shook her hand and she said we are going to have the film maker arrested who was responsible for the death of my son.” A true and correct copy of this diary entry is attached hereto as **Exhibit B**.

5. Subsequently, during Defendant Clinton’s presidential campaign, Defendant Clinton engaged in a pattern and practice of negligently, recklessly, and/or maliciously defaming me by directly calling me a liar and/or strongly implying that I lied about what

Defendant Clinton told me was the cause of the Benghazi Attack.

6. There are *at least* four separate occasions on which Defendant Clinton made these defamatory statements, including but not limited to:

a. **December 6, 2015** – *Interview with ABC’s George Stephanopoulos* – Defendant Clinton flat out falsely denied telling the families of Benghazi victims that the YouTube video caused the attack. After George Stephanopoulos asked Defendant Clinton, “Did you tell them it was about the film?”, Defendant Clinton responded, “No. You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans. And I did testify, as you know, for 11 hours. And I answered all of these questions. Now, I can’t – I can’t help it the people think there has to be something else there. I said very clearly there had been a terrorist group, uh, that had taken responsibility on Facebook, um, between the time that, uh, I – you know, when I talked to my daughter, that was the latest information; we were, uh, giving it credibility. And then we learned the next day it wasn’t true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.

b. **December 30, 2015** – *Conway Daily Sun Editorial Board Meeting* – Defendant Clinton directly branded Plaintiffs as liars. After Conway Daily Sun columnist Tom McLaughlin pointed out discrepancies in Defendant Clinton’s private and public comments

about the cause of the Benghazi Attack, and referenced Defendant Clinton's interview with George Stephanopoulos where Defendant Clinton denies telling Plaintiffs that the Benghazi Attacks were caused by the YouTube video, McLaughlin asks, "Somebody is lying. Who is it?". Clinton responds, "Not me, that's all I can tell you."

c. **March 9, 2016** – *Democratic Presidential Debate* – When asked about Plaintiff Smith's allegation that Defendant Clinton lied to her by blaming the Benghazi Attack on the YouTube video, Defendant Clinton responded by saying, "I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can't even imagine the grief that she has for losing her son, but she's wrong. She's absolutely wrong."

d. **July 31, 2016** – *Interview with Chris Wallace of Fox News Sunday* – Defendant Clinton stated, "Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that's not what they heard, I don't hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn't said."

7. As a direct result of Defendant Clinton's defamatory statements, the injuries that I have suffered

include, but are not limited to, pecuniary damage, including my ability to work, as well as injury to reputation, impairment to standing in my community, personal humiliation, pain and suffering, and emotional distress.

I declare under penalty of perjury, under the laws of the District of Columbia, that the foregoing is true and correct.

Executed on December 8, 2016 at Portland, OR.

/s/ Charles Woods
Charles Woods

AFFIDAVIT OF PLAINTIFF PATRICIA SMITH

I, Patricia Smith, declare as follows:

1. I am the mother of Sean Smith, the American U.S. Foreign Service member and Information Programs Officer, U.S. Consulate General, U.S. Department of State who was killed during the September 11, 2012 Benghazi Attack (“Benghazi Attack”)

2. On September 14, 2012, Defendant Hillary Clinton (“Defendant Clinton”) met privately with the family members of the four Americans who were killed during the Benghazi Attack, including Plaintiff Charles Woods and myself, at Joint Base Andrews in Maryland.

3. During the September 14 meeting, Defendant Clinton falsely told me that the Benghazi Attack was

the result of an anti-Muslim video that had been posted online and that the creator of the video would be arrested.

4. Subsequently, during Defendant Clinton's presidential campaign, Defendant Clinton engaged in a pattern and practice of negligently, recklessly, and/or maliciously defaming me by directly calling me a liar and/or strongly implying that I lied about what Defendant Clinton told me was the cause of the Benghazi Attack.

