



Plaintiffs allege claims for libel/defamation, libel per se, and intentional infliction of emotional distress (“IIED”) based on statements made in the Article. As set forth in more detail below, Plaintiffs’ libel claims are barred by the one-year statute of limitations since the Article was published, at the latest, on May 23, 2007, and Plaintiffs did not file their claim until May 30, 2008. Plaintiffs’ claim for IIED is based upon the same factual allegations as the libel claims and is inextricably intertwined with Plaintiffs’ libel claims. Therefore, it is likewise barred by the one-year statute of limitations. Plaintiffs’ claim for IIED is further legally barred since IIED is a “gap-filler” tort which cannot be used where, as here, the gravamen of the Plaintiffs’ claims is another tort. As such, Defendants are entitled to summary judgment on each of Plaintiffs’ claims asserted in the above-styled action.

## II.

### **GROUNDS FOR SUMMARY JUDGMENT**

Defendants believe that there is no genuine issue of material fact and that they are entitled to judgment against Plaintiffs as a matter of law based upon the following grounds:

1. Pursuant to section 16.002 of the Texas Civil Practice and Remedies Code and other applicable law, Plaintiffs’ claims, each of which arises out of the publication of the Article, are barred by the one-year statute of limitations.

2. A claim of IIED arising out of the publication in the Article is not legally available to Plaintiffs.

## III.

### **SUMMARY JUDGMENT EVIDENCE**

In support of this Motion, Defendants rely on the following evidentiary materials:

1) Plaintiffs Original Petition (“Orig. Pet.”), attached as Tab 1.

2) Affidavit of Diane Dishman (“Dishman Aff.”), attached as Tab 2.

3) Affidavit of Landon West (“West Aff.”), attached as Tab 3.

#### IV.

#### UNDISPUTED FACTS

1. The article entitled “Minus One Good Cop” was published in the June 2007 issue of *D Magazine*. (See Tab 1, Orig. Pet., at Ex. “A”).

2. *D Magazine* is a mass media publication. (Tab 2, Dishman Aff., at ¶¶ 2-4; Tab 3, West Aff., at ¶¶ 2-3).

3. The June 2007 issue of *D Magazine* was distributed to The News Group on May 22, 2007 for delivery to newsstands, which was initiated on May 24, 2007. (See Tab 3, West Aff., ¶ 3).

4. The June 2007 issue of *D Magazine* was distributed to the United States Postal Service on May 23, 2007, and the Postal Service began delivery to subscribers that same day. (See Tab 2, Dishman Aff., at ¶¶, 3-4, Ex. “A”).

5. Plaintiffs did not file the above-styled suit against Defendants concerning the Article until May 30, 2008, more than one year its publication of the Article. (See Tab 1, at p. 1).

#### V.

#### ARGUMENTS AND AUTHORITIES

##### **A. Summary Judgment Standard.**

A movant should be granted summary judgment if it demonstrates that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law with respect to the issues set forth in the motion. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Once the movant produces evidence entitling it to summary

judgment, the burden shifts to the non-movant to establish a material fact question. *Lection v. Dyll*, 65 S.W.3d 696, 701 (Tex. App.—Dallas 2001, pet. denied). As set forth in more detail below, there are no genuine issues of material fact with respect to Plaintiffs' claims, and Defendants are entitled to judgment as a matter of law.

**B. Pursuant to Section 16.002 of the Texas Civil Practice and Remedies Code, Plaintiffs' Libel Claims are Barred by the One-Year Statute of Limitations.**

Pursuant to section 16.002 of the Texas Civil Practice and Remedies Code, Plaintiffs' claims are barred by the one-year statute of limitations. Texas has adopted the "single publication rule" in cases alleging libel through the mass media. *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710 (Tex. App.—Fort Worth 1998, no writ)); *Holloway v. Butler*, 662 S.W.2d 688, 690 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.);<sup>1</sup> *see also Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 142 (5th Cir. 2007) (applying Texas law). For statute of limitations purposes, the single publication rule means that a libel cause of action accrues when the magazine is first published. *Holloway*, 662 S.W.2d at 692. In other words, "[o]n that date, the publisher of the statement has made the [allegedly] libelous matter available to his intended audience and the tort is complete." *Stephan v. Baylor Med. Ctr. at Garland*, 20 S.W.3d 880, 889 (Tex. App.—Dallas 2000, no pet.). Generally, "publication" is complete on the day of "mass distribution" of copies of the printed matter—the day when the publisher, editor, and authors have done all they can to relinquish the right of control, title, and interest in the printed matter. *Holloway*, 662 S.W.2d at 692. As this rule applies to publishers, "publication"

