16-CV-458 (Lead)
16-CV-459, 16-CV-500 (Consolidated)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CV-458 Lead	RUBY NICDAO, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, ET AL., Appellee.
No. 16-CV-459 Consolidated	LARRY CIRIGNANO, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, ET AL., Appellee.
No. 16-CV-500 Consolidated	JONATHAN DARNEL, Appellant, v. TWO RIVERS PUBLIC CHARTER SCHOOL, INCORPORATED, ET AL., Appellee.

Appeal from the Superior Court of the District of Columbia
Civil Action No. 2015 CA 009512 B

BRIEF OF APPELLANT LARRY CIRIGNANO

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the instant appeal of the Superior Court's denial of Defendant–Appellant Cirignano's special motion to dismiss under D.C. Code §16-5502(b) by virtue of the collateral order doctrine. *See, e.g.*, *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1220 (D.C. 2016) ("[W]e hold that we have jurisdiction under the collateral order doctrine to hear appellants' interlocutory appeals of the trial court's denial of their special motions to dismiss filed under the Anti-SLAPP Act.").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the Superior Court erred in holding that Cirignano's unquestionably protected speech and peaceful expression in a traditional public forum can nevertheless be restricted because not "all speech [is] permitted in all forums."

(2) Whether the Superior Court erred in holding that, despite the fact Two Rivers has no members, Two Rivers can nevertheless assert claims on behalf of its non-existent "members" that bear no traditional indicia of membership.

(3) Whether the Superior Court erred in holding that Cirignano's constitutionally protected speech and peaceful expression in a traditional public forum can serve as a basis for a claim of intentional infliction of emotional distress.

(4) Whether the Superior Court erred in holding that Two Rivers can assert a separate and independent claim for private nuisance when there is no other underlying tort upon which private nuisance could serve as a type of damages.

(5) Whether, even if this Court recognized a separate and independent tort, the Superior Court erred in finding that Cirignano's single alleged act of peaceful expression and constitutionally protected speech can serve as a basis for a private nuisance claim when Two Rivers has not and cannot allege that Cirignano's alleged speech has any requisite degree of permanence and does not represent unlawful and unreasonable use of the traditional public forum.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

On December 9, 2015, Plaintiff/Appellee Two Rivers Public Charter School ("Two Rivers") and the Two Rivers Board of Trustees filed their Complaint in the Superior Court of the District of Columbia. (Appendix 111.) Two Rivers sued Appellant Cirignano along with other defendants. (App. 111.) Cirignano filed a special motion to dismiss under D.C. Code § 16-5502(b), a provision of the District of Columbia Anti-SLAPP Act. (App. 202), and a motion to dismiss under SCR Civil 12(b)(1) and (6) (App. 206).

On April 29, 2016, the Superior Court held a hearing on Cirignano's motion to dismiss and special Anti-SLAPP motion to dismiss, along with the motions to

dismiss and special Anti-SLAPP motions to dismiss filed by the other Defendants.[1] (App. 020.) At that hearing, the Superior Court denied the parties' respective Anti-SLAPP motions and denied, in part, their motions to dismiss, dismissing only claims brought by the Plaintiff Two Rivers Board of Trustees for lack of standing. (App. 088–102). On May 10, 2016, Cirignano filed his Notice of Appeal of Order Denying Special Motion to Dismiss (App. 222), and at or about the same time the other Defendants filed their respective notices of appeal of the trial court's denial of their respective Anti-SLAPP motions. (App. 219–221, 225–230.)

STATEMENT OF FACTS

I. TWO RIVERS' THREADBARE ALLEGATIONS AGAINST CIRIGNANO.

Though Two Rivers' Complaint spans thirty pages and eighty-eight numbered paragraphs, **Defendant Cirignano is mentioned a total of only six times**. (App. 112 (listing Cirignano in introduction concerning all Defendants); App. 114, ¶ 7 (naming Cirignano as a Defendant); App. 117 (showing picture of Cirignano peacefully holding a sign on the public sidewalk); App. 127, ¶ 52 (alleging Cirignano had a sign on November 23, 2015); App. 127, ¶ 54 (alleging Cirignano

[1] Named Defendants Lauren Handy, John Doe 1, John Does, and Jane Does did not file motions to dismiss or otherwise appear in the litigation below. Defendant Robert Weiler, Jr., formerly an appellant herein, settled with Two Rivers and was dismissed from the case.

peacefully held a sign on the public sidewalk on November 23, 2015); App. 135 (mentioning Cirignano in prayer for relief).)

The upshot of Two Rivers' scant mention of Cirignano in its Complaint is that **Cirignano stood on a public sidewalk, peacefully holding a sign, on one single occasion, November 23, 2015**. (App. 127, ¶¶ 52, 54.) Cirignano is not alleged to have ever spoken a single word to a single individual at Two Rivers. Cirignano is not alleged to have approached a single individual at Two Rivers. Cirignano is not alleged to have even opened his mouth at Two Rivers. Indeed, Two Rivers' entire claim against Cirignano involves nothing more than **one single act of peaceful demonstration on the public sidewalk on one single day in 2015**.

Consistent with Two Rivers single allegation against him, Cirignano's sworn testimony to the Superior Court was that he was present on the public ways adjacent or near to the Two Rivers school on November 23, 2015 (App. 204, ¶ 4.) At that time, Cirignano stood "in place, displaying a sign comprising a photograph accurately depicting a human baby who had been killed and partially dismembered by the practice of abortion. (App. 205, ¶ 6.) Cirignano engaged in his expressive activities entirely of his own accord, and he "did not enter into any agreement or otherwise coordinate with any other person either the method or the content of [his] or any other person's expressive activities . . . ." (App. 205, ¶ 7.) Furthermore, Cirignano was not present on any of the other days on which other Defendants are

alleged to have been at the school and had no involvement in any of their alleged conduct. (App. 204, ¶ 2.)

Also in his sworn testimony before the Superior Court, Cirignano testified that his purpose on November 23, 2015, was to "exercise [his] right of advocacy on issues of public interest: the construction of a new Planned Parenthood facility . . . and Planned Parenthood's practice of killing innocent children in the womb." (App. 204, ¶ 4.) "The goals of [his] expressive activities were to advocate against Planned Parenthood and the killing of innocent children by the practice of abortion, to inform the community surrounding the new facility of the record and practices of Planned Parenthood, and to encourage the community to likewise advocate against Planned Parenthood." (App. 204–205, ¶ 5.)

Cirignano never trespassed on private property, or otherwise broke any laws, nor does Two Rivers allege that he ever did so. Cirignano did not chase, follow, or otherwise target his expressive activities towards children, nor is he alleged to have done so. (*Id.*, ¶ 8). Rather, as he testified, Cirignano's intended audience was the entire community surrounding the Planned Parenthood facility under construction between the Two Rivers school buildings. (App. 204-205, ¶¶ 4, 5.)

