UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FELD ENTERTAINMENT, INC.	:	
Plaintiff,	:	
v.	:	**Case No. 07-1532 (EGS/JMF)**
ANIMAL WELFARE INSTITUTE, et al.	:	
Defendants.	:	

PLAINTIFF FELD ENTERTAINMENT, INC.'S OPPOSITION TO THE ORGANIZATIONAL DEFENDANTS' MOTION FOR A PROTECTIVE ORDER

OPPOSITION EXHIBIT C

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JAN POTTKER, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	**1999 CA 008068 B**
v.	:	**Calendar 3**
	:	**Judge Brook Hedge**
KENNETH J. FELD, *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Introduction

This case arises from an article published by plaintiff Jan Pottker in *Regardie's* magazine that discussed Irvin Feld and defendant Kenneth J. Feld, Irvin Feld's son and successor at the helm of the Ringling Bros.-Barnum & Bailey Combined Shows ("Ringling"). Angered and concerned that Pottker would write further about his family and the circus, defendant Feld hired Clair E. George, the then former Deputy Director of [covert] Operations at the Central Intelligence Agency, and Robert Eringer, an author, publisher and attorney, to divert Jan Pottker from attempting any further publications about the Feld family or the Ringling Circus.

Before the Court is the Feld Defendants' Motion for Summary Judgment on the remaining claims against them from plaintiffs' Third Amended Complaint ("TAC"): Count I – Invasion of Privacy; Count III – Intention Infliction of Emotional Distress ("IIED"); Count IV – Tortious Interference with Prospective and Existing Business Relations; Count V – Fraud; Count VI – Civil Conspiracy; Count IX – Breach of

Fiduciary Duty; and Count X – Inducement to Breach Fiduciary Duties.[1] Defendants Joel Joseph and National Press Books have also filed for summary judgment. Plaintiffs oppose the motions contending material facts are in dispute. The filings have included voluminous material from discovery to support the various positions of each side. Defendants contend that the record establishes no material facts in dispute and that, in any event, the claims are time-barred.[2] For the reasons that follow, the Court denies the Feld Defendants' motion as to plaintiffs Pottker and WCI, and grants the motion as to plaintiff Fishel. The Court grants the Motion for Summary Judgment filed by Defendants Joel Joseph and National Press Books.

Factual Background

Plaintiffs in this case are Jan Pottker ("Pottker"), the corporation of which she is President, Writer's Cramp, Inc. ("WCI"), and her husband, Andrew S. Fishel ("Fishel").[3] The individual plaintiffs are residents of Maryland, and WCI is incorporated in the State of Maryland.[4] The Defendants are: the Feld Defendants,[5] as well as Clair E. George ("George"), Robert Eringer ("Eringer"), National Press Books ("NPB"), and Joel D. Joseph (who was with NPB) ("Joseph").[6]

Jan Pottker is a published author. In July 1988, plaintiff wrote defendant Kenneth Feld that she was writing a book about the management style of young executives titled

[1] The suit was filed November 10, 1999. The Third Amended Complaint was filed January 14, 2002. A separate order will issue regarding the motions to exclude expert witnesses.
[2] Defendant George joined in the Feld Defendants' Motion. Defendant Eringer served a document titled "Dispositive Motion." It was either not sent to the clerk's office for filing or was not accepted for filing because it is not on the docket. The Court will treat the document as one for joining in the Feld Defendants' Motion.
[3] Unless otherwise specified, when the opinion refers to "plaintiff," it is to Jan Pottker.
[4] Plaintiffs had full-time employment with separate federal agencies in the District of Columbia. Plaintiff's office for WCI, however, was in her home in Maryland.
[5] The "Feld Defendants" include: Kenneth J. Feld; Feld Entertainment, Inc.; Ringling Bros.-Barnum & Bailey Combined Shows, Inc.; Sells-Floto, Inc.; and I&K Trading Company Limited Partnership.
[6] During the time period in question, none of the defendants resided, or were incorporated, in Washington, D.C. Some or all of the defendants, however, engaged in business in Washington, D.C.

Taking Charge: A New Generation of American Business Leaders Shapes America. (This book was later called *Born to Power: Heirs to America's Leading Businesses* ("*Born to Power*")). As she explained in the letter, the book was to focus on those who succeeded a parent who was a chief executive of a nationally-known business. She further stated "you are a natural for inclusion . . . because your management style epitomizes today's thrust toward strengthening employee creativity and progress."[7] She indicated she wanted to devote a chapter to him and provided a list of questions which were oriented towards what made for a successful leader of such a company, including how his father's role may have played in that development. She included a brief biography indicating she had published articles and books. Defendant Kenneth Feld granted the requested interview.

On October 22, 1989, plaintiff wrote her literary agent, Ron Goldfarb, stating that she had interviewed defendant Feld's sister, Karen Feld, that she had gathered "good" information that would be suitable for a local magazine, preferably *Regardie's*. She indicated that no one had uncovered the suit between the Feld siblings, Kenneth's and Karen's father's (Irvin Feld) "controlling personality," Kenneth Feld's "wild adolescence, or the mother's suicide." [8] She further indicated that she wanted local exposure, that this could be published quicker than the book, and, if she wanted to leave her salaried job to write full-time, she would need to sell magazine pieces.[9]

[7] July 5, 1988 Letter from Pottker to Feld. *See* Defendants' Memorandum in Support of their Motion for Summary Judgment ("MSJ"), Volume 1, Tab 1, Exh. 1.
[8] October 22, 1989 Letter from Pottker to Ron Goldfarb, MSJ, Volume 3, Tab 24. In January 1990, plaintiffs Pottker and WCI entered into a contract with Barron's Educational Series, Inc., to write *Born to Power*. TAC, ¶ 20.
[9] October 22, 1989 Letter from Pottker to Ron Goldfarb, MSJ, Volume 3, Tab 24.

In February 1990, plaintiff requested a further interview with defendant Feld. She indicated it was to shadow his management style but she wanted to confirm facts from the prior interview. He declined, but she did meet with Allen J. Bloom ("Bloom"), a senior officer and vice president for marketing in a Feld company. Plaintiff informed Bloom that *Regardie's* magazine had contacted her for first serialization rights of her proposed book and that it wanted to profile Feld in a feature story.[10]

The *Regardie's* article was published in August 1990, under the title *The Family Circus*, with the description: *Find a Tale of Illicit Love, Suicide, and Sibling Warfare*. The article disclosed what could be said to be highly personal family matters and has been described as scandalous. It appears to be undisputed that Kenneth Feld was extremely upset by the article, developed an intense dislike for plaintiff, and wanted to keep her from publishing about the circus or his family again.

In May or June 1990, plaintiff and David Cutler ("Cutler") were discussing her writings regarding the circus.[11] Cutler was a published author, had engaged in free-lance public relations work, including for the circus, and, by this point, had an independent literary agency. According to plaintiff, Cutler was "an established and well-regarded figure in the Washington literary scene."[12] On June 27, 1990, plaintiff sent Cutler her draft for *Regardie's* because she said she was not satisfied with the edits done by the magazine's editors.[13] She also discussed the idea of *Highwire: The Unauthorized Biography of Irvin Feld and His Three Ring Circus* ("*Highwire*"), and they discussed his

[10] TAC, ¶ 20.
[11] It is unclear who approached whom first. The TAC suggests Cutler approached Pottker, ¶ 21. Cutler's deposition suggests Pottker contacted him perhaps because of his background with the Circus. Deposition of David Cutler ("Cutler Dep.") at 50-52.
[12] TAC, ¶ 21.
[13] Cutler Dep. at 51.

being her agent for the circus book. On September 11, 1990, she and WCI entered into a contract with Cutler for him to represent her as her literary agent on the *Highwire* proposal.[14]

Also around the same time, in May or June 1990, Robert Eringer returned from Monaco and contacted Cutler who had previously been Eringer's literary agent. Eringer stated "he was interested in working on various book projects together, either as an author or potentially as a publisher, and that he was even contemplating his own publishing house."[15] At Eringer's request, Cutler worked up a budget. As part of these discussions, Eringer inquired of Cutler as to who Cutler knew in the literary Washington world and "some idea as to what projects were in the marketing pipeline to see if there might be a possible fit" for their publishing venture.[16] These discussions entailed disclosing Cutler's confidential information, including identifying Jan Pottker as a potential client and that they were discussing publishing a book on the circus.[17] Specifically, in early fall 1990, most likely in September 1990, Eringer asked to look at the *Highwire* proposal indicating he might be interested from the publishing standpoint, and Cutler gave Eringer a copy.[18] After that, Eringer suggested editors who might be interested in publishing such a proposal.[19]

It is not clear how long the discussions regarding the publishing venture lasted. Cutler indicated at one point it was not long,[20] but there is also record evidence that the

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[14] Ron Goldfarb remained her agent for any other proposals.
[15] Cutler Dep. at 39.
[16] *Id.* at 50-51.
[17] *Id.*
[18] *Id.* at 305-07. Cutler did not receive a final copy of the *Highwire* proposal until that time frame. Cutler did not tell Pottker he gave Eringer a copy because he had discussed Eringer as a possible publishing vehicle and she had told Cutler to pursue all avenues. *Id.*
[19] *Id.* at 388-90. There was also evidence that Eringer asked for a copy in October 1990. *Id.* at 584).
[20] *Id.* at 40-41.

discussion got serious in the Fall of 1990 on the issue.[21] Cutler also told Pottker about these discussions in terms of Eringer being interested in a publishing venture as another possible option.[22] There was no definitive termination of the discussions. Eringer apparently indicated that starting up a company was too expensive and he would rather align himself with an existing venture (which he subsequently did). Cutler assumed when Eringer suggested publishing houses for *Highwire* that he was not going forward with Cutler in a publishing business at least for that book. In any event, they continued to work together on ideas. It is a factual issue as to how close Eringer and Cutler were in terms of defining themselves as a partnership, but Cutler felt secure enough in the discussions to share client information and Jan Pottker's *Highwire* proposal with him. Cutler also indicated Eringer would share in any commission Cutler received from *Highwire*, if the publisher was one Eringer had recommended.[23] Cutler also indicated he never would have shared the information with Eringer if he thought Eringer was going to give it to others.[24]

On September 26, 1990, Cutler sent the *Highwire* proposal to 14 publishers.[25] Of those, three were recommended by Eringer, including Ned Chase of Charles Scribner & Sons (a part of Macmillan publishing house). Eringer did not know who the other publishers were to whom Cutler sent the proposal.[26] Of those three that Eringer recommended, Cutler included Eringer's name in the cover letter indicating he had referred Cutler to the editor.