5. There are *at least* four separate occasions on which Defendant Clinton made these defamatory statements, including but not limited to:

a. **December 6, 2015** – *Interview with ABC's George Stephanopoulos* – Defendant Clinton flat out falsely denied telling the families of Benghazi victims that the YouTube video caused the attack. After George Stephanopoulos asked Defendant Clinton, "Did you tell them it was about the film?", Defendant Clinton responded, "No. You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans. And I did testify, as you know, for 11 hours. And I answered all of these questions. Now, I can't – I can't help it the people think there has to be something else there. I said very clearly there had been a terrorist group, uh, that had taken responsibility on Facebook, um, between the time that, uh, I – you know, when I talked to my daughter, that was the latest information; we were, uh, giving it credibility. And then we learned the next day it

wasn't true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.

b. **December 30, 2015** – *Conway Daily Sun Editorial Board Meeting* – Defendant Clinton directly branded Plaintiffs as liars. After Conway Daily Sun columnist Tom McLaughlin pointed out discrepancies in Defendant Clinton's private and public comments about the cause of the Benghazi Attack, and referenced Defendant Clinton's interview with George Stephanopoulos where Defendant Clinton denies telling Plaintiffs that the Benghazi Attacks were caused by the YouTube video, McLaughlin asks, "Somebody is lying. Who is it?". Clinton responds, "Not me, that's all I can tell you."

c. **March 9, 2016** – *Democratic Presidential Debate* – When asked about Plaintiff Smith's allegation that Defendant Clinton lied to her by blaming the Benghazi Attack on the YouTube video, Defendant Clinton responded by saying, "I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can't even imagine the grief that she has for losing her son, but she's wrong. She's absolutely wrong."

d. **July 31, 2016** – *Interview with Chris Wallace of Fox News Sunday* – Defendant Clinton stated, "Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives

protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that's not what they heard, I don't hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn't said."

6. As a direct result of Defendant Clinton's defamatory statements, the injuries that I have suffered include, but are not limited to, pecuniary damage, including my ability to work, as well as injury to reputation, impairment to standing in my community, personal humiliation, pain and suffering, and emotional distress.

I declare under penalty of perjury, under the laws of the District of Columbia, that the foregoing is true and correct.

Executed on December 8, 2016 at San Diego, CA.

/s/ Patricia Smith

Patricia Smith

 AT-A-GLANCE

2012

Ritz Carlton - Andrews -
WEEK 37
257/109

SEPTEMBER 10 - 16

Thursday 13

[Redacted]

Redacted

258/108

Friday 14

[Redacted]

Redacted

259/107
Declaration of Independence (M) Saturday 15

UofO Tennessee State - 12: noon
I gave Hillary a hug and shook her
hand, and she said we are going to
have the film maker arrested who was
responsible for the death of my son

260/106
Independence Day (M) Sunday 16

Rosh Hashanah begins at sundown

● NM

AT-A-GLANCE®

Someone had to make the decision not to sue the

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PATRICIA SMITH,
San Diego, California

and

CHARLES WOODS,
Portland, Oregon

Plaintiffs,

v.

HILLARY RODHAM CLINTON,
3067 Whitehaven St. NW
Washington, D.C., 20008

Defendant.

Case No:

1:16-cv-01606

COMPLAINT

(Filed Aug. 8, 2016)

I. INTRODUCTION.

Plaintiffs Patricia (hereafter “Pat Smith”) Smith and Charles Woods are the parents of Sean Smith and Tyrone Woods, respectively, each of whom were killed by Islamic terrorists during the attack on the American consulate in Benghazi, Libya on September 11, 2012. Hillary Rodham Clinton (“Defendant Clinton”), who was the U.S. Secretary of State at the time, has since been found to have used a private e-mail server to send and receive confidential and classified government information, often concerning matters of national security, during her tenure. In fact, Director of the Federal Bureau of Investigation (“FBI”), James Comey, publicly stated that Defendant Clinton, at a minimum, was “extremely careless” in handling

confidential and classified government information and “there is evidence of potential violations of the statutes regarding the handling of classified information.”