II. THE SUPERIOR COURT'S DENIAL OF CIRIGNANO'S SPECIAL MOTION TO DISMISS.

A. The Superior Court's Holdings on the Anti-SLAPP Act.

In its oral ruling issued on April 29, 2016, the Superior Court held that "the case is not dismissed on the grounds that it violates the Anti-SLAPP Act." (App. 098.) In making this determination, the Superior Court found that "**the abortion rights issue is an issue of great importance and defendants are advocating their position**," and that Cirignano's speech "is a matter of not only public interest, but it's a Constitutional right in terms of speech." (App. 097 (emphasis added).)

Despite that finding, the Superior Court remarkably stated that not "all speech [is] permitted in all forums." (App. 097.) The court held that the Anti-SLAPP Act was inapplicable to Cirignano's speech because "the underlying claim of the plaintiff is not the advocacy of abortion rights." (App. 097.) Instead, it contended, "the school is seeking injunctive relief or reasonable restrictions on the tactics utilized by defendants during their protest near and on school property." (*Id.*). Additionally, contrary to the plain allegations of Two Rivers' Complaint against Cirignano, the Superior Court held Two Rivers' "objective is not used as a weapon to chill or silence defendants' speech" because Two Rivers has not "taken any position on abortion rights." (*Id.*).

The Superior Court's holding can be summarized as follows: (1) Cirignano "made a prima facie showing that the plaintiffs' claim arises from his anti-abortion protests" (i.e., speech in a traditional public forum), (2) that Cirignano's speech was on "an issue of public interest," and (3) though Cirignano had made the requisite showing under the Anti-SLAPP statute, Two Rivers had demonstrated a likelihood of success on its claim that Cirignano's protected speech should be restricted. (App. 096–098.) The Superior Court, therefore, denied Cirignano's special Anti-SLAPP motion to dismiss.

B. The Superior Court's Holdings on Two Rivers' Intentional Infliction of Emotional Distress Claim.

In its slapdash treatment of Two Rivers' intentional infliction of emotional distress claim, the Superior Court merely stated the elements of such a claim, and then stated that "a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim." (App. 098–099.) The Superior Court did not say what facts Two Rivers had alleged against Cirignano that might give rise to any inference satisfying its pleading requirements. Indeed, the Superior Court's discussion of the intentional infliction of emotion distress claim **does not even mention Cirignano or any facts that Two Rivers had plead to support any such claim against him**. The Superior Court simply stated that "with respect to this count, the discovery period would be the opportunity to explore further any additional facts to support the claim." (App. 100.) The court gave no

rationale for its holding, discussed no facts supporting its holding, and provided no legal justification for its ruling. Rather, the court merely stated, "The Court denies the motion to dismiss that count, which is Count 1." (App. 100.)

C. The Superior Court's Holding on Two Rivers' Private Nuisance Claim.

With respect to the private nuisance claim, the Superior Court stated that such a claim "may stand alone and not require a separate tort." (App. 101.) The court contended that such claims have also been recognized in the "context of abortion protest cases." (App. 101.) Again, **without even mentioning Cirignano or any facts supporting such a claim against him**, the Superior Court held that "some of the defendants did come upon the actual school property," but failed to mention that Cirignano is not alleged to have done so and did not do so. (App. 102.) The Court simply held—without legal justification, factual grounding, or even simple discussion—that "the motion to dismiss Count 2, private nuisance, is denied." (App. 102.)

SUMMARY OF THE ARGUMENT

Cirignano made the requisite prima facie showing that Two Rivers' claims against him arise solely from his constitutionally protected speech in a traditional public forum, concerning a matter of public interest. The D.C. Anti-SLAPP Act, therefore, shifted the burden to Two Rivers to demonstrate **with actual evidence**

that its claims were likely to succeed on the merits. Despite the Superior Court's holding to the contrary, Two Rivers utterly failed to make any such demonstration.

First, Two Rivers did not and cannot demonstrate a likelihood of success on any of its claims because it does not have standing to bring any of its claims. Two Rivers' purported third-party standing disintegrates upon even a cursory inspection. It has no members, just students. An organization without members cannot, as a matter of law, bring a complaint by associational standing. And, even if this Court applies the alternative test inquiring as to the traditional indicia of membership, Two Rivers still cannot satisfy such a standard because its students bear no such indicia of membership. Two Rivers' students do not select the leadership of the organization, do not control its activities, and as a matter of District statutory law, cannot contribute financially to its operation or this litigation. Two Rivers therefore fails even the secondary test for third-party standing.

Second, Two Rivers did not and cannot demonstrate a likelihood of success on its intentional infliction of emotional distress claim. Indeed, as a matter of binding law, constitutionally protected expression in a traditional public forum – even if offensive to some – cannot serve as a basis for an intentional infliction of emotional distress claim. Binding law precludes such a finding because constitutionally protected expression cannot, as a matter of law, be considered extreme or outrageous conduct. Moreover, Two Rivers' single allegation against Cirignano concerning his

single alleged act of peaceful expression on one day does not, under binding law, satisfy the elements of Two Rivers' claims against him.

Third, Two Rivers cannot assert a separate and independent claim for private nuisance because this Court does not recognize such a tort. It is considered a form of damages, not an independent theory of liability. But, even if this Court were to consider such a tort, Two Rivers utterly failed to demonstrate that it was likely to prevail on its claims. The single alleged act of Cirignano's peaceful and constitutionally protected expression in a traditional public forum does not and cannot, as a matter of binding law, constitute the degree of requisite permanence or continuance to satisfy a private nuisance claim. As this Court has held, one single act of alleged offense is insufficient to constitute a private nuisance. Further, an act of constitutionally protected expression in a traditional public forum does not and cannot represent an unlawful or unreasonable use of the public sidewalk, so a private nuisance claim likewise fails as a matter of law.

Finally, Two Rivers has not and cannot demonstrate that Cirignano participated in an alleged civil conspiracy. It has not alleged that Cirignano entered into any agreement with anyone, and it does not even mention the word agreement in its Complaint. Moreover, Cirignano cannot conspire to commit the lawful and constitutionally protected act of peacefully demonstrating in a traditional public forum. Any civil conspiracy claim must fail for that reason alone.

The Superior Court erred in finding that Two Rivers was likely to succeed on the merits of its claims. Cirignano's single act of constitutionally protected expression does not and cannot serve as the basis for any claims sounding in tort, and Two Rivers threadbare allegations against him utterly fail as a matter of settled and binding law. The Superior Court's order denying Cirignano's special Anti-SLAPP motion to dismiss should be reversed with prejudice.