[21] *Id.* at 298, 384-87.
[22] *Id.* at 298-99.
[23] *Id.* at 720.
[24] *Id.* at 707, 719.
[25] *Id.* at 376.
[26] *Id.* at 710-12.

All publishing houses except one rejected the proposal without further discussion.[27] The only one who showed interest was Ned Chase ("Chase") at Charles Scribner & Sons.[28] Chase called Cutler on October 2, 1990, expressing interest but indicating the proposal was cryptic and that he wanted to see a chapter or two.[29] It appeared Cutler was surprised because the proposal was as comprehensive as any other he had seen, plaintiff had already published a lengthy magazine article so the research had been done, and Pottker was a published book author. Cutler and Pottker went to New York to talk with Chase. She and Cutler talked further and, in December 1990 or in early 1991, she concluded it was not worth the time expenditure to produce the work requested by Chase since there was no guarantee of it being published.[30]

Eringer and Cutler did not have any direct contact between January 1991 and April 1993.[31] In April 1993, Eringer contacted Cutler about plaintiff. They discussed that Eringer and Pottker had similar interests in the *National Inquirer* and she was going to be at the Potomac Book Club discussing her work.[32] Eringer asked Cutler to open the door and let her know he would be coming and wanted to talk with her.

Before turning to the events of 1993 forward, it is necessary to place in context Eringer's dual identity. Eringer and defendant Clair George met in 1988 and became

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[27] For example, the letter from the editor at Doubleday indicated that there was not enough to expand the *Regardie's* article into a book. *Id.* at 555-56. It appears from the record that, if a book is sent to publishing houses by one agent, another agent will not "touch" the proposal. *See* Deposition of Jan Pottker ("Pottker Dep.") at 2539.
[28] Cutler Dep. at 545. Eringer said he recommended Chase because he had sent Chase a book not long before to consider for publication—unsuccessfully. Deposition of Robert Eringer ("Eringer Dep.") at 470.
[29] Cutler Dep. at 546-47. The TAC contends that George's notes show that Feld learned of Chase's interest by October 3, 1990. TAC, ¶ 27.
[30] Cutler Dep. at 552-53. At this point, plaintiff also had a separate contract through her agent to submit her manuscript for *Born to Power: Heirs to America's Leading Industries* by April 1991, to the publisher Barron's Educational Series, Inc. Pottker Dep. at 4051. For various disputed reasons, this deadline was extended to Spring 1992. Pottker Dep. at 4051-52. During this time, Pottker changed her literary agent at William Morris Agency in New York from Ron Goldfarb to Marcy Posner.
[31] Cutler Dep. at 587.
[32] *Id.* at 590; Eringer Dep. at 98-100.

friends.[33] In or by October 1990, Eringer, through his contacts with defendant George was hired, as was George, as an "independent contractor" for Feld.[34] As discussed earlier, Feld was upset over the *Regardie's* article and did not want any further publications by Pottker on the topic. George contacted Eringer for suggestions on how to handle the situation.[35] Eringer suggested having someone write an alternative book that would be positive about Feld and the circus.[36] The project was called "Preempt" because the book that Feld commissioned, *Starmaster, Dreammaker,* would only be published if Pottker's book were published. Eringer also suggested a writer, Frank Martin, who could do the work.[37] Eringer was paid $1500 a week to coordinate the in-house publication. An additional, and it is fair to say, more important agenda was to "divert" Pottker from publishing anything about the circus.[38] It is unclear from this record when Eringer and George first talked about Pottker, but George told Eringer about the *Regardie's* article, and Eringer told George about Pottker's planned book as a result of his conversations with Cutler, provided George with a copy of the proposal, and told George that Ned Chase was interested in the proposal.[39]

On October 10, 1990, Feld and I&K Trading Company entered into a contract with Clair George to provide "a quality nonfiction book about the Feld family for worldwide publication."[40] George was to be paid $3,000 a week starting October 15,

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[33] Eringer Dep. at 58.
[34] *Id.* at 59, 60, 75.
[35] *Id.* at 87.
[36] *Id.*
[37] *Id.* at 87. Later Richard Cotes was brought in to polish Martin's research into manuscript form.
[38] Plaintiff contends that Feld wanted her destroyed and not publishing anything again. This claim is disputed. Defendants fronted another publication by Pottker and testified that they were only trying to divert her from circus publications. Such a dispute, however, is left to the jury.
[39] *Id.* at 467, 471, 526. Plaintiffs contend the defendants used her proposal to rework it to write their book, *Starmaster, Dreammaker.*
[40] TAC, Exh. 6. The contract identified the to-be author as Frank W. Martin.

1990 through December 31, 1991, when the contract would be reviewed. Eringer met with Feld twice, as well as with Charles Smith ("Smith") from the Feld group. Smith was also very concerned about the *Regardie's* article and its impact on the Feld businesses. Eringer talked with and sent memoranda to George regularly on what he learned about Pottker.[41] George paid him with funds from a Feld entity or entities.[42] Needless to say, this was all done without any disclosure to Pottker and it appears without disclosure to Cutler.

In April 1993, George asked Eringer to contact Pottker. She was speaking at the Potomac Library for the Potomac Book Club on her recently published book, *Born to Power*. As Eringer testified, he was paid to contact her and to keep contact and report back what she was doing.[43] He introduced himself, bought her book that she was discussing, discussed the publishing world and, at some point, may have described himself as a "book packager."[44] Pottker testified that he asked to be her agent, (which she refused) and that, at the first or second meeting, they agreed to become "partners."[45] The agreement was that he would work for her to help her earn money by helping her select topics, refine the topics and package the topics.[46] There was no written agreement at that time. They "shook hands on it."[47] The "relationship," the extent and nature of

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[41] *Id.* at Exh. 4. Eringer's memoranda report on Pottker's writing activities, as well as paths taken and progress in diverting her from writing about the circus.

[42] Deposition of Clair George ("George Dep.") at 660. In an affidavit attached to the TAC, George said he was paid by Feld Entertainment or its affiliates. TAC, Exh. 3, ¶ 4. (George Affidavit). The affidavit is dated June 1, 1998, before the complaint in this case was filed. Defendants' answers to interrogatories indicate that I&K Company was the sole source of funding. *Id.* at ¶ 7. Given that George's affidavit, a dispute remains as to the source of the Feld funds.

George's declaration is silent as to any surveillance of Pottker or her family, although it does talk of surveillance of the "activists of various animal rights groups." *Id.*

[43] Eringer Dep. at 100.

[44] *Id.* at 97.

[45] Pottker Dep. at 1227-31.

[46] *Id.*

[47] *Id.* at 1230.

which is disputed, lasted several years, although there were concentrated discussions in 1994.

On July 13, 1994, WCI, and Eringer entered into a written agreement to publish *Celebrity Washington: Who They Are, Where They Live and Why They're Famous* ("*Celebrity Washington*") through Enigma Books, in which Eringer had an interest.[48] Pottker terminated the contact in the Fall of 1995, because Eringer was doing things that she could only conclude were to delay publication and were "ludicrous."[49] They remained in contact and she still sought some advice from him.

In the Spring of 1997, she learned that there had been a "blood bath" in the Feld company or companies and one casualty was Charles Smith with whom she had talked when she interviewed Feld in researching the *Regardie's* article.[50] Pottker, however, did not then contact Smith for information.[51] In 1998, however, Charles Smith contacted Pottker and told her of Eringer's role.[52]

In the intervening years before Eringer's exposure, plaintiff continued to express interest in writing about the circus. In late 1993 and early 1994, she pursued an article, *Chills and Spills for Children of All Ages,* which concerned child labor in the circus and the alleged violation of federal laws. Initially, *Mirabella* magazine accepted it for publication, but later declined to publish it. The reason given was that there were not enough direct quotes from circus employees.[53] She also tried to sell it (unsuccessfully) to other publications, such as *Redbook* and *USA Today*. According to Eringer's memoranda

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[48] *Id.* at 5834.
[49] *Id.* at 5890, 5869. The final straw was when Eringer suggested putting the guidebook into verse.
[50] *Id.* at 6150.
[51] *Id.*
[52] *Id.* at 6153.
[53] Deposition of Gay Bryant ("Bryant Dep.") at 27. Bryant testified that because of the lack of direct quotes, the story was not verifiable and that no one asked him not to publish, and that he would not have declined to publish if asked, if the story were otherwise acceptable.

to George, Pottker was surprised that she was hitting such roadblocks and believed that the circus had blocked all doors.

As discussed, in July 1994, WCI and Eringer entered into an agreement to publish the celebrity guidebook. The idea for the guidebook was something that Pottker had thought about on her own.[54] Eringer paid for the research. She contends that Eringer diverted her from other writing by focusing her on *Celebrity Washington*.[55]

In addition, Eringer told Pottker that NPB was interested in a book about the Mars candy family.[56] This was part of the project to divert her writing from the circus.[57] In November 1994, NPB and WCI entered into an agreement to publish *Crisis in Candyland: Melting the Chocolate Shell of the Mars Family Empire*.[58] Pottker's agent, Marcy Posner of the William Morris agency negotiated the agreement.[59] NPB agreed to pay a $25,000 advance for the book. When the contract was entered into, Pottker did not know that Eringer had entered into a "co-publishing" agreement with NPB.[60] Eringer

[54] Pottker Dep. at 3600-01.
[55] *Id.* at 3597-3600.
[56] The record is unclear as to the status of NPB when these discussions were occurring. NPB had been publishing. Joel Joseph testified that it was out of business in 1995. Deposition of Joel Joseph ("Joseph Dep.") at 1291-93. But it is alleged that its charter as a Maryland corporation was revoked in 1993. *See* TAC, ¶ 15. Joseph also testified that he did not know of Eringer's connection to Feld. Joseph Dep. at 77-79. In his motion for summary judgment, Joseph, on his behalf and that of NPB, submits his affidavit and that of Eringer's stating again that Eringer did not tell Joseph of the Feld connection. Joseph also attests that NPB closed its doors on December 31, 1995, and stopped distribution of *Crisis in Candyland* earlier that month.
[57] *See* Eringer Memo #2 attached to the TAC.
[58] Before getting involved, Pottker talked with the editors, Joel Joseph and Alan Sultan, and others about NPB. They had just published a book by Senator Paul Simon. Pottker Dep. at 5522-28.
[59] Deposition of Marcy Posner ("Posner Dep.") at 141-42.
[60] There is some evidence that she did learn this later while Eringer was making edits that she thought were unprofessional and she complained to Joel Joseph. Pottker Dep. at 1291-93. Joel Joseph said he could not stop Eringer from editing because of an arrangement and, when asked, refused to discuss with Pottker what the arrangement was with Eringer. *Id.* Both Eringer and Joseph have stated under oath that Joseph had no knowledge of the broader plan with Pottker and Feld's role.