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<sup>1</sup> The court in *Holloway* adopted the UNIFORM SINGLE PUBLICATION ACT, promulgated by the American Law Institute, as follows:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition or issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

is complete at the time the issue is mailed to subscribers and distributors if nothing further is done by the publisher.” *Id.* (citing *Stephenson v. Triangle Publ'ns, Inc.*, 104 F. Supp. 215 (S.D. Tex. 1952)). Publication does not, however, encompass retail sales of individual copies or sales of back issues of the printed matter. *Id.*

In *Holloway*, the plaintiff filed suit on February 22, 1978 against Texas Monthly over an allegedly libelous article appearing in the March 1977 issue of *Texas Monthly* magazine. *Id.* at 690. As is customary in the magazine industry, Texas Monthly distributed copies of its issues to subscribers through the postal service and to wholesalers through private delivery companies during the month **prior to** the month indicated on the issue cover. *Id.* Affidavits supporting Texas Monthly’s Motion for Summary Judgment established that the March 1977 issue was distributed on February 17 and 18 of 1977. *Id.* Because Holloway’s lawsuit was filed February 22, 1978, his claims were barred by the one-year statute of limitations. *Id.* at 693.

D Magazine likewise distributes its issues to subscribers and wholesalers in the month **prior to** the month indicated on the issue cover. The June 2007 issue of *D Magazine* was distributed by the printer to The News Group for delivery to newsstands on May 22, 2007. (Tab 3, West Aff., at ¶ 3). The June 2007 issue of *D Magazine* was distributed to the United States Post Office for delivery to subscribers on May 23, 2007. (See Tab 2, Dishman Aff., at ¶ 4). Under the single publication rule, publication of the June 2007 issue of *D Magazine* occurred, at the latest, on May 23, 2007, and any claims of libel arising out of this publication accrued on that day, since that was the day when the publisher, editor, and authors had done all they could “to relinquish the right of control, title, and interest in the printed matter.” See, *Holloway*, 662 S.W.2d at 692. Therefore, the one-year statute of limitations expired on May 23, 2008, and Plaintiffs’ libel claims, which Plaintiffs filed on May 30, 2008, are barred by the statute of

limitations.

**C. Plaintiff's IIED claim is Likewise Barred by the One-Year Statute of Limitations.**

On Page 8 of their Original Petition, Plaintiffs assert that the same published statements which give rise to their libel claims also constitute IIED. (See, Tab 1, Orig. Pet. at p. 8). A libel plaintiff cannot escape the one-year statute of limitations by claiming that the same allegedly defamatory statements also constitute some other cause of action. Texas courts have held that the one-year statute of limitations applies to any tort claim based on the same facts as a libel claim. See *Williamson*, 980 S.W.2d at 710-11; *Martinez v. Hardy*, 864 S.W.2d 767, 776 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Laird v. Texaco Inc.*, 722 S.W.2d 519, 521 (Tex. App.—Beaumont 1986, no writ)). In *Martinez*, the court held that when an alleged claim for tortious interference is “inextricably intertwined” with a claim for defamation, the claim is barred by the one-year statute of limitations. 864 S.W.2d at 776; see also *Moore & Assocs. v. Metro. Life Ins. Co.*, 604 S.W.2d 487, 491 (Tex. Civ. App.—Dallas 1980, no writ) (applying one-year statute of limitations to tortious interference claim because it was “indistinguishable from the claims for libel”). Likewise, in *Gulf Atl. Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 98 (Tex. App.—Dallas 1985), *rev'd on other grounds*, 749 S.W.2d 762 (Tex. 1987), the Dallas Court of Appeals held that because a business disparagement claim was “in its essence a claim for slander,” it was barred by the one-year statute of limitations. And in *Cain v. Hearst Corp*, 1993 WL 304412, at \*1 (S.D. Tex. 1993), the court held that a “false light” claim was subject to a one-year limitations period because, “irrespective of what the plaintiff may call his suit, it is, nevertheless, a suit in libel.”

Because Plaintiffs' claim of IIED is not based on facts independent of their libel claims, they are subject to the one-year statute of limitations. The only factual assertion made in support

of Plaintiffs' claim of IIED is that "Defendants acted intentionally and recklessly with regard to the false statements that they were making about the Plaintiffs." (*See, Tab 1*, Orig. Pet., at pg. 8). Since the same facts are alleged in support of Plaintiffs' libel and IIED claims, the one-year statute of limitation bars all of Plaintiffs' claims. Plaintiffs' IIED claim should therefore be dismissed with prejudice.