ARGUMENT

I. STANDARD OF REVIEW.

This Court's review of the Superior Court's denial of Cirignano's special Anti-SLAPP motion to dismiss is *de novo*:

> A court's review for legal sufficiency is a particularly weighty endeavor when First Amendment rights are implicated. The court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' . . . **With these principles in mind, we turn to a de novo review of the record to determine whether the evidence produced . . . could support, with the clarity required by First Amendment principles, a jury verdict in [the plaintiff's] favor**.

Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1240 (D.C. 2016) (emphasis added) (citations omitted) (first three alterations in original).

II. THE SUPERIOR COURT'S ORDER DENYING CIRIGNANO'S SPECIAL ANTI-SLAPP MOTION TO DISMISS SHOULD BE REVERSED BECAUSE TWO RIVERS DID NOT DEMONSTRATE THAT ITS CLAIMS AGAINST CIRIGNANO ARE LIKELY TO SUCCEED ON THE MERITS.

A. Cirignano's Prima Facie Showing That Two Rivers' Claims Against Him Arise Solely from an Act in Furtherance of the Right of Advocacy on a Matter of Public Interest Shifted the Burden to Two Rivers to Demonstrate, with Evidence, That Its Claims Against Cirignano Are Likely to Succeed on the Merits.

1. Two Rivers' Claims Against Cirignano Arise from His Protected Speech and Advocacy in a Traditional Public Forum.

Two Rivers' Complaint makes only one specific allegation against Cirignano: "Defendant Larry Cirignano **stood** right near the entrance of the middle school and **held** a sign . . . ." (App. 127, ¶54 (emphasis added).) Cirignano is not alleged to have done anything else. Thus, Cirignano's only alleged "act" was his peaceful expression in a traditional public forum—standing and holding a sign opposing abortion on a public sidewalk.

The Anti-SLAPP Act provides, in pertinent part,

> If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

D.C. Code §16-5502(b). Peacefully holding a sign on a public sidewalk is unquestionably protected speech as a matter of binding law. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (picketing signs and demonstrations on public sidewalk are constitutionally protected speech); *United States v. Grace*, 461 U.S. 171, 176 (1983) (holding sign and peaceful picketing are constitutionally protected expression); *Boos v. Berry*, 485 U.S. 312 (1988) (same); *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 607 (D.C. Cir. 2007) (holding picketing signs in traditional public forum is constitutionally protected speech); *Foti v. City of Menlo Park*, 146 F.3d 629, 642 (9th Cir. 1998) (carrying picket signs in a traditional public forum of the public sidewalk is constitutionally protected speech); *Juracek v. City of Detroit*, 994 F. Supp. 2d 853, 861 (E.D. Mich. 2014) ("holding signs and leafletting [are] expressive activity involving speech protected by the First Amendment").

Given that Two Rivers' sole allegation against Cirignano involves his peaceful "act" of constitutionally protected speech opposing abortion, there can be no dispute that Two Rivers' claims against Cirignano arise solely from Cirignano's "act in furtherance of the right of advocacy." D.C. Code §16-5502(b). Peacefully holding a written sign in a traditional public forum is undoubtedly "an act in furtherance of the right of public advocacy" under the plain terms of the statute. *See* D.C. Code §16-5501(1)(A)(ii) (defining "an act in furtherance of the right of

advocacy" as "**[a]ny written or oral statement made . . . [i]n a place open to the public**." (emphasis added)). Cirignano therefore made a prima facie showing of the first prong of the Anti-SLAPP Act.[2]

2. Cirignano's Protected Speech and Advocacy Concern Issues of Public Interest as a Matter of Law.

Cirignano also must make a prima facie showing that his advocacy is "on issues of public interest." D.C. Code §16-5502(b). Cirignano unquestionably satisfies this second prong as well. Cirignano's protected speech and advocacy concern issues of public interest under the plain terms of the Act and as a matter of binding precedent.

a. Cirignano's Advocacy Concerns Issues of Public Interest Under The Plain Language of The Anti-SLAPP Act Because It Concerns Health, Safety, And Community Well-Being.

The plain terms of the District's Anti-SLAPP Act indisputably make Cirignano's speech and advocacy a matter of public concern. As defined in the Act, an "[i]ssue of public interest" "means an issue **related to health or safety**, environmental, economic, or **community well-being**; the District government; a public figure; or a good, product, or **service in the market place**" D.C. Code §16-

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[2] Indeed, even the Superior Court held that Cirignano "made a prima facie showing that the plaintiffs' claim arises from [Cirignano's] anti-abortion protest." (App. 097.)

5501(3) (emphasis added). There can be no doubt that speech concerning abortion is related to the health and safety of women and children, and the health of the entire community. But, even if one could dispute that abortion relates to health or safety, there can be absolutely no question that Cirignano's speech concerning abortion dealt with a service being offered in the market place of the District. Thus, under the plain language of the Anti-SLAPP Act, Cirignano's speech concerned an issue of public interest. The Superior Court so concluded, holding that Cirignano's speech was "an issue of great importance" and plainly "a matter . . . of public interest." (App. 097.)

b. Under Long-Settled and Binding Supreme Court Precedent, Cirignano's Protected Speech and Advocacy Concern Issues of Public Interest Related to Abortion.

Even if the Anti-SLAPP Act did not define Cirignano's speech as a matter of public interest (it does), and even if the Superior Court had not held that Cirignano's speech concerned a matter of public interest (it did), long-settled, binding precedent also demonstrates that Cirignano's speech concerns a matter of public interest:

> Speech deals with a matter of public concern when it can be fairly considered as relating to **any matter of political, social, or other concerns to the community** or when it is a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public.

Snyder, 562 U.S. at 453 (emphasis added). It is beyond peradventure that Cirignano's speech concerning the issue of abortion related to a matter of political

and social concern to the community and is of general concern and value to the community. Indeed, there are few issues that capture the interest and concern of the public as forcefully as the issue of abortion.

Even if this truth was not societally self-evident, the Supreme Court has noted many times that speech concerning matters of abortion and abortion itself are *ipso facto* matters of public interest. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464 (2014) (noting that speech about abortion is "an important subject"); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 850 (1992) (noting the "profound moral and spiritual implications of [abortion]"); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing the profound interest in the "abortion controversy"); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (noting the significant public interests concerning the issue of abortion with "Millions of Americans" on both sides of the issue). Thus, under binding law, Cirignano's speech concerns a matter of great public interest and therefore satisfies the public interest prong of the Anti-SLAPP Act.

3. Two Rivers Cannot Satisfy Its Anti-SLAPP Burden, as a Matter of Law, by Relying Solely on the Allegations of Its Complaint.