lent them the advance which would be paid back with sales.[61] Eringer in turn received the money from George through I&K Trading, a Feld corporation.[62] The Mars family book was published but was pulled from the shelves of Crown bookstores because of a copyright infringement of a photograph used in the book. Joel Joseph did not respond to Pottker's satisfaction, and she ended up paying the fee for the photograph, but, by then, the books had been pulled from the shelves.[63] William Morris had the rights to sell the Mars family book in paperback and abroad, but such efforts could be said to be unsuccessful.[64]

Between 1995 and 1997, Pottker worked on another proposed circus publication, *Showmen, Shamans, Spinmasters: The Untold Story of the Owners of the Greatest Show on Earth*, that was an extensive book proposal about the history of the circus. At this point, plaintiff was having few conversations with Eringer but they did talk around the Spring of 1997.[65] According to Pottker, Eringer pushed her to do a book on the circus and he suggested ideas, which Pottker did not appear to follow.[66] Marcy Posner ("Posner") from William Morris was her agent on this project. Around October and November 1997, Posner sent the proposal to ten potential editors at well-established publishing houses.[67] At that time, plaintiff gave a copy to Alan Sultan (who had been

[61] Eringer testified he had had conversations with Joel Joseph about investing in NPB, but Eringer said he would rather just invest in a promising book. Eringer Dep. at 489. The Mars family book fit that category. He knew that NPB could not afford $25,000. *Id.* at 490.
[62] Deposition of Charles Smith ("Smith Dep.") at 494-96. Smith discussed the "Mars" book with Feld, and the money came from I&K Trading through George.
[63] Pottker Dep. at 4991- 95.
[64] *Id.* at 5779, 5782.
[65] *Id.* at 6147-48. At this point, Eringer supposedly was not receiving money from Feld entities but still sent memoranda to George.
[66] *Id.* at 6147-6148, 6153
[67] *Id.*. at 6052, 6150.

with NPB) who later told her he had let Eringer see a copy.[68] The proposal was rejected by all.[69] Shortly thereafter, William Morris ceased representing plaintiff. Marcy Posner testified it was because of the direction plaintiff had taken in her writing, that it was not a direction Posner wanted to take, and Posner had not made a lot of money from ventures with plaintiff.[70]

It is unclear when Feld ceased to pay Eringer for this project. There is some evidence in the record that George's last payment to Eringer for the Pottker project was May 10, 1994.[71]

As indicated previously, in November 1998, plaintiff was contacted by Charles Smith, a former Vice President for Finance and Chief Financial Officer of defendant Feld Entertainment, Inc., who had been terminated by Feld. Smith ended up suing Feld around March 1998.[72] Pottker said that Smith told her that Feld despised her, that Feld had hired someone to divert her writing away from the circus, and had someone start some type of surveillance of her. Smith thought her telephone was tapped, and that her house "may" have been broken into. He had a videotape of her and weekly reports on her

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[68] *Id.* at 6143-46.
[69] Posner Dep. at 190-211. The reasons given were of the same theme, including that the book would not have a wide enough audience for the topic and the Felds did not match the reputation of P.T. Barnum and, therefore, would not be successful. *Id. at* 203. Posner also testified she had no reason to believe that someone tried to block the publication. *Id.* at 210-11. Posner did not send it to smaller publishing houses "because the overwhelming response from the larger publishers was there wasn't much of a market," and she wanted plaintiff to focus on those things that would make money. *Id.* at 216-17. Posner represented Pottker on a proposal about the Rockefeller cousins: *The Dynasty Today*, (*Id.* at 216), which was prior to the book on the Mars family (*Crisis in Candyland).* Pottker Dep. at 2538. Posner sent the proposal to approximately twenty-three editors. *Id.* at 1583. Plaintiff was offered a $40,000 advance for the book, but Posner recommended holding out for six figures because $40,000 would not cover the costs of researching such an extensive piece. Pottker agreed and followed her advice. *Id.* at 2540. No contract was consummated regarding the book. Eringer was aware of these events and suggested to George that they use this as a hook to further divert Pottker by using a Washington, D.C. area publisher to commission her to write about the Rockefeller family. As Eringer stated: "The Rockefeller book will side-track Pottker for many months to come – probably a couple of years – and this will mean she must relegate any possible Ringling book project to a back-burner." TAC, Exh. 4, Memo #2.
[70] Posner Dep. at 340-41.
[71] Eringer Dep. at 658.
[72] Smith Dep. at 631.

activities.[73] In short, he indicated people had entered her life to dupe her to keep her from writing about the circus. After that, Pottker had no more contact with Eringer. Shortly after Smith's revelations to Pottker, plaintiffs secured the Clair George affidavit that was filed in Smith's suit. That affidavit attached the memoranda that had been written about Pottker for Feld.[74] This lawsuit was then filed November 10, 1999.

The filings are voluminous, but the core facts relevant to the claims are set forth above and revolve around the admitted plan to divert plaintiff from authoring any more works on the circus. The motion seeks judgment on remaining claims contending that the material facts are undisputed and legal barriers block further prosecution of plaintiffs' claims.

Discussion

Standards for Summary Judgment

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Super. Ct. Civ. R. 56(c); *Chang v. Inst. for Public-Private P'ships, Inc.*, 846 A.2d 318, 323 (D.C. 2004). "The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, after which the burden shifts to the non-moving party to designate specific facts showing that there is a genuine issue for trial." *LaPrade v. Rosinsky*, 882 A.2d 192, 196 (D.C. 2005). To satisfy this burden, the moving party must inform the trial court of the basis for its motion and identify "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it

[73] Pottker Dep. at 123-28.; *see* TAC, ¶ 25. Plaintiffs contend they saw a car in 1990 and 1991, sitting outside their house approximately six times. When approached, the car left.
[74] Pottker Dep. at 522-23.

believes demonstrate the absence of a genuine issue of material fact." *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in her favor. *Herbin v. Hoeffel*, 806 A.2d 186, 191 (D.C. 2002). After the movant shows "that there is no genuine issue of material fact, the non-moving party then has the burden to show that an issue does exist." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Graff v. Malawer*, 592 A.2d 1038, 1041 (D.C. 1991) (quoting *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 252 (1986)) (internal quotations omitted). Summary judgment is proper when the non-moving party fails to establish an essential element of his case on which he bears the burden of proof. *Pannell v. District of Columbia*, 829 A.2d 474, 478 (D.C. 2003). As stated by the Court of Appeals:

> Where the moving party supports the motion for summary judgment with . . . deposition responses or other evidence submitted under oath, the opposing party may not rely on general pleadings or a denial, but rather must respond similarly by [providing] material facts under oath which raise genuine issues of fact for trial.

Maupin v. Haylock, 931 A.2d 1039, 1042 (D.C. 2007) (citing *Tobin v. John Grotta Co.*, 886 A.2d 87, 90 (D.C. 2005)). Thus, statements that are not made under oath are insufficient to defeat a motion for summary judgment. *Potts v. District of Columbia*, 697 A.2d 1249, 1252 (1997).

Similarly, affidavits filed pursuant to subdivision (e) of Rule 56 are insufficient to meet the burden of showing no genuine factual dispute on motions for summary judgment, where affidavits contain merely conclusory assertions and hearsay. *Spellman v. American Sec. Bank*, 504 A.2d 1119, 1123 (D.C. 1986); *Puma v Sullivan*, 746 A.2d 871,874-75 (D.C. 2000).[75]

The history of the development of the summary judgment procedure shows that it is intended to permit "a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried." *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137, 1145 (D.C. Cir. 1970).

Global Issues Underlying Most or All Claims

As discussed, there are basic rules as to how a party may establish or defeat whether something is a material fact not in dispute. Because of how this motion has been briefed (by all parties), it is necessary to address global issues as they relate to these principles and the effect as applied to the counts and the record before the Court.

Plaintiffs oppose the summary judgment motion with a voluminous submission and three key themes. First, they note that Eringer did not file an answer or affirmatively deny allegations in the Third Amended Complaint. They, therefore, contend the complaint allegations are taken as unopposed and are deemed admitted. Second, plaintiffs argue throughout that no denial done under oath may be treated as such because this was a covert operation where deception was required. In their view, the jury must

[75] Plaintiffs' statement of facts in dispute and opposition suggest plaintiffs have had insufficient discovery. Prior orders of the court closed the door on what the court determined was wide-ranging, irrelevant discovery. As can be seen from the record, voluminous discovery has occurred.

examine each "no" and determine whether it is credible.[76] Third, they contend that "hearsay evidence opposing summary judgment "may be considered if the out-of-court declarant could later present that evidence through direct testimony, i.e. in a form that would be admissible at trial."[77] In certain respects, the last two arguments merge.

First, the issue of Eringer's response to the Third Amended Complaint is answered by Judge Long's June 23, 2003 Order Denying Eringer's Request for Leave to Amend his Answer to Third Amended Complaint. Eringer apparently moved to England a few days before the response to the latest complaint was due. He filed, without leave of court and late, a "Reply" to the complaint. Eringer was represented by counsel the first two years of the case, and the lawyers had filed motions to dismiss on his behalf. Thus, although he was represented by counsel for a good portion of the preliminary stages of this suit, Eringer does not appear to have been represented after moving to England just before the answer was due and is not represented now. When the motion came before the court to late file the answer to the Third Amended Complaint, the court would not let him file the answer out of time to amend his "reply" that he submitted without leave of court. This does not end the discussion, however, as plaintiffs seem to suggest.

It was clear Judge Long was trying to move the case along and that Eringer was disputing the allegations. Judge Long said:

> [I]n a complex case such as this, a highly important factual contribution of a defendant is what he says under oath at his deposition. This is where his *final* position on the allegations is clarified and probed by the opponents. Allowing the defendant to shift or re-draft theories of his defense or approaches to the allegation is simply too tardy.[78] [emphasis added].