It is highly probable, given Defendant Clinton’s history of reckless handling of classified information, that Defendant Clinton, as Secretary of State, sent and received information about Ambassador Christopher Stevens and thus the U.S. Department of State activities and covert operations that the deceased were a part of in Benghazi, Libya. This information was compromised from the second that it left Defendant Clinton’s private e-mail server and easily found its way to foreign powers including, but not limited to Russia, Iran, China, and North Korea. As a direct result of Defendant Clinton’s reckless handling of this classified, sensitive information, Islamic terrorists were able to obtain the whereabouts of Ambassador Christopher Stevens and thus the U.S. State Department and covert and other government operations in Benghazi, Libya and subsequently orchestrate, plan, and execute the now infamous September 11, 2012 attack.¹ From the illegal use of Defendant Clinton’s private email server, it was reasonably foreseeable that Islamic terrorists would premeditatedly kill Plaintiffs’ sons.

¹ Aaron Klein, *Hillary Emails Betrayed Whereabouts of Murdered Ambassador Chris Stevens*, (March 1, 2016) available at: <http://www.breitbart.com/national-security/2016/03/01/hillary-emails-betrayed-whereabouts-of-murdered-ambassador-chris-stevens/>

Immediately after the attack, Defendant Clinton, in an effort to save the re-election chances of President Barack Obama, and in turn, her own chances at the 2016 Presidency, lied to Plaintiffs and the public at large that the Benghazi Attacks were caused by Islamic reaction over an anti-Muslim YouTube video that had been posted on the internet. These lies were perpetrated despite the fact that she knew immediately that this video was actually not the cause of the attack—information that she shared with the Prime Minister of Egypt and her own daughter, Chelsea Clinton, but hid from Plaintiffs and the public at large. Defendant Clinton even promised Plaintiffs that the person responsible for the video would be arrested. Plaintiff Woods recorded the conversation with Defendant Clinton contemporaneously in his diary, which he has recorded in for many years. Now, Defendant Clinton, in an attempt to save her reputation and intimidate Plaintiffs and their surviving family members into silence as she attempts to be elected President in the November, 2016 election, has gone on a defamatory smear campaign to paint Plaintiffs as liars in the public eye in order to discredit Plaintiffs, who have been vocal about Defendant Clinton's pattern and practice of dishonesty regarding what caused the Benghazi attack, its aftermath, and the death of their sons.

II. JURISDICTION AND VENUE.

1. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332 because

each Plaintiff and the Defendant are citizens of different states and the amount in controversy exceeds \$75,000 (Diversity of Citizenship Jurisdiction).

2. This Court has supplemental jurisdiction over this case pursuant to 28 U.S.C. § 1367.

3. Venue is proper pursuant to 18 U.S.C. § 1965 and 28 U.S.C. § 1391(b)(2), (3) in that Defendant resides here and is subject to personal jurisdiction in this District.

III. PARTIES.

Plaintiffs

4. Pat Smith is an individual, natural person who, at all material times, was and is a citizen and resident of the state of California. She is the natural mother of Sean Smith, the American U.S. Foreign Service member and Information Programs Officer, U.S. Consulate General, U.S. Department of State who was killed during the September 11, 2012 Benghazi Attack.

5. Charles Woods is an individual, natural person who, at all material times, was and is a citizen and resident of the state of Oregon. He is the natural father of Tyrone Woods, the American Navy SEAL who was killed during the September 11, 2012 Benghazi Attack.

Defendant

6. Defendant Hillary Rodham Clinton is an individual, natural person who, at all material times, was and is a resident of the District of Columbia.

IV. STANDING.

7. Plaintiffs have standing to bring this action because they have been directly affected and victimized by the unlawful conduct complained herein. Their injuries are proximately related to the conduct of Defendant Hillary Rodham Clinton.