Because Cirignano unquestionably made the requisite prima facie showing that Two Rivers' claims arise from his constitutionally protected speech and advocacy on a matter of public interest, the Superior Court was required to grant Cirignano's Anti-SLAPP motion to dismiss unless Two Rivers "demonstrates that

the claim is likely to succeed on the merits." D.C. Code §16-5502(b). Two Rivers did not and cannot make such a showing as a matter of settled law, and the Superior Court's holding to the contrary was plainly in error.

This Court has unequivocally held that such a demonstration

> requires that the plaintiff **present evidence—not simply allegations—**and that the evidence must be legally sufficient to permit a jury properly instructed on the applicable constitutional standards to reasonably find in the plaintiff's favor.

Mann, 150 A.3d at 1220–21(emphasis added). Further,

> we conclude that in considering a special motion to dismiss, the court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported **in light of the evidence that has been produced or proffered in connection with the motion**. This standard achieves the Anti–SLAPP Act's goal of weeding out meritless litigation by ensuring early judicial review of the legal sufficiency of the evidence, consistent with First Amendment principles.

Id. at 1232–33 (emphasis added).

Thus, as a matter of binding law, Two Rivers cannot simply rely on the allegations of the Complaint, but was required to produce evidence showing that Cirignano's alleged activities can serve as a basis for the purported torts Two Rivers alleged in its Complaint. Indeed, "[u]se of the word 'demonstrate' indicates that once the burden has shifted to the complainant, **the statute requires more than mere**

reliance on allegations in the complaint, and mandates the production or proffer of evidence that supports the claim." *Id.* at 1233 (emphasis added).

Two Rivers likewise cannot satisfy its burden under the Anti-SLAPP Act by relying upon arguments in the pleadings. *See id.* As this Court's *Mann* decision demands, "**something more than argument based on the allegations in the complaint is required.**" *Id.* (emphasis added). Indeed, argument and allegations are insufficient as a matter of law to demonstrate a likelihood of success on the merits, because the Anti-SLAPP Act "**requires the plaintiff to put his evidentiary cards on the table**." *Id.* at 1238 (emphasis added). Two Rivers utterly failed this test.

B. Two Rivers Cannot Demonstrate Any Claims Against Cirignano Are Likely to Succeed on the Merits Because Two Rivers Does Not Have Associational Standing to Bring the Claims.

1. Two Rivers Alleges Only Third-Party Claims.

Two Rivers' claims against Cirignano must be dismissed under the Anti-SLAPP Act because Two Rivers does not have standing to get them out of the starting gate. Despite not explicitly stating that it was asserting the claims of its students—rather than Two Rivers itself—the Complaint's allegations make it abundantly clear that Two Rivers seeks to raise the claims of third parties (students at Two Rivers) and not Two Rivers as an institution.

Two Rivers begins its Complaint by noting that it is bringing its purported claims against Cirignano "to protect the well-being of students at Two Rivers"

because Two Rivers is purportedly "responsible for the safety and emotional well-being of the students." (App. 112.) Every purported injury Two Rivers alleges in its Complaint applies not to Two Rivers itself, but purportedly to its students. (*See, e.g.,* App. 116–17, ¶ 13 (alleging students are menaced by Defendants' activities, Defendants' signs are directed at students, and Defendants disrupt students' learning environment); App. 133, ¶ 73 (alleging students have suffered injury from Defendants' alleged activities).)

Thus, under any proper reading of Two Rivers' Complaint, its only purported injuries are those of third parties (students), and it therefore must satisfy the requirements of third-party standing.[3] Two Rivers did not and cannot demonstrate such standing, and the Superior Court's holding to the contrary was in error.

Demonstrating third-party standing requires that Two Rivers demonstrate "(a) its **members** would otherwise have standing to sue in their own right, (b) the interests it seeks to protect are germane to the organization's purpose, and (c) neither the claim asserted nor the relief requested requires the participation of individual **members**." *Friends of Tilden Park, Inc v. D.C.*, 806 A.2d 1201, 1207 (D.C. 2002) (emphasis added). Two Rivers must also demonstrate "some hindrance to the third party's ability to protect his or her own interest." (App. at #, Transcript at 80); *see*

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[3] The Superior Court likewise found that Two Rivers was actually bringing third-party tort claims, and therefore needed to satisfy the third-party standing requirements to proceed on its claims against Cirignano. (App. 099.)

also Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (same). Two Rivers has no members, and therefore cannot even get out of the gate for its claims against Cirignano. Moreover, Two Rivers did not and cannot demonstrate that its non-existent members would face any hindrance to bringing their own claims on their own behalf.

2. Two Rivers Is Not an Association With "Members" Upon Whose Behalf It Could Theoretically Bring Claims by Associational Standing Because It Has No "Members" Who Could Otherwise Have Standing To Sue on Their Own Behalf.

a. Two Rivers' Students Are Not Its Members.

As many courts have recognized, Two Rivers must meet a threshold requirement before a court even thinks about applying the associational standing test. Indeed, "**[t]he threshold requirement for even applying this test is that the organization has actual members or indicia of membership**." *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 50 n.12 (D.D.C. 1998) (emphasis added). "The assumption that an organization litigates on behalf of its members is, after all, implicit in the three-part test." *Am. Legal Found. v. FCC*, 808 F.2d 84, 89 (D.C. Cir. 1987).

Time and again, courts have held that a plaintiff cannot even get out of the starting gate if it fails to demonstrate that it has **members** on whose behalf it could

theoretically bring claims. *See, e.g.*, *Friends of Tilden Park*, 806 A.2d at 1204 ("Friends has no standing to sue in a representational capacity because **it has no members**." (emphasis added)); *id.* at 1208 (holding organization had no standing because "[t]he persons whom Friends claims to represent **are not its members**." (emphasis added)); *Am. Legal Found*., 808 F.2d at 89–90 (holding that organization had no standing to assert its claims because it had no members); *Gettman v. DEA*, 290 F.3d 430, 434 (D.C. Cir. 2002) ("High Times Magazine stumbles on the first step. **It does not have any *members***." (bold emphasis added)); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25 (D.C. Cir. 2002) (holding organization had no standing because "[i]t does not appear that Fund Democracy actually has any members" so it "stumbles on the first step"); *Basel Action Net. v. Maritime Admin.*, 370 F. Supp. 2d 57, 69 (D.D.C. 2005) ("Tides Center has no members . . . . Therefore, it has no associational standing.").

Like the many organizations who have tried and failed before, Two River's claims to associational standing must fail because **it does not have members**. In its Complaint, Two Rivers makes its plainly evident that it has only students – not members. (*See, e.g.*, App. 112 (alleging claims brought "to protect the well-being of its students" and that school is responsible for the students); App. 116–17, ¶ 13 (discussing purported activities of Defendants aimed at Two Rivers' students); (App. 118, ¶ 17 (alleging Two Rivers' mission related entirely to its "students").) The word

"**member**" appears nowhere, in any allegation. Thus, like in the litany of precedent discussed above, Two Rivers "stumbles on the first step" and cannot establish its standing to bring its purported claims on behalf of individuals who are not members.

b. Two Rivers' Students, Alternatively, Do Not Bear Any Legal Indicia of Membership.