**D. Plaintiffs' IIED Claim is Otherwise Barred.**

Finally, Plaintiffs' claim of IIED is not proper because Plaintiffs do not assert factual allegations independent of those made in support of their libel claims. The tort of IIED is, first and foremost, a "gap-filler" tort, which was created with the "clear purpose" of "providing a cause of action for egregious conduct' that might otherwise go unremedied." It cannot be used to supplant other remedies. *See Montemayor v. Ortiz*, 208 S.W.3d 627, 664 (Tex. App.—Corpus Christi 2006, pet. denied) (citing *Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 816 (Tex. 2005)). IIED "has no application when the conduct at issue invades some other legally-protected interest." *Oliphint v. Richards*, 167 S.W.3d 513, 517 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

In *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447 (Tex. 2004), the Texas Supreme Court held that "[w]here the gravamen of a plaintiff's complaint is really another tort, IIED should not be available."<sup>2</sup> Rather, IIED should only be available "in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress." *Id.* (citing *Standard Fruit & Vegetable Co. v.*

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<sup>2</sup> *Zeltwanger* dealt specifically with an intentional infliction of emotional distress claim in connection with a sexual harassment claim, but the court cited several cases applying this theory in the defamation context. 144 S.W.3d at 447. (citing *Provencher v. CVS Pharmacy*, 145 F.3d 5, 12 (1st Cir.1998) (defamation); *Norris v. Bangor Publ'g Co.*, 53 F.Supp.2d 495, 508-09 (D.Me.1999) (defamation); *Barker v. Huang*, 610 A.2d 1341, 1351 (Del.1992) (defamation); *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 316 (Mo.1993) (defamation)).

*Johnson*, 985 S.W.2d 62, 68 (Tex. 1998).<sup>3</sup> Thus, where a claim of IIED is based solely on defamatory conduct, such a claim is not proper.

In *Oliphant*, the Fourteenth Court of Appeals in Houston upheld the granting of the defendant's motion for summary judgment on the plaintiff's claim of intentional IIED arising from the plaintiff's defamation claim. 167 S.W.3d at 517. The court reasoned that, because the plaintiff "did not even attempt to base his [IIED] claim on facts independent of his defamation claim, . . . an [IIED] claim [was] not available." *Id.* Plaintiffs likewise have not offered any facts independent of their defamation claim to support their IIED claim, relying instead solely on statements made in the Article. (*See, Tab 1, Orig. Pet., at p. 8*).

## V.

### CONCLUSION

The Article was first published, at the very latest, on May 23, 2007, when it was delivered to the United States Postal Service, since at that point, the publisher, editor, and authors had done all they could to relinquish the right of control, title, and interest in the printed matter. As libel is governed by the one-year statute of limitations, Plaintiffs' libel claims, which were filed on May 30, 2008, are barred. Further, Plaintiffs' claim for IIED, which is based on the same factual allegations as and inextricably intertwined with Plaintiffs' libel claims, is barred by the one-year statute of limitations. Finally, where, as here, a claim for IIED is based upon the same facts as a libel claim, the claim, regardless of limitations, must fail as a matter of law. Based upon the foregoing, Defendants' are entitled to summary judgment on each of Plaintiffs' claims.

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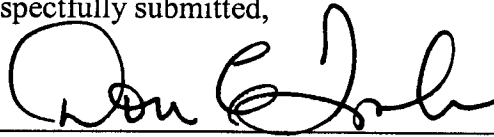
<sup>3</sup> *Hoffman-La Roche* also holds that IIED cannot be utilized to evade statutory limitations. *Id.*

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendants Alberto Pagan a/k/a Nicolo Novello, Shana Lopez, Trey Garrison, D Magazine Partners, LP d/b/a D Magazine, Allison Media, Inc., Magazine Partners, L.P., and DMAG, Inc. request that the Court:

1. Grant this Motion for Summary Judgment in its entirety;
2. Dismiss each of Plaintiffs' claims with prejudice; and
3. Grant Defendants such other and further relief to which they may be entitled at law or in equity.

Respectfully submitted,



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**ATTORNEYS FOR DEFENDANTS**

FIAT

Hearing is set on the above referenced cause of action on the 23 day of September  
2008, at 1:30 o'clock p.m. w/ Judge Sims - Auxiliary Ct RMLEA

Anna C. Cuddy  
Judge Presiding

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument has been served on Plaintiffs' counsel of record, as indicated below, on this 3rd day of July, 2008.

David A. Schiller  
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Plano, TX 75023  
Fax: (469) 467-9600

*Via Certified Mail, Return Receipt Requested*

  
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Donald C. Templin