V. FACTS.

8. Defendant Hillary Rodham Clinton (“Defendant Clinton”) served as U.S. Secretary of State from 2009 until 2013.

9. During her tenure as Secretary of State, Defendant Clinton utilized a private e-mail server to conduct official government business, including but not limited to, sending and receiving thousands of e-mails regarding matters of national security, including information that has been categorized as “top secret”, “secret”, and “confidential”.²

² Alicia Parlapiano, *What We Know About Hillary Clinton’s Private Email Server*, NEW YORK TIMES, (last updated July 13, 2016), available at: http://www.nytimes.com/interactive/2016/05/27/us/politics/what-we-know-about-hillary-clintons-private-email-server.html?_r=0

10. After an investigation into Defendant Clinton's private e-mail server, the Director of the FBI, James Comey, publicly declared that Defendant Clinton had, at a minimum, been "extremely careless" in handling confidential and classified government information and acknowledged that "there is evidence of potential violations of the statutes regarding the handling of classified information."³

11. There still remain thousands of e-mails sent and received by Defendant Clinton using her private email server during her tenure as Secretary of State that have not been released.⁴

12. Defendant Clinton's own campaign spokesman, Jake Sullivan, has even acknowledged the national security implications of Defendant Clinton's private e-mail server when he, in an official press release discussing the e-mails, stated, "[t]his has gone from being a curiosity, and a matter of politics, to being a national security issue."⁵

³ David Jackson, Kevin Johnson, "*Extremely Careless,*" but *FBI advises no charges for Clinton's emails*, USA TODAY (July 5, 2016) available at: <http://www.usatoday.com/story/news/politics/elections/2016/07/05/james-comey-fbi-hillary-clinton/86702072/>

⁴ Parlapiano, *supra* note 1

⁵ Sean Davis, *Donald Trump Just Got Hillary Clinton to Admit Her E-Mails Are a 'National Security Issue'*, THE FEDERALIST, (July 27, 2016) available at: <http://thefederalist.com/2016/07/27/donald-trump-just-got-hillary-clinton-to-admit-her-e-mails-are-a-national-security-issue/>

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13. Defendant Clinton’s private e-mail server was, in fact, the subject of hacking from [Russia] Iran, China, South Korea, and Germany.⁶

14. Related to this, Defendant Clinton personally accused Russian intelligence services of hacking into Democratic National Committee computers concerning Defendant Clinton’s presidential campaign, stating that, “We know that Russian intelligence services hacked into the DNC and we know that they arranged for a lot of those emails to be released and we know that Donald Trump has shown a very troubling willingness to back up Putin, to support Putin.”⁷ Thus the Russians logically hacked Defendant Clinton’s private email server as well.

15. During her tenure as Secretary of State, Defendant Clinton utilized her private email server to send and receive information about the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert Central Intelligence Agency (“CIA”) and other government operations in Benghazi, Libya. This information was intercepted by foreign powers, including but not limited to, Russia, Iran, China, and North Korea.

⁶ Josh Gerstein, Rachael Bade, *Clinton server faced hacking from China, South Korea and Germany*, POLITICO, October 8, 2015, available at: <http://www.politico.com/story/2015/10/hillary-clinton-email-server-hacked-china-south-korea-germany-214546>

⁷ Aaron P. Bernstein, *Clinton says Russian intelligence services hacked DNC*, REUTERS, (August 1, 2016) available at: <http://www.reuters.com/article/us-usa-election-clinton-idUSKCN10B0IX>

16. Islamic terrorists obtained the information sent and received by Defendant Clinton about the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert CIA and other government operations in Benghazi and used it to plan, orchestrate, and carry out the horrific and devastating attack on the American diplomatic compound in Benghazi, Libya on September 11, 2012 (“Benghazi Attack”), resulting in the death of four Americans, including Sean Smith and Tyrone Woods.

17. The Benghazi Attack was a directly and proximately caused, at a minimum, by Defendant Clinton’s “extreme carelessness” in handling confidential and classified information, such as the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert CIA and other government operations in Benghazi.