Though Two Rivers certainly fails even to allege that it has members, a failure that is utterly fatal to its standing to bring claims against Cirignano, it may still satisfy an alternative test if the individuals who are not "members" nevertheless bear "the indicia of a traditional membership organization." *Am. Legal Found.*, 808 F.2d at 90 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)). This Court, too, has permitted an organization bearing such traditional indicia of membership to bring claims of others if it is the "functional equivalent of a traditional membership organization." *Friends of Tilden Park*, 806 A.2d at 1209. But, importantly, while "the substance of an association-member relationship is more important than the form," *Hunt* "teaches that the **substance must be present**." *Id.* (emphasis added).

The traditional indicia of membership standard requires Two Rivers to show that the students it claims to represent are a "discrete, stable group of persons with a definable set of common interests," that the students "play any role in selecting [Two River's] leadership, guiding [Two River's] activities, or financing those activities,"

including financing the present litigation. *Friends of Tilden Park*, 806 A.2d at 1210; *see also Am. Legal Found.*, 808 F.2d at 90 (same). Two Rivers has not and cannot make any such showing. In fact, the allegations of Two Rivers' Complaint specifically refute such claims.

Two Rivers specifically notes that it is "overseen by the District of Columbia Public Charter School Board," is "governed by the Two Rivers Board of Trustees," and that its leadership is composed by elections. (App. at #, Compl. ¶¶ 16, 27). Thus, Two Rivers' own allegations demonstrate that its students play no role in selecting Two Rivers' leadership or guiding Two Rivers' activities. In fact, D.C. Code §38-1802.04(c)(3) specifically mandates that Two Rivers (itself, as an entity) "exercise[s] exclusive control" over its administration and direction. Thus, its students play no role in that administration.

Two Rivers is financed entirely through public funds allocated from the District of Columbia government and is explicitly prohibited by law from receiving financial contributions from the students or their families. *See* D.C. Code §38-1802.04(c)(2) (prohibiting Two Rivers from accepting financial contributions from students, whether in the form of tuition, fees, or any other payment). Thus, Two Rivers' students are not responsible for financing Two Rivers' activities in general or this litigation in particular.

Therefore, because Two Rivers students do not bear the traditional indicia of membership, it does not constitute the functional equivalent of a membership organization and cannot assert the claims of its students.

3. Two Rivers Cannot Demonstrate That Its Non-Existent "Members" Could Not Assert Their Purported Claims on Their Own Behalf.

Not only does Two Rivers fail to get out of the starting gate, but it cannot demonstrate that there is any obstacle to its students bringing claims on their own behalf. To satisfy this requirement, Two Rivers must demonstrate that its students "face [some] obstacle to litigating their rights themselves," *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209 (6th Cir. 2011), that its students "might be deterred from suing" on their own behalf, *id.*, or encounter some sufficient impediment to bringing their own claims. *Penn. Psychiatric Ass'n v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002).

First, Two Rivers does not allege anywhere in its Complaint that its students are somehow hindered in bringing their own tort claims against Cirignano. In fact, Two Rivers does not even mention a purported hindrance to such claims. Indeed, the Superior Court admitted that Two Rivers failed to include any such assertion in its Complaint. (App. 099 ("that was not in the, on the face of the complaint").) That alone is fatal to Two Rivers' assertion of standing on its students' behalf.

Moreover, the Superior Court's assertion that a lack of ability to finance litigation against Cirignano is somehow a sufficient impediment to warrant associational standing for Two Rivers is plainly in error. (App. 099.) Indeed, as the Supreme Court has said, indigency or the inability to afford an attorney is not itself a sufficient hindrance to satisfy the third-party standing requirements. *Kowolski*, 543 U.S. at 130–31. More fundamentally, however, if this Court's functional equivalency test requires that Two Rivers demonstrate that the students fund its activities in general and **this litigation in particular**, *see Friends of Tilden Park*, 806 A.2d at 1210, it is disingenuous at best to claim that they cannot afford litigation on their own behalf but can fund Two Rivers' claims on their behalf. Both cannot be true, and the Superior Court's holding to the contrary was in error.

Two Rivers does not have standing to bring the claims it is asserting, and it therefore cannot demonstrate that it is likely to succeed on the merits of its claim. The Superior Court erred in failing to dismiss Two Rivers' Complaint under the Anti-SLAPP Act.

C. Two Rivers Cannot Demonstrate That Its Intentional Infliction of Emotional Distress Claim Against Cirignano Is Likely to Succeed on the Merits.

1. Cirignano's Only Alleged Activity in This Matter Involves His Peaceful and Protected Speech in a Traditional Public Forum.

As demonstrate *supra*, Two Rivers' Complaint alleges only one thing against Cirignano: that he peacefully held a sign on the public sidewalk on one occasion, November 23, 2015. (App. 127, ¶ 54 ("Cirignano stood right near the entrance of the middle school and held a sign . . . .").) Cirignano's only alleged activity in this matter therefore involves a single act of peaceful expression in a traditional public forum. Nothing else is alleged against Cirignano, and the only allegation against him is constitutionally protected activity.

2. Cirignano's Protected Speech, Including on Issues That Some Might Find Offensive, Cannot Constitute Extreme and Outrageous Conduct as a Matter of Binding Law.

a. Even Offensive Speech in a Traditional Public Forum Is Entitled to Constitutional Protection.

Though Two Rivers attempts to make issue out of its claim that Cirignano held a sign that "depicted a gruesome picture of an aborted fetus and various body parts," (App. 117, ¶ 54), such a contention is plainly irrelevant. Whether Cirignano's peaceful and constitutionally protected act of holding a sign in a traditional public forum might have included speech or expression that some might find offensive does

not diminish in any way the constitutional protection afforded to his alleged act. Indeed, even offensive speech is constitutionally protected. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) ("advocacy of a politically controversial viewpoint is the essence of First Amendment expression" and "no form of speech is entitled to greater protection"); *McCullen*, 573 U.S. at 505 (Scalia, J., concurring) ("PROTECTING PEOPLE from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks."); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994) (First Amendment protects carrying signs with "disagreeable" images, even on the issue of abortion); *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection"); *Terminielow v. City of Chicago*, 337 U.S. 1, 4 (1949) (holding that speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

b. Binding Law Prohibits a Finding That Cirignano's Peaceful and Constitutionally Protected Expression Can Constitute Extreme or Outrageous Conduct.