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[76] See Plaintiffs' Opposition to Motion for Summary Judgment ("Plaintiffs' Opp.") at 74-76.
[77] Plaintiffs' Opp. at 9 (citing *Williams v Borough of West Chester, Pa.*, 891 F.2d. 458, 466 (3rd Cir. 1989)) [internal quotation marks omitted].
[78] *Id.* at 2. That the court was not trying to hold defendant to a technical denial is also evident in that the case law of this jurisdiction is obviously well-known, that leave to amend filings is freely given absent

Depositions are one tool used to pierce the pleadings and, by Judge Long's order, cement Eringer's response to the latest complaint. Thus, plaintiffs may not establish a fact as disputed merely by treating Eringer's lack of a formally filed answer to the third complaint as an admission.

As to the second issue, plaintiffs make a valid point that, at least as to the principals, candor has not been a strong suit. The predicate of the scheme was deception. But that does not mean that every statement must be discounted and submitted to the trier of fact. There, however, is an admitted course of action that is uncontested and does form the foundation for the claims. As can be discerned from the factual background set forth above, the following key uncontested facts emerge from witnesses under oath and form a factual predicate for all the counts: (1) Feld did not want Pottker to write about his family or the circus; (2) Feld wanted Pottker diverted from writing about the circus; (3) Feld contracted with George to commission the writing of a favorable book about the circus to be used if Pottker appeared able to publish her proposed book on the circus; (4) George, with Feld's knowledge, consent and money, hired Eringer to carry out the twin goals to see to the production of the shadow book and to divert Pottker from writing about the circus; (5) Eringer sought out and befriended Pottker to obtain information about her writing and plans and to secure her trust as to his value to her in the publishing world so that he could provide information to Feld; (6) Eringer reported his information and findings to George through memoranda and discussions; (7) Eringer received the

prejudice, and the court undertook no analysis of the prejudice to either side if the motion were granted or denied. By indicating the depositions under oath would seal Eringer's position to the complaint, it is evident that the judge was allowing him to amend in this practical way. There was no question that Eringer was denying the allegations, so any suggestion of being lulled by this order is unrealistic and without foundation.

money he needed to carry out plans to divert, such as securing the money from Feld entities to partner with National Press Books to co-publish the Mars family book, *Crisis in Candyland,* by providing NPB the money that went for Pottker's advance and securing the right to edit the book, but all in confidence with NPB without Pottker's knowledge; (8) Eringer entered into a written agreement with Pottker to publish *Celebrity Washington,* but made editorial suggestions that, under any reasonable interpretation, were designed, at best, to impede or delay the publication; and (9) Eringer had to listen to "all of Pottker's life plans" because he was paid to do that.[79]

These undisputed facts form a sufficient basis to deny judgment to the defendants on all of the counts brought by Pottker and WCI against the Feld defendants.[80] The resolution of aspects of these counts (above and beyond the bare minimum to survive the motion) and the privacy counts brought by Pottker and Fishel is dependent on the inferences and evidence regarding the texture of the undisputed facts. For example, Feld wanted Pottker's writings on the circus stopped. Plaintiffs contend Feld's plan went farther; he wanted to destroy her writing career entirely and inflict pain on her in retribution for the harm and hurt she caused his family with the *Regardie's* article. Defendants deny this inference and contend that it was all about business and keeping her from hurting the circus and Feld.

Celebrity Washington, however, did not concern the circus. It was a guidebook to Washington area celebrities' homes. Eringer, Pottker's contractual partner on the publication, first suggested that the photographs of the homes that had been taken be

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[79] Eringer Dep. at 628.

[80] This would include: Count IV Tortious Interference with Business; Count V Fraud; Count VI Civil Conspiracy; Count IX Breach of Fiduciary Duty (which will be addressed later separately); and Count X Inducement to Breach Fiduciary Duties.

abandoned and replaced with sketches. Near the book's completion, he suggested that the text be put into verse. Were these merely tactics to delay publication to keep plaintiff occupied or to sabotage the publication, thereby hurting Pottker professionally and, therefore, personally, or both?[81] Was the information passed on to George and Feld about Pottker's feelings and personal information to better assess the success of their plan to divert her, satisfaction over the success in diverting her, just savoring some element of control, or all three and more? These are classic motive and intent issues left for the trier of fact.

Another central disputed issue is the nature of the legal relationship established, if at all, between Eringer and Pottker prior to the *Celebrity Washington* contract. As discussed, in 1993, Eringer approached Pottker at a book reading at the Potomac, Maryland library. He admits he may have identified himself as a book packager then or at the subsequent meeting. They agree he was to help her with topics for publications. There was no written agreement and he was not her literary agent. But that does not end the inquiry. Whether a reasonable person would conclude, applying the facts to the legal elements of the claims, that a position of trust was established based upon Eringer's words and deeds and, possibly, industry practice, is a question of fact and credibility. At a minimum, however, it was the means by which defendants' could engage in conduct that might constitute tortious interference with plaintiffs' business.

Then there is the heart of this case – defendants' claimed undisputed facts regarding the attempted publication of *Highwire* in October 1990. It is undisputed Eringer returned from abroad and contacted Cutler, Pottker's agent on the proposal, to

[81] Another example is Eringer's relaying information to Robert Lauder that Pottker was contemplating a book about Estee Lauder. Was this Eringer being self-serving to secure more "business" for himself or was it carrying out a plan to block Pottker's writings and destroy her writing career, which for her was her life?

discuss partnering with him on creating a publishing house. It was around the same time as Pottker's pursuit of a book on the circus and the *Regardie's* article. Eringer secured from Cutler the information that she was looking to publish, he suggested three publishing houses, and he passed this information to Feld through George. Defendants cite that a dozen or so publishing houses were sent the proposal by Cutler and that Eringer had no knowledge of these. All publishing houses declined to publish and, therefore, the intervening acts of these entities caused the book not to be published, not the defendants. It is an argument with merit. The problem is it only takes one publishing house to show interest (the proposal on the Rockefeller book reflects this). It is for the jury to decide whether declinations from the publishers, particularly of the three that Eringer recommended, were born from any undue influence by the defendants. In particular, the rejection from Ned Chase at Macmillan raises a factual issue. As discussed above, Chase requested that one or two chapters be produced before he could decide whether to accept *Highwire*. Cutler's deposition implied it was quite an unusual request given Pottker's track record as of that date. The request though is not inconsistent with how Eringer attempted to derail or delay Pottker with his suggestions on *Celebrity Washington*. These are questions which must be resolved by the trier of fact after considering competent evidence.

That brings the discussion to the third point regarding what type of evidence is necessary to pierce through the pleadings for summary judgment. Plaintiffs are correct that out-of-court statements may be taken into account if the person could testify. For that reason, affidavits of potential witnesses are acceptable to raise factual disputes (excepting, of course, a so-called sham affidavit). What plaintiffs rely upon at great

length, however, is double and triple hearsay within sworn statements, which would not be admissible, and speculation that, because something was done with others or in the past, it happened here.

This defective approach to opposing the summary judgment is most apparent with the personal claims – the invasion of privacy and the IIED. Plaintiffs contend that defendants broke into her house, wiretapped her phone, eavesdropped, sureveilled her, and hired a body builder to seduce her. The reason, plaintiffs so contend, is that they saw a car six times in front of their house and, when approached, it left. They contend they heard clicking on the phone as if it were tapped. A former Feld company executive, Charles Smith, told Pottker that Feld had had someone surveilling her over the years, that he saw a videotape of her and thought her telephone was tapped because of how much people knew, and that her house may have been broken into.[82] She also contends she was told that Feld hired a body builder to seduce her and ruin her marriage.

It is true that Smith testified that he saw one videotape of Pottker at a mall and the tape may have started from her house. Smith, however, has no direct, personal knowledge of any wiretapping, surveillance or break-in of Pottker's home or of the hiring of a body builder to seduce her (even taking as true what Pottker says he told her). In his deposition, Smith denied such activities or knowledge of the same and testified that he understood that the means to the plan to derail Pottker had to be lawful ones.[83] Plaintiffs found no evidence of a break-in in their home nor did they find any wiretap on the phone. Plaintiff has not pointed to a transcript or explicit conversation that contained information that could only have been secured from the home and not from Pottker or her husband

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[82] Pottker Dep. at 121-26.
[83] Smith Dep. at 836.

discussing it outside the home with another. As to the body builder allegation, plaintiff identified the person as Bruce Babashan ("Babashan"). He testified under oath that he was a personal trainer who had wanted to publish a book on fitness. He mentioned it to a client who knew Pottker and the client introduced them. There is no suggestion that this client is in any way involved. Babashan went to her house less than twenty times over a year to discuss the publishing business. Babashan met and briefly talked with Pottker's husband and children, all confined to pleasantries. He testified he never made any overtures to her or tried to seduce her (and Pottker did not testify that he did make any such overtures). He said Pottker contacted him about the allegations sometime after January 2002, and "they laughed about it."[84] He also said he had never met or heard of Feld, Eringer, or Smith but thought he had heard of George, but had never met him.[85] There is no contrary evidence in the record. Plaintiffs' surveillance claims in this regard rest on pure speculation. This is the classic example of discovery narrowing issues to shed alleged facts that are claimed but cannot be shown by competent evidence.

Issues With Regard to Individual Counts

<u>Count I - Invasion of Privacy</u>

Plaintiffs Pottker and Fishel allege that each defendant knowingly "invaded and interfered with the solitude, seclusion and private affairs of plaintiffs."[86] They did so to elicit "private and confidential information concerning plaintiffs that was unavailable through normal inquiry."[87] Improper, intrusive means were allegedly used to secure the

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[84] Deposition of Bruce Babashan ("Babashan Dep.") at 94. In an apparent reference to the deposition questions regarding whether he tried to seduce plaintiff, he noted: the more I'm sitting here, I get a little slightly offended at all of this, because it's not just a casual thing. It's freaking absurd, is what this is." *Id.* at 79.
[85] *Id.* at 95-100.
[86] TAC, ¶ 99.
[87] *Id.* ¶100

information such as "persistent and overzealous surveillance" of plaintiffs (Pottker, Fishel and their children) and "deceptive and fraudulent tactics devised to intrude upon and destroy Pottker and WCI's business and personal interests."[88] Plaintiffs, Pottker and Fishel, each demand ten million dollars in compensatory damages and fifty million dollars in punitive damages, as well as, a permanent injunction barring further such conduct.