18. After the Benghazi Attack, Defendant Clinton attempted to blame an anti-Muslim YouTube video for inciting the Benghazi Attack. On September 11, 2012, Defendant Clinton stated in a Press Statement, “Some have sought to justify this vicious behavior as a response to inflammatory material posted on the Internet.”⁸ Again, on September 12, 2012, in a public speech, Defendant Clinton states, “Some have sought to justify this vicious behavior, along with the protest that took

⁸ Hillary Clinton, *Statement on the Attack in Benghazi*, U.S. Department of State, (September 11, 2012) available at: <http://www.state.gov/secretary/20092013clinton/rm/2012/09/197628.htm>

place at our Embassy in Cairo yesterday, as a response to inflammatory material posted on the internet.”⁹

On September 14, 2012, Defendant Clinton met privately with the family members of the four Americans who were killed during the Benghazi Attack, including Plaintiffs Pat Smith and Charles Woods (“Woods”) at Joint Base Andrews in Maryland. During the private meeting, Defendant Clinton lied to Plaintiffs and told Plaintiffs that the Benghazi Attack was the result of the anti-Muslim YouTube video that had been posted online and that the creator of the video would be arrested.

20. Woods contemporaneously recorded this September 14, 2012 interaction with Defendant Clinton by writing in his diary, stating that “I gave Hillary a hug and shook her hand, and she said we are going to have the film maker arrested who was responsible for the death of my son.”

21. Indeed, Nakoula Basseley Nakoula was later prosecuted and jailed for making the anti-Muslim YouTube video that Defendant Clinton claimed caused the Benghazi Attack.¹⁰

⁹ *Secretary Clinton Delivers Remarks on the Deaths of U.S. Personnel in Benghazi, Libya*, September 12, 2012, available at <https://blogs.state.gov/stories/2012/09/12/secretary-clinton-delivers-remarks-deaths-us-personnel-benghazi-libya>

¹⁰ Rico Lowly, *The Benghazi Patsy*, POLITICO, (May 9, 2013), available at: <http://www.politico.com/story/2013/05/the-benghazi-patsy-091101>

22. Since the conclusion of her tenure as Secretary of State, Defendant Clinton has formally announced her long-planned and orchestrated candidacy for President of the United States of America in the November, 2016 election and has now successfully secured the nomination of the Democratic party.

23. During her campaign for President, Defendant Clinton has negligently, recklessly, and/or maliciously defamed Plaintiffs by either directly calling them liars, or by strongly implying that they are liars, in order to protect and enhance her public image and intimidate and emotionally harm and silence them to not speak up about the Benghazi attack on at least four separate occasions. These occasions include, but are not limited to:

- (a) **December 6, 2015** – *Interview with ABC’s George Stephanopoulos* – Defendant Clinton flat out falsely denied telling the families of Benghazi victims that the YouTube video caused the attack. After George Stephanopoulos asked Defendant Clinton, “Did you tell them it was about the film?”, Defendant Clinton responded, “No. You know, look I understand the continuing grief at the loss that parents experienced with the loss of these four brave Americans. And I did testify, as you know, for 11 hours. And I answered all of these questions. Now, I can’t – I can’t help it the people think there has to be something else there. I said very clearly there had been a terrorist group, uh, that had

taken responsibility on Facebook, um, between the time that, uh, I – you know, when I talked to my daughter, that was the latest information; we were, uh, giving it credibility. And then we learned the next day it wasn't true. In fact, they retracted it. This was a fast-moving series of events in the fog of war and I think most Americans understand that.”¹¹

- (b) **December 30, 2015** – *Conway Daily Sun Editorial Board Meeting* – Defendant Clinton directly branded Plaintiffs as liars. After Conway Daily Sun columnist Tom McLaughlin pointed out discrepancies in Defendant Clinton's private and public comments about the cause of the Benghazi Attack, and referenced Defendant Clinton's interview with George Stephanopoulos where Defendant Clinton denies telling Plaintiffs that the Benghazi Attacks were caused by the YouTube video, McLaughlin asks, “Somebody is lying. Who is it?”. Clinton responds, “Not me, that's all I can tell you.”¹²