That some might have found Cirignano's peaceful expression in a public forum offensive therefore cannot serve as a basis for an intentional infliction of emotions distress claim. The Supreme Court's decision in *Snyder v. Phelps* is

particularly instructive of the fact that Two Rivers cannot succeed on its claim as a matter of law. There, members of the Westboro Baptist Church attended funerals of military veterans that were killed in action. 562 U.S. 443, 448 (2011). As part of their expression, Westboro members would occupy spaces on the public sidewalk and hold signs stating things such as, "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." *Id.* After one such protest, the father of a deceased soldier brought a suit claiming intentional infliction of emotional distress because of such expression in the public forum. *Id.* at 451. There, as here, the plaintiff was required to prove that a defendant "engaged in extreme and outrageous conduct that caused the plaintiffs to suffer severe emotional distress." *Id.*

The Supreme Court held that "[w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether the speech is of public or private concern . . . ." *Id.* In response to that inquiry, the Supreme Court held that Westboro's speech—though highly offensive to many—was nevertheless a matter of public concern and constitutionally protected. *Id.* at 454. Indeed, "[w]hile these messages may fall short of refined social or political commentary, the issues they highlight . . . are matter of public import." *Id.* The same is true of Cirignano's speech in this matter.

Because the speech was considered to be on a matter of public concern, the Supreme Court held that it could not serve as a basis for finding Westboro's conduct "extreme or outrageous." *Id.* at 456–58. Indeed, "Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a special position in terms of First Amendment protection." *Id.* at 456. "Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to special protection under the First Amendment. **Such speech cannot be restricted simply because it is upsetting or arouses contempt**." *Id.* at 458 (emphasis added).

As such, the intentional infliction of emotional distress claim failed as a matter of law because a finding of offensiveness related to the speech cannot overcome the constitutional protection to which it was afforded. Indeed,

> In a case such as this, a jury is unlikely to be neutral with respect to the content of the speech, posing a real danger of becoming an instrument for the suppression of . . . vehement, caustic, and sometimes unpleasant expression. . . . Such a risk is unacceptable; in public debate we must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. . . . **What Westboro said, in the whole context of how and where it chose to say it, is entitled to "special protection" under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous**.

Id. (emphasis added) (internal citations omitted).

This Court's decision in *Ortberg v. Goldman Sachs Grp.*, 64 A.3d 158 (D.C. 2013) is also instructive on this point. There, this Court stated that "the requirement of outrageousness is not an easy one to meet." 64 A.3d at 163 (quoting *Dreisa v. Vaccaro*, 650 A.2d 1308, 1312 (D.C. 1994)). Indeed, to satisfy it, this Court noted that "**[l]iability will only be imposed for conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community**." *Id.* at 163 (quoting *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (emphasis added); *see also Baltimore v. D.C.*, 10 A.2d 1141, 1155 (D.C. 2011) (same); *Kotsch v. D.C.*, 924 A.2d 1040, 1045-46 (D.C. 2007) (same); *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998) (same); *Kerrigan v. Britches of Georgetowne, Inc.*, 705 A.2d 624, 628 (D.C. 1997) (same); *Bernstein v. Fernandez*, 6499 A.2d 1064, 1075 (D.C. 1991) (same).

But, because of the enshrined protections of the First Amendment, this Court held that peaceful demonstrations in a traditional public forum cannot satisfy such a stringent test as a matter of law. *Ortberg*, 64 A.3d at 163–64.

> The conduct took place on public streets, and consisted mostly of chanting slogans and some vague threats. In general, the conduct complained of is part and parcel of the frictions and irritations and clashing of temperaments incident to participation in a community life, **especially life in a society that recognizes a right to public political protest**.

Id. Such constitutional protection precludes affording relief for intentional infliction of emotional distress, because protected constitutional expression cannot be considered outrageous conduct as a matter of law. *Id.*

The same is true of Cirignano's speech. That Two Rivers, or even others encountering his speech on a public sidewalk, might have found it offensive and even wanted to label it "outrageous," the First Amendment demands that his speech is entitled to "special constitutional protection." *Id.* So long as Cirignano's speech concerned an issue of public importance, which it did, and took place in a traditional public forum, which it did, it was entitled to constitutional protection no matter how offensive some might find it. That protection overrides any claim to intentional infliction of emotional distress as a matter of law. The Superior Court's holding to the contrary simply cannot withstand *Snyder*, and Two Rivers' claims not only are unlikely to prevail, but cannot prevail as a matter of law.

c. Binding Law Dictates That Cirignano's Isolated Act of Constitutionally Protected Expression Cannot Constitute Extreme and Outrageous Conduct.

As shown *supra*, Two River's Complaint against Cirignano alleges only one act on one single day: he held a sign on the public sidewalk on November 23, 2016. (App. 117, ¶ 54.) This Court has held as a matter of law that such an isolated occurrence cannot constitute extreme and outrageous conduct. Indeed, this Court unequivocally stated, "**A few unwelcome visits, accompanied by some harassing**

conduct would not be cognizable in an action for a tort which requires proof of extreme and outrageous conduct." *Ortberg*, 64 A.3d at 164 (emphasis added); *see also Homan*, 711 A.2d at 820 (same).

Also in *Ortberg*, this Court noted that "the record shows that [the plaintiff] was only disturbed on a few occasions over a period that spanned several weeks" and that such conduct could not warrant a finding of extreme and outrageous conduct. 64 A.3d at 164. And, in *Homan*, this Court recognized that while a few unwelcome visits cannot justify a finding of outrageous conduct, "a hundred visits and probably thousands of phone calls would constitute such conduct." 711 A.2d at 820. Here, Cirignano engaged in constitutionally protected expression in the traditional public forum near Two Rivers on a single occasion, and Two Rivers does not allege that he has done anything more. His protected speech therefore cannot constitute extreme and outrageous conduct as a matter of law. The Superior Court's finding to the contrary was plainly in error.

3. Two Rivers Does Not And Cannot Allege That Any Of Cirignano's Alleged Activity Has Caused Any Severe Emotional Distress.

Two Rivers also did not and cannot demonstrate that Cirignano's protected speech caused any severe emotional distress. As this Court has held, "[t]o recover, the plaintiff must demonstrate '**an intent on the part of the alleged tortfeasor to cause a disturbance in [the plaintiff's] emotional tranquility so acute that**

harmful physical consequences might result.'" *Wood v. Neuman*, 979 A.2d 64, 77 (D.C. 2009) (quoting *Sterling Mirror of Md., Inc. v. Gordon*, 619 A.2d 64, 67 (D.C. 1993)). Indeed, "[r]ecovery is not allowed merely because the conduct causes mental distress." *Ortberg*, 64 A.3d at 164. In *Wood*, this Court held that even being "horrified" by the defendants' alleged acts, "constantly crying and almost sleepless," and becoming "shaken" were not sufficient to demonstrate a condition "so acute that harmful physical consequences" had resulted. *Wood*, 979 A.2d at 78.