The tort of invasion of privacy is really four torts. The one that is claimed here is intrusion upon one's solitude or seclusion.[89] The elements of such a tort are: "(1) an invasion or interference by physical intrusion, by use of defendant's sense of sight or hearing, or by use of some other form of investigation or examination [citations omitted]; (2) into a place where the plaintiff has secluded himself, or into his private or secret concerns [citations omitted]; (3) that would be highly offensive to an ordinary, reasonable person . . . ."[90]

Summary judgment cannot be entered against plaintiff Pottker with regard to this claim because there are material facts in dispute as to the extent of the intrusion into Pottker's thoughts, feelings and actions. Writing was Pottker's business, but it was also personal. Defendants, by employing Eringer to investigate and report on information that would reflect her activity of writing about the circus, be it information concerning her thought process, plans for the future, as well as business, intruded upon her privacy. In essence, defendants wanted a window to her thoughts to determine what was occurring and if they were succeeding.

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[88] *Id.* ¶100

[89] *See Wolf v. Regardie,* 553 A.2d 1213, 1216-17 (D.C. 1989); *Vassiliades v. Garfinkle's, Brooks Bros.*, 492 A.2d 580, 587 (D.C. 1985).

[90] *Wolf,* 553 A.2d at 1217. This tort is also recognized in Maryland. *See Bailer v. Erie Ins. Exch,* 687 A.2d 1375, 1380-81 (Md. 1997); *see also Lawrence v. A.S. Abell Co.,* 475 A.2d 448, 450 n. 1 (Md. 1984).

In this regard, *Nader v. General Motors Corp.*, 255 N.E. 2d 765 (N.Y. 1970) is instructive. Public observations generally do not intrude on one's privacy, but depending on the time, manner, and what is garnered, it may. As the court recognized, "mere observation of the plaintiff in a public place does not amount to an invasion of his privacy."[91] If, however, the observation is "overzealous" or discloses that which could not be seen to other observers (such as the amount of money in Nader's bank account), then the otherwise public surveillance could be actionable.[92]

In this case, there are conflicts in the testimony as to the extent of information Eringer sought and who initiated the request for personal information. Was it more from Eringer seeking to find what he could to pass along? Or because of the 'confidence game' played by Eringer, was Pottker telling more than she would have to a business associate regarding private inner turmoil over the course her career was headed, all of which could help Feld gauge the success of his mission? Such issues cannot be resolved on summary judgment and do fall within the tort.

Summary judgment, however, must be entered with regard to the Fishel's privacy claim. The tort of invasion of privacy is a personal one. It is undisputed that Eringer never went to the home and had minimal conversations with Fishel on the telephone. The only real reference to that which Fishel was doing was through Pottker. Fishel's claim is derivative of the harm to Pottker. In essence it is this: they injured her and, as a result, he was injured because it so impaired their home and life that, as a result, he suffered various damages. Certainly, the alleged injury to Pottker would intrude upon his life with his wife and might cause him harm, just as a person would suffer "collateral damage"

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[91] *Nader v. General Motors Corp.*, 255 N.E. 2d 765, 771 (N.Y. 1970).

[92] *Id.* The *Nader* court also noted that soliciting women to approach Nader was not within the ambit of this tort. *Id.* at 770.

when his or her spouse's sole proprietorship or business went bankrupt for reasons beyond his or her control. But this claim sounds more in loss of consortium, with one exception. The exception is the allegations regarding physical invasion of the home since it is also Fishel's home.

As discussed previously, however, the allegations of breaking and entering and wiretapping the home cannot survive summary judgment. Plaintiffs have presented no direct, first hand knowledge of such events regarding Pottker's home. They have relied entirely on second and third-hand statements and speculation. Since plaintiffs cannot rest on Eringer's failure to deny affirmatively the allegations of the TAC, particularly Paragraph 26, there is no competent evidence to place this claim at issue. Accordingly, there is no separate duty to Fishel or breach of it with Count I.

Count III -Intentional Infliction of Emotional Distress (IIED)

The heart of plaintiffs Pottker's and Fishel's IIED claims are expressed as follows:

> By virtue of the conduct [alleged in the complaint], Defendants have engaged in extreme and outrageous conduct such as installing a dishonest business partner, tapping Fishel and Pottkers' telephones, breaking and entering their home, using false pretenses to intrude into Pottkers' business, stalking the streets outside Pottker and Fishel's house; using persistent and overzealous surveillance of Pottker and Fishel, their family and their home, as well as repeated malicious attempts to defame Pottker, destroy Pottker's professional and personal life, and prevent the publication of Pottker's writings.[93]

Pottker and Fishel seek ten million dollars each for compensatory and fifty million dollars punitive damages for this claim as well.

In short, the defendants contend that the undisputed facts show this was a plan to avoid publication of a book by Pottker on the circus, that there is no competent evidence

[93] TAC, ¶ 107.

of the surveillance, and to the extent there is, it does not rise to the level needed for IIED, that an IIED claim has to be more than just fraud or a separate tort violation, that the claimed emotional damages do not stem from the actions of the defendant and that the whole purpose of the defendants' action was not to be discovered and it, therefore, cannot be an IIED, since the plaintiffs were unaware of the conduct.

The well-known elements of IIED are:[94] (1) extreme and outrageous conduct on the part of the defendant which; (2) intentionally or recklessly; (3) causes the plaintiff severe emotional distress.[95] The court in *Best* further noted:

> A plaintiff need not prove actual physical injury . . . . It is for the trial court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery . . . . The case should be submitted to the jury if reasonable people could differ on whether the conduct is extreme and outrageous. [internal citations omitted][96]

The courts apply a "very strict standard of liability" for intentional infliction of emotional distress,[97] and "[f]raud, alone, is not enough to state a claim for intentional infliction of emotional distress."[98] This tort "requires a high standard of intent, that is, the intent must be to actually cause emotional harm" and that such harm must be "specifically directed" toward the plaintiff.[99] Therefore, to sustain this claim, the plaintiff must allege some outrageous act . . ."[100] For example, the *Drejza* court described the outrageous conduct there as "so extreme in degree, as to go beyond all possible bounds of

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[94] The elements of this tort in Maryland are essentially the same. *See Foor v. Juvenile Servs. Admin.*, 552 A.2d 947, 959 (Md. Ct. Spec. App. 1989).
[95] *Howard Univ. v. Best,* 484 A.2d 958, 985 (D.C. 1984) (internal citations omitted).
[96] *Id.* at 985-86.
[97] *See Bernstein v. Fernandez*, 696 A.2d 1064, 1075 n. 17 (D.C. 1991).
[98] *Hayes v. Chtd. Health Plan*, 360 F. Supp. 2d 84, 88 (D.D.C. 2004) (citations omitted).
[99] *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 463 (D.D.C. 1997).
[100] *Id.*

decency . . . and to be regarded as atrocious and utterly intolerable in a civilized community.[101]

Most cases involve situations, like *Best*, where the plaintiff is well-aware of the conduct that is occurring and generally knows of the source of the events. What makes this case unusual is that the plaintiff was unaware of the deception and possible surveillance.[102] It was only after she discovered the deception that the pieces fit together regarding what was occurring (outside of those things she observed such as the car in front of her house).

Defendants' arguments are very similar to the defendants in *Alyeska II* upon which plaintiffs heavily rely.[103] In that case, plaintiff Hamel, who had a business that used defendant's oil, reported alleged environmental hazard violations committed by the defendant to federal agencies. To mitigate this activity, the defendants formed a 'dummy' environmental organization, "The Ecolit Group," which they used to gain Hamel's confidence and apparent cooperation to secure information from which the defendants could launch a lawsuit to intimidate Hamel. In the course of this, there was evidence that the defendants illegally wiretapped personal telephone calls, videotaped plaintiffs, took documents from their homes, searched the plaintiffs' trash and obtained

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[101] *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 n.10 (D.C. 1994); *See also Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (extreme and outrageous conduct does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"); *Sere v. Group Hospitalization Inc.*, 443 A.2d 33, 37 (D.C. 1982) (plaintiff must suffer from severe emotional distress "of so acute a nature that harmful physical consequences might be not unlikely to result." *Id.* at 37 (internal quotations omitted)).

[102] In a different twist, in *Homan v. Goyal,* 711 A.2d at 26, the plaintiff knew of the conduct, but not immediately who was responsible.

[103] *Management Information Technologies Inc. v. Alyeska Pipeline Service Co.*, 1993 WL 524745 (Dec. 1, 1993, Judge Sporkin). This is an unreported case. There is only a Westlaw cite which is not recognized under our rules. Also, the parties should note that the trial court does not have access to Westlaw, only Lexis. Nonetheless, the Court secured copies of both opinions. The opinion can be treated as instructive but it certainly is not binding.

their telephone records and credit information. The court allowed the claim to go to the jury.

The discussion with regard to the claim for invasion of privacy is equally applicable here. The claims in this case are quite similar, but with IIED requiring a higher level of proof in that the conduct must be of an extreme and outrageous nature that is above and beyond the pled torts. At bottom, defendants' argument is really that the torts of fraud and tortious interference cover the actions here. The plan was merely taking care of business to prevent Pottker from hurting Feld, his family, and the circus. As discussed, above, however, there is evidence from which a jury could, at this point, draw the conclusion that the intent was also to destroy Pottker's writing career, which, in turn, was far beyond protecting the Felds and the circus. It is a close question as to whether this claim should survive the instant motion, and it may not survive a directed verdict; but, depending on the evidence produced with regard to the actions of the defendants, extreme and outrageous conduct could be established. This issue, however, is so intertwined with the underlying facts that are in dispute, it must be left for the jury to decide, at least at this point.

The defendants also claim a lack of damages caused by their actions because of the covert nature of the operation and alleged intervening medical causes unrelated to their actions. These too are factual issues for the jury to resolve.