¹¹ Guy Benson, *Hillary: No, I didn't Blame the Video in My Meeting With Benghazi Families*, TOWNHALL, (December 8, 2015) available at: <http://townhall.com/tipsheet/guybenson/2015/12/08/whoa-hillary-says--benghazi-families-are-wrong-she-didnt-blame-attacks-on-intemet-video--n2090274>

¹² Daymond Steer, *Clinton Talks Iraq and Benghazi with the Sun Ed Board*, CONWAY DAILY SUN, (December 30, 2015) available at: <http://www.conwaydailysun.com/newsx/local-news/123956-clinton-talks-iraq-and-benghazi-with-the-sun-ed-board>

- (c) **March 9, 2016** – *Democratic Presidential Debate* – When asked about Plaintiff Smith’s allegation that Defendant Clinton lied to her by blaming the Benghazi Attack on the YouTube video, Defendant Clinton responded by saying, “I feel a great deal of sympathy for the families of the four brave Americans that we lost at Benghazi, and I certainly can’t even imagine the grief that she has for losing her son, but she’s wrong. She’s absolutely wrong.”¹³
- (d) **July 31, 2016** – *Interview with Chris Wallace of Fox News Sunday* – Defendant Clinton stated, “Chris, my heart goes out to both of them. Losing a child under any circumstances, especially in this case, two State Department employees, extraordinary men both of them, two CIA contractors gave their lives protecting our country, our values. I understand the grief and the incredible sense of loss that can motivate that. As other members of families who lost loved ones have said, that’s not what they heard, I don’t hold any ill feeling for someone who in that moment may not fully recall everything that was or wasn’t said.”¹⁴

¹³ Bre Payton, *Watch Hillary Clinton Call the Mother of a Benghazi Victim a Liar*, THE FEDERALIST (March 10, 2016) available at: <http://thefederalist.com/2016/03/10/watch-hillary-clinton-call-the-mother-of-a-benghazi-victim-a-liar/>

¹⁴ Tommy Christopher, *Chris Wallace Grills Hillary Clinton About Benghazi parents’ Claims She Blamed Video*, MEDIAITE,

24. In fact, Defendant Clinton knew from the very beginning that the Benghazi Attack was not caused by the YouTube video, but was rather a planned, premeditated terrorist attack. On the night of the Benghazi Attack, Defendant Clinton sent an e-mail to her daughter, Chelsea Clinton, where she clearly blames the attack on an “Al-Qaeda-like group”.¹⁵ In another email the day after the Benghazi Attack, Defendant Clinton directly told the Egyptian Prime Minister “we know the attack in Libya had nothing to do with the film. It was a planned attack, not a protest.”¹⁶

FIRST CAUSE OF ACTION
(Wrongful Death)

25. Plaintiffs reallege paragraphs 1 to 24, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

26. The deaths of Sean Smith and Tyrone Woods were directly and proximately caused by the negligent and reckless actions of Defendant Clinton, who used a

(July 31, 2016) available at: <http://www.mediaite.com/tv/fox-news-chris-wallace-grills-hillary-clinton-about-benghazi-parents-claims-she-blamed-video/>

¹⁵ Peter Nicholas, *Hillary Clinton’s Email to Chelsea Stars in Benghazi Hearing*, THE WALL STREET JOURNAL, (October 22, 2015) available at: <http://blogs.wsj.com/washwire/2015/10/22/hillary-clintons-email-to-chelsea-stars-in-benghazi-hearing/>

¹⁶ *These 3 Emails Show What Hillary Was Really Saying About Benghazi*, FOX NEWS, (October 23, 2015) available at <http://insider.foxnews.com/2015/10/23/hillary-clinton-emails-chelsea-during-benghazi-attack-blames-al-qaeda>

private email server to send and receive secret, confidential and classified government information that compromised the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert CIA and other government operations in Benghazi, Libya that both Sean Smith and Tyrone Woods were a part of.