Here, Two Rivers has not and cannot allege that Cirignano's single act of peaceful expression in the traditional public forum caused any severe emotional distress to the point of physical illness. Indeed, no reasonable reading of the Complaint connects Cirignano to any allegation of physical illness or severe distress at all. Two Rivers' single allegation that a child allegedly felt "sick," which is the only allegation even approaching the level of "severe emotional distress" required to support its purported claim, was tied specifically to a particular "incident" not even alleged to involve Cirignano: "One student was so upset by **this incident** that he began to feel sick and had to go home." (App. 129, ¶ 61 (emphasis added).) The "incident" referred to was described two paragraphs before: "**Other individuals** held large signs on the narrow sidewalk between the alley and a driveway, making it difficult for parents and students to pass by and enter the middle school building." (App. 129, ¶ 59 (emphasis added)). There is no connection between "the incident"

involving unnamed "other individuals" and Cirignano's alleged single act of peaceful expression in the traditional public forum.

D. Two Rivers Cannot Demonstrate Its Private Nuisance Claim Against Cirignano Is Likely to Succeed on the Merits Because It Is Not a Separate and Independent Tort.

1. Under D.C. Law, Private Nuisance Is Not a Separate and Independent Tort, but Merely a Type of Damages Associated with Some Other Tort Theory.

Under the law in the District, there is not a separate and independent tort for private nuisance. As such, Two Rivers' claim for private nuisance against Cirignano is inextricably intertwined with its intentional infliction of emotional distress claim and fails with it.

"As an independent tort, claims of nuisance have indeed not been viewed favorably by this Court. In recent cases we have even said that nuisance is a type of damage and not a theory of recovery in and of itself." *D.C. v. Beretta*, 872 A.2d 633, 646 (D.C. 2005) (en banc); *see also Wood*, 979 A.2d at 78 (same); *Ortberg*, 64 A.3d at 167 (same). While these may be the most recent discussions of the issue, this Court has actually gone further in its condemnation of private nuisance as a separate tort: "**Nuisance is a field of tort liability, rather than a type of tortious conduct. . . . Nuisance, in short, is not a separate tort in itself**." *D.C. v. Fowler*, 497 A.2d 456, 461 (D.C. 1985) (emphasis added); *see also Reese v. Wells*, 73 A.2d 899, 902 (D.C.

1950) (holding that nuisance is "not a single type of tortious conduct"). Thus, Two Rivers cannot state a separate and independent tort for private nuisance.

2. Because Two River's Private Nuisance Claim Is Inextricably Intertwined with Its Intentional Infliction of Emotional Distress Claim, It Likewise Fails as a Matter of Binding Law.

As this Court stated in *Ortberg*,

> a plaintiff may only recover on the theory of negligence . . . or another theory such as intentional infliction of emotional distress. Indeed, **where a plaintiff alleges both nuisance and intentional infliction of emotional distress, we have explained that nuisance is a type of damage and not a theory of recovery in and of itself, so the elements of a theory of recovery must be established with reference to the elements of the intentional infliction of emotional distress claim.**

64 A.3d at 167 (emphasis added) (internal quotation marks and citations omitted).

Thus, Two Rivers' private nuisance claim is inextricably intertwined with its intentional infliction of emotional distress claim and must rise or fall with it. *See, e.g.*, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934 (D.C. 1995) ("because nuisance is a type of damage and not a theory of recovery in and of itself, any [claims] must be addressed under the intentional infliction of emotional distress claim"). Two Rivers' nuisance claim, like its intention infliction of emotional distress claim therefore fails as a matter of law.

E. Even If Two Rivers Could State a Separate and Independent Private Nuisance Claim, Two Rivers Would Still Fail to Demonstrate the Claim Is Likely to Succeed on the Merits.

Even if Two Rivers could state a separate and independent claim for private nuisance, which it cannot, its claim would still fail as a matter of law. Two Rivers does not and cannot allege that Cirignano's single alleged incident of protected speech in a traditional public forum demonstrates the degree of permanence required for a private nuisance claim. Two Rivers has not and cannot allege that Cirignano's alleged acts are marked by "some degree of permanence" so as to be "continuing in nature." Indeed, one incident of alleged offending behavior is insufficient as a matter of law to constitute a "constantly recurring grievance." Cirignano's protected speech in a traditional public forum does and cannot constitute an unlawful or unreasonable use to sustain a private nuisance claim. Two Rivers is not likely to succeed on the merits of this claim.

1. Two River's Does Not and Cannot Allege That Cirignano's Single Alleged Incident of Protected Speech in a Traditional Public Forum Demonstrates the Degree of Permanence Required for a Private Nuisance Claim.

a. Two Rivers Must Allege That Cirignano's Alleged Acts Are Marked by "Some Degree of Permanence" so as to Be "Continuing in Nature."

Two Rivers must allege that Cirignano's allegedly offending activities at Two Rivers are marked by some degree of permanence that would constitute actions

continuing in nature. Two Rivers has not and cannot do so. Indeed, one isolated act of peaceful and constitutionally protected act of speech in a traditional public forum cannot constitute any degree of permanence and thus cannot serve as the basis for a private nuisance claim.

As this Court has made clear, even if an independent tort of private nuisance existed, Two Rivers must still plead a requisite degree of permanence to even get out of the starting gate. Indeed, "**[t]o be actionable as a nuisance, the offending thing must be marked by some degree of permanence such that the continuousness or recurrence of the things, facts, or acts which constitute the nuisance give rise to an unreasonable use**." *Wood*, 979 A.2d 78 (emphasis added); *see also Ortberg*, 64 A.3d at 168 (same). As such, "some degree of permanence is an **essential element** of the conception of nuisance." *Reese*, 73 A.2d at 902 (emphasis added). Two Rivers has not and cannot allege that Cirignano's single alleged incident of peaceful protest on one day, November 23, 2016, constitutes any degree of permanence. Any claim to private nuisance therefore must fail.

b. One Incident of Alleged Offending Behavior Is Insufficient as a Matter of Law to Constitute a Constantly Recurring Grievance.

More fatal to Two Rivers' purported private nuisance claim, however, is that one incident of alleged offense is insufficient as a matter of law to constitute a private nuisance. As this Court said in *Reese*, "**whatever the approach, it seems clear that**

one act of misconduct, though it causes discomfiture or inconvenience to others in the use and enjoyment of property, is not actionable as a nuisance." 73 A.2d at 902 (emphasis added); *Wood*, 979 A.2d at 78 (noting that one alleged incident of offense is not sufficient for a private nuisance). Again, this Court's decision in *Ortberg* is instructive. There, the defendants had engaged in "five demonstrations at [plaintiff's] home" and "eight demonstrations" at the Goldman Sachs' office. *Ortberg*, 64 A.3d at 168. Under those circumstances, this Court held that "assuming that we recognize a private nuisance as an independent tort, we cannot conclude that there is a substantial likelihood that Mr. Paese and Goldman Sachs can prevail on their nuisance claim." *Id.* Indeed, "we cannot say that the protestors behavior resulted in substantial injury or continuous and constantly recurring acts that constituted an unreasonable interference." *Id.* at 168-69.