Summary judgment, however, must be entered for the defendants against plaintiff Fishel on this claim for the same reasons it was entered on the privacy claim. As discussed above, the law of IIED requires that the intent must be to actually cause

emotional harm and that such harm must be specifically directed toward the plaintiff.[104] Assuming the most favorable inferences that could be drawn from the facts, the alleged harm to plaintiff Pottker could affect her life beyond her work. The actions however, were not directed to Fishel. Pottker was the target, and there is no evidence suggesting that Fishel was an intended target of any attempt to inflict emotional distress.[105] His injury, as with the privacy count, is collateral and not actionable on his behalf.[106]

Business Related Torts

The remaining claims are those of plaintiffs Pottker and WCI. The undisputed facts make out a sufficient predicate for each of the claims and summary judgment inappropriate. The material facts in dispute require that these claims be tried. For example, defendants seek dismissal of the civil conspiracy count contending there cannot be a conspiracy without an underlying tort. This is true, but it is a factual issue as to whether an underlying tort has occurred. As discussed, defendants created a plan to divert Pottker from writing about the circus. It is a factual issue as to whether the *Highwire* proposal was rejected without any undue influence by the defendants as to those whom Eringer recommended, in particular, by Ned Chase. It is a factual issue as to whether the intent was to go beyond just preventing writing about the circus to injuring her writing career as a whole. If either of these facts are demonstrated at trial (and there

[104] *Witherspoon v. Philip Morris, Inc.*, 964 F. Supp. 455, 463 (D.D.C. 1997).
[105] As to the body builder claim, there is no competent evidence to place the sworn denials in dispute. There is no evidence, therefore, of any actions directed to Fishel as the intended target, as required by IIED.
[106] Plaintiffs make the argument that "Maryland law – by statute – does recognize that conduct directed at a man's wife (but not vice versa) impacts the man directly." Plaintiffs Opp. at 38. The statute relied upon, however, has to do with injuring a wife's reputation for chastity. The argument is not supported by IIED cases and seeks to ignore the point of a loss of consortium claim.

is enough evidence to withstand summary judgment) then, at a minimum, the elements of Count III tortious interference with business is established.[107]

Three other issues remain to be addressed: the conflict of law with regard to the tort of breach of fiduciary; the statute of limitations; and compensatory damages.

Conflict of Laws Issue and Breach of Fiduciary Duty

Turning to the first issue regarding breach of fiduciary duty, the question raised is whether Maryland law applies or the District's. It is agreed the District recognizes causes of action for breaches of fiduciary duties.[108] Defendants contend, however, that Maryland law applies, and that it does not recognize the tort of 'breach of fiduciary duty' citing *Kahn v Kahn,* 690 A.2d 509 (Md. 1997). The critical language from *Kahn* upon which defendants rest their argument is: "Accordingly, we hold that there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries."[109] Defense counsel, however, failed to add the sentences that followed:

> This does not mean that there is no claim or cause of action available for breach of fiduciary duty. Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship

[107] Defendants' arguments that WCI has never been profitable does not dictate that the motion should be granted. As discussed, it only takes one publisher to accept the book for publication. There are different ways to measure damages. Furthermore, equitable relief is sought in this case – an injunction barring further interference and disgorgement for certain claims.

[108] *See*, *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 363 (D.C. 1984) (stating that the common law cause of action for breach of fiduciary duty requires existence of a fiduciary duty and breach of that duty); *Vassiliades v. Garfinckel's, Brooks Bros., Miller & Rhoades, Inc.*, 492 A.2d 580, 591 (D.C. 1985) ("[P]ersons who occupy a fiduciary relationship must scrupulously honor the trust and confidence reposed in them because of that special relationship, and that the breach of a fiduciary duty warrants the imposition of damages." (citing *Wagman v. Lee*, 457 A.2d 401, 405 (D.C. 1983)); *Beckman v. Farmer*, 579 A.2d 618, 651 (D.C. 1990) (stating that breach of fiduciary duty between partners for failure to wind up and account, in violation of the Partnership Act, is no "new tort" but that "breach of fiduciary duty is not actionable unless injury accrues to the beneficiary or the fiduciary profits thereby." (citation omitted)); *Jenkins v. Strauss*, 931 A.2d 1026, 1032-33 (D.C. 2007) (upholding trial court's finding that a real estate agent had breached the fiduciary duty owed to his principals and the award of damages).

[109] *Kahn v. Kahn*, 690 A.2d 509, 521 (Md. 1997).

> involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem. Whether the cause or causes of action selected carry the right to a jury trial will have to be determined by an historical analysis. Counsel do not have available for use in any and all cases a unisex action, triable to a jury . . . .[110]

Kahn was concerned with plaintiff's attempt to reformulate traditional equitable remedies to create a broad cause of action that would sound in law and, therefore, require a jury trial. The context of the discussion was whether plaintiff had a right to a jury trial.

In their complaint, plaintiffs allege, *inter alia*, that "[b]y agreeing to act on Pottker and WCI's behalf as their book packager, defendant Eringer assumed fiduciary duties towards Pottker and WCI . . . . These duties included the duty of loyalty, a duty of care and an obligation to disclose all material facts, including any conflicts of interest, regarding Eringer's role as book packager."[111] "By entering into a joint-venture with Pottker with respect to *Celebrity Washington*, Eringer took on duties to her as his co-venturer."[112] Similar duties are alleged by Eringer entering into the co-publishing agreement with NPB to publish *Crisis in Candyland.* Plaintiff contends that by "installing" Eringer in these roles, Feld and George assumed similar duties. Plaintiffs seek compensatory damages in the amount of ten million dollars and/or disgorgement and fifty million dollars in punitive damages, as well as any appropriate injunctive relief.[113]

In determining which jurisdiction's law will apply to substantive issues, the court must use the "governmental interest analysis." As recently articulated in *Drs. Groover, Christie & Merritt v. Burke,* 917 A. 2d 1110, 1117 (D.C. 2007) ("Burke"), courts must examine the underlying governmental policies to determine which jurisdiction's laws

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[110] *Id.*
[111] TAC, ¶ 147.
[112] *Id.* ¶ 158.
[113] *Id.* ¶¶ 163-64.

would be more advanced by the application of its laws. To aid identifying which jurisdiction's interests are paramount, if at all, courts assess the relevant four factors of the Restatement (Second) of Conflict of Laws §145. Those factors are:

1. The place where the injury occurred;
2. The place where the conduct causing the injury occurred;
3. The domicile, residence, nationality, place of incorporation and place of business of the parties; and
4. The place where the relationship is centered.

Burke, 917 A.2d at 1117, (citing *District of Columbia v. Coleman,* 667 A.2d 811, 816 (D.C.1995)). When both jurisdictions have an interest in the controversy, the forum's law will apply unless the foreign jurisdiction has the greater interest. *Coleman,* 667 A.2d at 816. Therefore, "the state with the 'most significant relationship' should also be the state whose policy is advanced by application of [its] law." *Hercules*, 566 A.2d 31, 41 n.18 (D.C. 1989) (quoting *In re Air Crash Disaster*, 559 F.Supp. 333, 342 (D.D.C. 1983)).

A brief review of the facts reflects that all three jurisdictions (the District, Maryland and Virginia) have some interest in the controversy because of the nature of events occurring within the borders of each. Plaintiffs all reside in Maryland, WCI is incorporated in Maryland, and plaintiff conducted her writing business from her Maryland home. Defendants Kenneth Feld, Robert Eringer, Clair George, Joel Joseph and NBP are, or were, Maryland residents. Feld and the Feld defendant entities' business offices are in Virginia, which is where Feld held meetings regarding Pottker. David Cutler also was a Virginia resident, and Eringer met Cutler in Virginia to discuss publishing issues. NPB lost its Maryland charter in 1993.[114] Joel Joseph maintained an office in the District with another company, and NPB's records were maintained in the

[114] Therefore, Pottker's book was published by NPB when it was no longer a Maryland corporation.

same District office, and the NPB bank account was in the District. The NPB publishing agreement for *Celebrity Washington*, however, was signed in Maryland. Eringer claimed a Maryland residence from about 1990 to 1996, but he received his business mail, particularly with respect to Pottker in the District. Although Eringer first met Pottker in Maryland, he never went to her home. Their business meetings were not in offices. They met at the Chevy Chase Club and at area restaurants, mostly in Spring Valley in Washington, D.C. Telephone calls between Eringer and Pottker went to Pottker's Maryland home. Eringer met Clair George to debrief him in Maryland and in the District. He also conducted business with Richard Cote about writing *Dreammakers*, the Feld circus book, in the District. Pottker contacted federal entities in the District about alleged violations of federal child labor laws by the circus.

As is readily apparent, Maryland has significant interest in the action in that the core harm is centered in Maryland since Pottker and WCI reside and conduct the writing business from there. The District's interest, however, is not insubstantial because Eringer's business activities centered in the District. His business address was in the District and, more importantly, he met Pottker and George at District locations to carry-out the activities of either gathering or imparting information to divert Potter from writing about the circus.

The issue then is whether one jurisdiction has an overriding interest in its policies. The governmental interest test hinges on whether there is a "true conflict" between the laws of the two jurisdictions. A "false conflict" occurs when the laws of the two states are: (1) the same; or (2) different but would produce the same outcome under the facts of the case; or (3) when the policies of the first state would be advanced by application of

this state's law while the policies of the other state would not be advanced by the application of the other state's law.[115]

Whenever a court makes a finding of false conflict, it may either "apply the law of the state whose policy would be advanced by application of its law or [by default] forum law if no state's policy would be advanced by application of its law."[116] In contrast, in situations where "each state would have an interest in the application of its own law to the facts, a true conflict exists."[117] Only when a true conflict actually exists do courts then proceed to examine the "governmental policies underlying the applicable conflicting laws to determine which jurisdiction's policy would be more advanced by application of its law to the facts [of the case]."[118] In cases of true conflicts, "the law of the jurisdiction with the stronger interest will apply."[119] Using this analysis, the court "'applies another state's law when (1) [the other state's] interest in the litigation is substantial, and (2) 'application of District of Columbia law would clearly frustrate the clearly articulated public policy of that state.'"[120]

Defendants press that Maryland has the greater governmental interest because the critical activities centered there, and Maryland law does not recognize the omnibus tort of breach of fiduciary duty.[121] It seems fair to say that *Kahn* has generated confusion and criticism. Take, for example, a recent case from the Circuit Court of Montgomery

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[115] *Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984).
[116] *Long v. Sears and Roebuck & Co.*, 877 F. Supp. 8, 11 (D.D.C. 1995).
[117] *Biscoe*, 738 F.2d at 1360.
[118] *Drs. Groover, Christie & Merritt v. Burke*, 917 A. 2d 1110, 1117 (D.C. 2007) (internal citations omitted).
[119] *Biscoe*, 738 F.2d at 1360.
[120] *Herbert v. District of Columbia*, 808 A.2d 776, 779 (quoting *Kaiser-Georgetown Cmty. v. Stutsman*, 491 A.2d 502, 509 (D.C. 1985)).
[121] It is a close question as to whether Maryland has the greatest interest. As can be seen from the facts, the plan to divert Pottker was hatched in Virginia, executed in all three jurisdictions, but targeted in its effect to Maryland residents.