27. Using the information that was obtained from Defendant Clinton's "extremely careless" handling of confidential and classified government information, Islamic terrorists were able to locate Ambassador Christopher Stevens, Sean Smith and Tyrone Woods, and subsequently orchestrate, plan, and execute the Benghazi Attack that claimed the lives of Sean Smith and Tyrone Woods.

28. Without having access to the compromised information that was obtained due to Defendant Clinton's "extremely careless" handling of confidential information, the Islamic terrorist perpetrators of the Benghazi Attack would not have been able to carry out the attack due to lack of information.

29. As a result of the deaths of Sean Smith and Tyrone Woods, Plaintiffs have suffered pecuniary and other loss equaling the financial support the deceased would have been expected to provide, in addition to loss of services, mental anguish, and pain and suffering.

30. Plaintiff Patricia Smith is the mother of the deceased Sean Smith and is thereby entitled to bring this action.

31. Plaintiff Charles Woods is the father of the deceased Tyrone Woods and is thereby entitled to bring this action.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for actual, compensatory damages and punitive damages in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

SECOND CAUSE OF ACTION
Defamation

32. Plaintiffs reallege paragraphs 1-31, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

33. Defendant Clinton made false and defamatory statements negligently, recklessly, purposefully, and/or intentionally with actual malice as set forth in paragraphs 23(a), (b), (c), and (d) concerning Plaintiffs by stating that Plaintiffs were lying about Clinton having told them that the Benghazi Attack was caused by an anti-Muslim YouTube video.

34. Defendant Clinton, in fact, knew that her statements concerning Plaintiffs were false and misleading, as evidenced by her public comments after the Benghazi Attacks and her private e-mails to her daughter and the Prime Minister of Egypt.

35. Defendant Clinton's statements were all published and made in public, and subsequently

published and disseminated through various media outlets to persons and entities in the District of Columbia, all over the United States, and across the world, and were understood to be of or concerning Plaintiffs.

36. Defendant Clinton's statements were not subject to any privilege.

37. As a direct and proximate result of Defendant Clinton's statements, Plaintiffs have suffered pecuniary damage, as well as injury to reputation, impairment to standing in their community, personal humiliation, pain and suffering, and emotional distress.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for actual, compensatory damages and punitive damages, in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

THIRD CAUSE OF ACTION
False Light

38. Plaintiffs reallege paragraphs 1-37, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

39. Defendant Clinton knowingly made false statements, representations, or imputations about Plaintiffs by stating that Plaintiffs were lying about Defendant Clinton having told them that the Benghazi

Attack was caused by an anti-Muslim YouTube video, as set forth in paragraphs 23(a), (b), (c), and (d), above.

40. Defendant Clinton's statements were all made in public, and were foreseeably published and disseminated through various media outlets to persons and entities in the District of Columbia, all over the United States, and across the world, and were reasonably understood to be of or concerning Plaintiffs.

41. Defendant Clinton's statements about Plaintiffs, referring to them as liars and questioning their honesty, placed Plaintiffs in a false light that would be offensive to a reasonable person.

42. As a direct and proximate result of Defendant Clinton's statements, Plaintiffs have suffered pecuniary damage, as well as injury to reputation, impairment to standing in the community, personal humiliation, pain and suffering, and emotional distress.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for pecuniary, actual, compensatory damages and punitive damages, in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

FOURTH CAUSE OF ACTION

Negligence

43. Plaintiffs reallege paragraphs 1 to 42, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

44. Defendant Clinton owed Plaintiffs, as parents of the deceased, a duty to not act, at a minimum, “extremely carelessly” in the handling of confidential and classified government information via her personal email server and compromise the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert and other government operations in Benghazi, Libya that the deceased were a part of.

45. Defendant Clinton breached her duty by sending and receiving information on her private e-mail server about the location of Ambassador Christopher Stevens and thus the U.S. State Department and the covert and other government operations in Benghazi, Libya that the deceased were a part of that was intercepted and subsequently used by Islamic terrorists to plan, orchestrate, and execute the Benghazi Attack.

46. The deaths of Sean Smith and Tyrone Woods were directly and proximately caused by the negligent and reckless handling of confidential and classified government information by Defendant Clinton, in that Defendant Clinton compromised the location of Ambassador Christopher Stevens and thus the U.S. Department of State and the covert and other government operations in Benghazi, Libya that the deceased were a part of.

47. But-for Defendant Clinton’s negligent and reckless handling of confidential and classified government information by Defendant Clinton, in that

Defendant Clinton compromised the location of Ambassador Christopher Stevens and thus the U.S. State Department and the covert and other government operations in Benghazi, Libya that the deceased were a part of, the Islamic terrorists who carried out the attack would not have been able to do so due to lack of information.

48. As a direct and proximate result of Defendant Clinton's statements, Plaintiffs have suffered pecuniary damage, pain and suffering, and emotional distress.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for pecuniary, actual, compensatory and punitive damages, in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

FIFTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

49. Plaintiffs reallege paragraphs 1 to 48, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

50. Defendant Clinton engaged in extreme and outrageous conduct by using her private e-mail server to send and receive confidential and classified government information, often concerning matters of national security, including the location of Ambassador Christopher Stevens and thus the U.S. State

Department and the covert and other government operations in Benghazi, Libya that the deceased were a part of.

51. Defendant Clinton intentionally and knowingly used her private e-mail server to send and receive confidential and classified government information, including, on information and belief, the location of Ambassador Christopher Stevens and thus the U.S. State Department and the covert and other government operations in Benghazi, Libya that the deceased were a part of, as well as defaming and holding in a false light Plaintiffs.

52. Defendant Clinton's extreme and outrageous conduct, on information and belief, directly caused Plaintiffs severe emotional distress stemming from the death of Plaintiffs' sons Sean Smith and Tyrone Woods.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for actual, compensatory damages and punitive damages, in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

SIXTH CAUSE OF ACTION

Negligent Infliction of Emotional Distress

53. Plaintiffs reallege paragraphs 1 to 52, and incorporate herein by reference each and every foregoing paragraph of this Complaint as if set forth in full.

54. Defendant Clinton, as Secretary of State, had a relationship with Plaintiffs, who were the parents of deceased Americans taking part in the U.S. Department of State and the covert CIA operations in Benghazi, that necessarily implicated Plaintiffs' emotional well-being in that Clinton was, as Secretary of State, ultimately responsible for the safety of Tyrone Woods and Sean Smith

55. There existed an especially probable and likely risk that Defendant Clinton's negligent and reckless handling of confidential and classified government information relating to matters of national security, including and not limited to the location [sic] Ambassador Christopher Stevens and thus the U.S. State Department and the covert operations that the deceased were part of, would compromise the safety of Tyrone Woods and Sean Smith, and therefore Plaintiffs' emotional well-being.

56. As a direct and proximate result of Defendant Clinton's negligent and reckless handling of confidential information relating to matters of national security, including and not limited to the location of the covert and other government operations that the deceased were part of, Tyrone Woods and Sean Smith were killed, as well as defaming and holding Plaintiffs in a false light, thereby causing serious emotional distress to Plaintiffs.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against Defendant for damages including actual, compensatory and punitive

damages in a sum to be determined by a jury, for costs herein incurred, for attorneys' fees, and for such other and further relief as this Court deems just and proper.

VI. PRAYER FOR RELIEF.

WHEREFORE, Plaintiffs pray for relief and judgment against Defendant Clinton as follows:

(a) For general (non-economic), special (economic), actual, compensatory and punitive damages to be determined by a jury.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all counts as to all issues so triable.

Dated: August 8, 2016

Respectfully submitted,

/s/ Larry Klayman

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28 USC § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before

trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting

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within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.