County, Maryland, *Lerner Development Co. Ltd. P'Ship v. Lerner*, 2007 Md. Cir. Ct. LEXIS 5 (September 21, 2007)). In that case, the court dismissed the plaintiff's claim for breach of fiduciary duty feeling duty bound to follow *Kahn*. In so doing, the court engaged in an extended discussion of the confusion generated by *Kahn* which is relevant here. The court stated:

> In *Vinogradova v. Suntrust Bank, Inc.*, 162 Md. App. 495, 875 A.2d 222 (Md. 2005), the Court of Special Appeals, with citation to *Int'l Bhd. of Teamsters v. Willis Corroon Corp. of Maryland,* 369 Md. 724, 802 A.2d 1050, fn. 1 (2002), held that the Court of Appeals has made it clear that there is no independent cause of action for breach of fiduciary duty. *Id.* at 231. It is difficult for this Court to reconcile that conclusion with other opinions of the Court of Appeals, most notably *Insurance Co. of North America v. Miller,* 362 Md. 361, 765 A.2d 587 (2001).
>
> In *Miller,* the plaintiff, Insurance Co., proceeded to trial against the defendant, Miller, on claims of both breach of fiduciary duty and negligence, as well as other claims. *Id.* at 363. The trial court granted judgment in favor of the defendant based in part upon a finding that the defendant was not a fiduciary for purposes of collecting premiums to pay for policies of insurance issued by the plaintiff. *Id.* at 364. The Court of Appeals reversed, holding that Miller was Insurance Co.'s agent and therefore breached a fiduciary duty by not forwarding to them the premiums collected on their policies. *Id.* In discussing the breach of fiduciary duty claim, the Court of Appeals held that the trial court erroneously applied the Court of Appeals' holding in *Kann v. Kann,* 344 Md. 689, 690 A.2d 509 (1997):
>
> > Contrary to the trial court's ruling, we hold that appellant: (1) identified the particular principal-agent fiduciary relationship created in the case at bar; (2) identified that it was breached by appellee participating in the double financing scheme, not forwarding premiums, and not informing INA that premiums were out-of-trust; (3) considered the remedies available; and (4) selected those remedies appropriate to the client's problem. *Miller*, 362 Md. at 379.
>
> It is difficult to read the passage as anything other than an acknowledgement that the complaint for breach of fiduciary duty in that case was a valid and appropriate claim. *Vinogradova* does not discuss *Miller.* Nonetheless, since *Vinogradova* was decided in 2005, four years

> after *Miller,* the Court feels bound by the decision of the Court of Special Appeals. Accordingly, the Court shall grant the Counter Defendant's motion to dismiss as to Count III [breach of fiduciary duty].[122]

Other courts, rather than dismiss the breach of fiduciary claim, have looked to the closest claim in law or equity. *See Vinogradova v. Suntrust Bank, Inc.,* 875 A.2d 222 (Md. 2005).

In comparing *Vinogradova* and *Miller*, it appears that *Miller* more closely followed the requirements of *Kahn* which directed the party to state with particularity the type of fiduciary duty being vindicated and the relief sought so that the court could determine whether the claim was in law or equity. What plaintiff has done in this case is not dissimilar to *Miller*. Plaintiffs Pottker and WCI have pled that Eringer at the outset agreed to be a book packager for her and to assist in the development of ideas for publication. This was a relationship not governed by written contract, the nature of which is disputed. Second, plaintiffs allege that a written contract existed for *Celebrity Washington* which created fiduciary duties on Eringer's part. Third, they allege that the contract between Eringer and NPB regarding Eringer's contributions to publication of *Crisis in Candyland* placed him in a fiduciary relationship to Pottker.

In *Miller*, the court was faced with an analogous situation – an individual who was found to be the agent of the principal and the agent utilized premium payments that belonged to the principal for another's benefit. The *Miller* court discussed *Kahn* and, at length, the fiduciary duty in words applicable here:

> The trial court relied on our analysis in *Kann v. Kann,* 344 Md. 689, 713, 690 A.2d 509, 521 (1997), where we said:

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[122] *Lerner Dev. Co. Ltd. P'Ship v. Lerner*, 2007 Md. Cir. Ct. LEXIS 5, 3-6 (September 21, 2007).

> We hold that there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries. This does not mean that there is no claim or cause of action available for breach of fiduciary duty. Our holding means that identifying a breach of fiduciary duty will be the beginning of the analysis, and not its conclusion. Counsel are required to identify the particular fiduciary relationship involved, identify how it was breached, consider the remedies available, and select those remedies appropriate to the client's problem.
>
> Contrary to the trial court's ruling, we hold that appellant: (1) identified the particular principal-agent fiduciary relationship created in the case at bar; (2) identified that it was breached by appellee participating in the double financing scheme, not forwarding premiums, and not informing INA that premiums were out-of-trust; (3) considered the remedies available; and (4) selected those remedies appropriate to the client's problem.[123]

The court went on to discuss the agency relationship:

> We have recently had the opportunity to expound on the duties that an agent owes, generally, to any principal in *Green v. H & R Block, Inc., 355 Md. 488, 517-19, 735 A.2d 1039, 1055-56 (1999)*:
>
> The duties an agent owes to his or her principal are well established. An agent has "a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." *RESTATEMENT (SECOND) OF AGENCY § 387* (1958). We have recognized the
>
> > "'universal principle in the law of agency, that the powers of the agent are to be exercised for the benefit of the principal *only, and not of the agent or of third parties.* A power to do all acts that the principal could do, or all acts of a certain description, for and in the name of the principal, is limited to the doing of them for the use and benefit of the principal only, *as much as if it were so expressed.*'" (Emphasis in original).
>
> *King v. Bankerd, 303 Md. 98, 108-09, 492 A.2d 608, 613 (1985)*(quoting *Adams' Express Co. v. Trego, 35 Md. 47, 67 (1872))*. Moreover, an agent is under a strict duty to avoid any conflict between his or her self-interest and that of the principal: "'It is an elementary principle that the fundamental duties of an agent are loyalty to the interest of his principal and the need to avoid any conflict between that interest and his own self-interest.'" *C-E-I-R, Inc. v. Computer Dynamics Corp., 229 Md. 357, 366, 183 A.2d 374, 379*

[123] *Insurance Co. of North America v. Miller*, 765 A.2d 587, 596-97 (Md. 2001).

(1962)(quoting *Maryland Credit v. Hagerty, 216 Md. 83, 90, 139 A.2d 230, 233 (1958)).*[124]

Therefore, the perceived conflict between the District and Maryland law is "false." In addition, the Court cannot say that Maryland has a governmental interest that application of District law would frustrate. Whether a cause of action is called a breach of fiduciary duty or negligence or contract is not the same type of governmental interest that would be frustrated by application of the forum law. Thus, the issue before the Court is in marked contrast to that which existed with *Drs. Groover, Christie & Merritt v. Burke*, where Maryland had a statutory cap on non-economic damages in medical malpractice cases. Application of District law would have thwarted that strong governmental policy. It represented a distinction with a difference and this is a distinction without a difference. The application of District law, therefore, will not thwart Maryland governmental interests.[125]

In short, the Court finds the conflict falls under the heading of one that is "false," and, as such Maryland law need not apply.[126]

<u>Statute of Limitations</u>

1. The Feld Defendants

[124] *Id.* at 597.
[125] In the District, the agent and principal have a fiduciary relationship with respect to all matters within the scope of the agency. *Aronoff v. Lenkin Co.*, 618 A.2d 669, 687 (D.C. 1992); *see also Jenkins v. Strauss*, 931 A.2d 1026, 1033 (D.C. 2007) (stating that the "agency relationship creates the agent's fiduciary obligation as a matter of law and the fiduciary must act loyally in the principal's interest as well as on the principal's behalf." (internal quotations omitted)). An agent owes the principal "a duty of good faith and candor in affairs connected with the undertaking, including the duty to disclose to the principal 'all matters coming to [the agent's] notice or knowledge concerning the subject [] of the agency, which it is material for the principal to know for his protection or guidance.'" *Aronoff*, 618 A.2d at 687 (quoting *McHugh v. Duane*, 53 A.2d 282, 285 (D.C. 1947)). Thus, the agent has a duty to inform the principal of all things he knows that may affect what the principal desires or how the principal will act. *Aronoff*, 618 A.2d at 687.
[126] In either jurisdiction, a third party can be liable for inducing a breach of fiduciary duty or benefiting from such breach. See *International Underwriters, Inc. v. Boyle*, 365 A.2d 779 (D.C. 1976); *Group Assn. Plans, Inc. v. Colquhoun*, 466 F.2d 469, 471 (D.C. 1972); *Fowler v. Printers II, Inc.* 89 Md. App. 448, 471 (1991).

Defendants seek judgment based on the expiration of the statute of limitations. The District applies the "Discovery Rule" when the time between the fact of the injury and the alleged tortious conduct is in debatable.[127] Under the doctrine, the statute of limitations begins to run when the plaintiff knows, or in the exercise of reasonable diligence should have known, of (1) an injury, (2) its cause in fact; and (3) some evidence of wrongdoing.[128]

Defendants argue that Pottker had all the information necessary to bring claims of fraud and breach of fiduciary duties against Eringer in 1995. They point to his poor editing, the financial condition of NPB, and that she asked Joseph to preclude Eringer from further editing her book. Joseph declined and advised her that he had an agreement with Eringer that he was not at liberty to discuss. Defendants further contend that, with this information, further inquiry would have led to recognizing the source of the alleged injury that gives rise to the other claims.

While there is some plausibility to the argument since Joseph apparently said he had a secret agreement with Eringer, one has to keep in mind that she had been duped by Eringer all along in a classic confidence game. The key defendants were uniform in their testimony that they held the plan close and did not disclose to others what their true intentions were. Stated another way, it was fraudulent concealment; every effort was made to ensure that Pottker would not discover the diversion project. The Feld Defendants do not suggest just how Pottker was to uncover the wrongdoing with further inquiry. It is fair to assume she would not have received an honest answer from the defendants. Indeed, once Smith came to Pottker and told her what he knew had been

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[127] *Brin v. S.E.W. Investors*, 902 A. 2d 784, 792 (D.C. 2006).
[128] *Id.* at 792.

happening, she investigated, went to the courthouse within a month, procured copies of the materials, and filed suit well within three years. Accordingly, the court cannot grant summary judgment on this ground. What is a reasonable inquiry and period to discover the actual cause of some evidence of the wrongdoing is a jury question.

2. Defendants Joseph and NPB

Joseph and NPB stand on a different footing than the Feld Defendants. The sworn statements and testimony are undisputed that Joseph was unaware of Eringer's dual role. Eringer paid Joseph directly without the funds being traceable to either George or Feld. The discussions regarding Eringer's interest in publishing were not unlike those he had with Cutler, except it was for a particular publication. The undisputed record is that Joseph (and, therefore, NPB) was duped in the same manner as Cutler and Pottker.

More important, under the discovery rule, Pottker was aware, in 1995, of the key facts with regard to any alleged breach by Joseph. Pottker, however, after being informed there was a confidential arrangement with NPB did not inquire of Eringer as to the motive and reason for this. She was aware by December 1995, that Joseph had a separate, confidential agreement with Eringer on the publication of *Crisis in Candyland,* and that Eringer did not perform to her satisfaction under that agreement. She also knew that Joseph did not pay the bill due the photographer that led to her books being removed from bookstores, and she knew that NPB ceased distribution in December 1995.[129] All of these were sufficient events to bring suit against Joseph and NPB had she felt it breached

[129] NPB had the hardback rights. Her literary agent, William Morris, Inc., had the paperback distribution rights.

obligations owed to her.[130] The statute of limitations, therefore, ran as to these two defendants by December 19, 1998, three years after the hardbound book distribution ceased. Suit was not filed until 1999. Therefore, judgment will be entered in favor of Joseph and NPB.

Damages Issues

1. Defendants contend that judgment should be entered on the fraud claim (Count V) because plaintiff can show no economic harm and, therefore, no compensable damages. Further, they argue that under Maryland law, Pottker cannot recover for emotional distress under the Fraud claim. Plaintiffs skirt the issue of the unavailability of damages for emotional distress under the fraud count and focus instead on argument that equitable remedies are available.[131]

Maryland courts, however, recognize compensable damages in the form of emotional injuries that manifest physically. The court in *Hoffman v. Stamper*[132] noted that courts around the country were split on the issue of whether one could recover for damages to redress emotional injury in fraud cases. In the end, the court held that plaintiff must "show some physical manifestation as a condition to recovery of damages for purely emotional injury."[133] In doing so, a plaintiff establishes compensable damages.

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[130] Inquiry notice does not require that a plaintiff be fully informed but only that some injury has occurred. *Colbert v. Georgetown University,* 641 A.2d 469, 473 (D.C. 1994) (en banc); *Weisberg v. Williams, Connolly & Califano*, 390 A. 2d 992, 996 (D.C. 1978).

[131] "Fraud may consist in the suppression of the truth as well as in the assertion of a falsehood." *Schnader v. Brooks*, 132 A. 381, 383 (Md. 1926); *Hoffman v. Stamper*, 867 A.2d 276, 292 (Md. 2005).

[132] 867 A.2d 276 (Md. 2005).

[133] *Id. at* 298. Plaintiffs must prove compensable damages by clear and convincing evidence for fraud. *Id.* at 300.

2. Defendants also contend that Pottker and WCI cannot establish compensable harm because they cannot demonstrate economic damage. They argue that Pottker's writing and business, WCI, have never been profitable. As plaintiffs address in their papers, and as the court in *Kahn* recognized, where there is an inadequate remedy at law, equitable remedies may lie. As plaintiffs note "a breaching fiduciary must 'disgorge any benefits emanating from, and provide compensation for any damages attributable to that breach.'"[134] In short, at a minimum, if no lost revenue to WCI can be shown, plaintiffs can elect to proceed in equity and measure the damages by the sums Feld paid to divert Pottker from writing and publishing and to produce a preemptive book.[135] As defendants recognize, the court in *Curtis v. Radio Representatives, Inc.*[136] noted that a "plaintiff must show either that they suffered an actual loss or that the fiduciary incurred an actual gain."[137] Monies were paid to others such as George and Eringer for their role in the project to divert Pottker from writing. They gained from that employment and can be made to disgorge those benefits.[138] Thus, a lack of economic harm does not dictate the entry of summary judgment on the fraud and fiduciary counts because alternative remedies are available in equity to address an established wrong.

Another issue needs to be addressed with regard to damages. Plaintiffs in their opposition seem to suggest that damages do not have to be measured with certainty.[139] Plaintiffs, however, bear the burden of proof. Moreover, although courts have allowed

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[134] *Thorpe v. CERBCO,* 676 A.2d 436, 437 (Del. 1996); Plaintiffs' Opp. at 116-18. *See United States v. Snepp,* 444 U.S. 507 (1980).

[135] In this sense, plaintiffs' claim is similar to the concept of measuring the loss suffered by a plaintiff in a case by the amount an employee has been bribed to breach his duty to the employer. Courts in equity can tailor a remedy to prevent a legal wrong from going without remedy.

[136] 696 F. Supp. 729, 734 (D.D.C. 1988).

[137] Feld Defendants' Reply Memorandum at 39.

[138] *See Randall v. Loftgaarden*, 478 U.S. 647, 663 (1986).

[139] Plaintiffs' Opp. at 111.

economic damages which were not certain, the amounts were within a definable, close range. *See Gandal v. Telemundo Group,* 23 F.3d 539, 547-48 (D.D.C. 1994). As the *Gandal* court observed:

> The trouble with the district court's damage award is that its inability to determine the value of the junk bond with ease and precision not only raises uncertainty as to the exact amount of damages, that inability also creates doubt as to whether a legal injury actually occurred. As we noted, Telemundo only injured Gandal if the junk bond and ADVO shares were once worth at least $ 35.25, but never worth more than $ 36.75. Although uncertainty over the amount of damages is resolved in favor of the injured party, that party still has the burden of demonstrating that an injury actually occurred. *See Berley Indus., Inc. v. City of New York, 45 N.Y.2d 683, 412 N.Y.S.2d 589, 591, 385 N.E.2d 281 (N.Y. 1978).*[140]

The *Gandal* court went on to quote a New York court:

> Damages will be awarded as long as they are not uncertain, contingent or conjectural and even where the amount cannot be determined with absolute certainty. There must, however, be some basis for computation in the evidence for determining the amount of the damages. And that basis must be supplied by the plaintiff.[141]

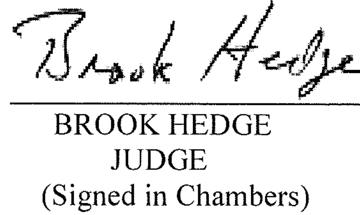
Plaintiffs, therefore, must establish the wrong that is alleged and the damages that actually occurred to WCI and Pottker as a result if they proceed at law. If they lack an adequate remedy at law, plaintiffs may turn to a remedy in equity.

Conclusion

For the reasons set forth, the motion for summary judgment will be granted with regard to plaintiff Fishel's claims and denied as to the remainder of the claims. A

[140] *Gandal v. Telemundo Group,* 23 F.3d 539, 547 (D.D.C. 1994).
[141] *Id.* (quoting *Fendelman v. Conrail*, 464 N.Y.S.2d 323, 329 (N.Y. Sup. Ct. 1983)).

separate judgment against plaintiff Fishel in favor of the defendants will be entered on Counts I and III.



August 14, 2008
Date

BROOK HEDGE
JUDGE
(Signed in Chambers)

Copies served electronically through eFiling for Courts on:

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SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

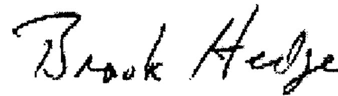
JAN POTTKER, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	**1999 CA 008068 B**
v.	:	**Calendar 3**
	:	**Judge Brook Hedge**
KENNETH J. FELD, *et al.*,	:	
	:	
Defendants.	:	

ORDER GRANTING IN PART AND DENYING IN PART FELD DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS JOEL JOSEPH AND NATIONAL PRESS BOOKS' MOTION FOR SUMMARY JUDGMENT

In accordance with the Memorandum Opinion entered this date, it is by the Court this 14th day of August, 2008, hereby

ORDERED that the Feld Defendants' Motion for Summary Judgment is **GRANTED** in part, and is **DENIED** in part;[1] and it is further

ORDERED that the Motion for Summary Judgment filed by Defendants Joel Joseph and National Press Books is **GRANTED.**



BROOK HEDGE
JUDGE
(Signed in Chambers)

Copies served electronically through eFiling for Courts on:

Roger C. Simmons, Esq.

[1] The motion is granted as to all claims raised by plaintiff Fishel (Count I –Invasion of Privacy and Count III – Intentional Infliction of Emotional Distress). The Feld Defendants' motion was joined in by defendants Clair E. George and Robert Eringer.

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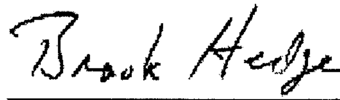
SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JAN POTTKER, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	**1999 CA 008068 B**
v.	:	**Calendar 3**
	:	**Judge Brook Hedge**
KENNETH J. FELD, *et al.*,	:	
	:	
Defendants.	:	

JUDGMENT

In accordance with the Memorandum Opinion entered this date, it is by the Court this 14th day of August 2008, hereby

ORDERED and ADJUDGED that judgment is hereby entered in favor of all defendants and against plaintiff Andrew S. Fishel [Count I (Invasion of Privacy) and Count III (Intentional Infliction of Emotional Distress)].



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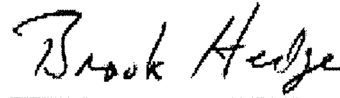
SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

JAN POTTKER, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	**1999 CA 008068 B**
v.	:	**Calendar 3**
	:	**Judge Brook Hedge**
KENNETH J. FELD, *et al.*,	:	
	:	
Defendants.	:	

JUDGMENT

In accordance with the Memorandum Opinion entered this date, it is by the Court this 14th day of August 2008,

ORDERED and **ADJUDGED** that judgment is hereby entered against plaintiffs and in favor of defendants Joel Joseph and National Press Books on all counts.



BROOK HEDGE
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(Signed in Chambers)

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