If five demonstrations at a plaintiff's home and eight demonstrations at his office are insufficient to constitute a constantly recurring grievance, then Cirignano's single alleged incident of constitutionally protected speech in a traditional public forum cannot, as a matter of law, constitute a nuisance. Two Rivers' Complaint, even assuming a private nuisance claim exists, cannot state a claim for it against Cirignano. The Superior Court's holding to the contrary was plainly in error.

2. Cirignano's Protected Speech in a Traditional Public Forum Does Not and Cannot Constitute an Unlawful or Unreasonable Use to Sustain a Private Nuisance Claim.

Two Rivers' private nuisance claim against Cirignano also fails for a separate and independent reason, again assuming such a claim even exists. This Court's *Reese* decision makes clear that a claim for nuisance necessarily requires a degree of permanence that amounts to an unlawful or unreasonable use. *Reese*, 73 A.2d at 902 (citing *United States v. Cohen*, 268 F. 420, 422 (E.D. Mo. 1920)). In *Cohen*, it was recognized that "at common law, a nuisance is a wrong arising from an unreasonable or unlawful use of a house, premises, place, or property, to the discomfort, annoyance, inconvenience, or damage of another." *Cohen*, 268 F. at 422. As demonstrated *supra*, Cirignano's constitutionally protected expression in a traditional public forum was neither unlawful nor unreasonable. Indeed, it was constitutionally permissible and "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Snyder*, 562 U.S. at 451. Given such constitutional protection, Cirignano's speech cannot be considered unlawful or unreasonable as a matter of law. Thus, Two Rivers' private nuisance claim against Cirignano, must fail as a matter of law.

F. Two Rivers Utterly Failed to Meet the Threshold Pleading Requirements of Any Purported Conspiracy and, Therefore, Cannot Demonstrate Its Conspiracy Claim Against Cirignano Is Likely to Succeed on the Merits.

To demonstrate a likelihood of success on the merits of its civil conspiracy claim, Two Rivers must demonstrate that there was

> an agreement between two or more persons; (2) to participate in an unlawful act, or in a lawful act in an unlawful manner; and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement (4) pursuant to, and in furtherance of, the common scheme.

Weishapl v. Sowers, 771 A.2d 1014,1023 (D.C. 2001). "Civil conspiracy depends on the performance of some underlying tortious act," and "is thus not an independent action." *Id.*; *see also Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994) (same).

Two Rivers has not and cannot demonstrate a likelihood of success on the merits of its purported conspiracy claim against Cirignano because (1) its conclusory allegations are insufficient as a matter of law, (2) Cirignano is not and cannot be alleged to have entered into any kind of agreement with the other Defendants, and (3) Cirignano cannot, as a matter of law, conspire to commit a lawful act.

1. Conclusory Allegations of Conspiracy Are Insufficient as a Matter of Law to State a Claim for Conspiracy.

As a threshold matter, Two Rivers was required to plead with specificity the requisite elements of a conspiracy. It is axiomatic that conclusory allegations of a

civil conspiracy will not suffice. *See, e.g.*, *Mattiaccio v. DHA Grp., Inc.*, 20 F. Supp. 3d 220 (D.D.C. 2014) (holding that a plaintiff "must set forth more than conclusory allegations of the [elements] to sustain a claim for conspiracy"); *McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77 (D.D.C. 2016) ("conclusory allegations of [the elements] do not suffice"); *Lyles v. Hughes*, 83 F. Supp. 3d 315, 323 (D.D.C. 2015) (same); *Bush v.. Butler*, 521 F. Supp. 2d 63, 68-69 (D.D.C. 2007) (same).

Here, Two Rivers makes only one conclusory allegation concerning the conspiracy claim against Cirignano. It alleges simply that "Defendants individually and collectively knowingly [sic] entered into a conspiracy to create a private nuisance." (App. 135, ¶ 86.) There are no allegations mentioning any agreement, any meeting of the minds, or any of the other elements of the alleged conspiracy. In fact, there is no mention of Cirignano at all. Two Rivers just simply states that there was conspiracy as a conclusion. Such conclusory and unsupported allegations cannot satisfy Two Rivers' burden to demonstrate, with actual evidence and not just allegations, that it is likely to succeed on the merits of its civil conspiracy claim.

2. Two Rivers' Failure to Allege That Cirignano Entered into Any Agreement Is Likewise Fatal to Its Purported Conspiracy Claim.

As this Court stated in *Griva*, an "essential element" of the civil conspiracy claims is evidence of an agreement. 637 A.2d at 849; *see also Matttiaccio*, 20 F. Supp. 3d at 230 ("The question of whether a conspiracy theory has been adequately

plead often turns upon the existence of an agreement, which is **the essential element of a conspiracy claim**." (emphasis added)); *Graves v. United States*, 961 F. Supp. 314, 320 (D.D.C. 1997) (same). Absent evidence of such an agreement, Two Rivers cannot prevail on its conspiracy claim. *Griva*, 637 A.2d at 849 ("We agree that Griva has not successfully alleged a civil conspiracy [because] Griva does not allege any agreement."). Indeed, Two Rivers "must allege facts showing the existence or establishment of an agreement." *McMullen*, 164 F. Supp. 3d at 97. Fatally for Two Rivers, and as mentioned above, it alleges only one conclusory notion that Defendants entered into a conspiracy and does not mention Cirignano at all. The word "agreement" or "meeting of the minds" is nowhere to be found in Two Rivers' Complaint. Without even mentioning the word, much less putting forward evidence that such a contention has factual support, Two Rivers simply cannot support its claims for civil conspiracy against Cirignano.

3. Even if Two Rivers Properly Alleged a Civil Conspiracy, Which It Did Not, Cirignano Cannot Conspire to Do a Lawful and Constitutionally Protected Act.

Two Rivers must demonstrate that Cirignano "participate[d] in an unlawful act, or in a lawful act in an unlawful manner, *Weishapl*, 771 A.2d at 1023, and that he engaged in "the performance of some underlying tortious act." *Id.* As demonstrated *supra*, Cirignano's peaceful and constitutionally protected expression in a traditional public forum is neither unlawful, nor tortious. Therefore, he could

not have engaged in any conspiracy whatsoever. Indeed, Cirignano cannot conspire to engage in constitutionally protected expression, as it is lawful and occupies the highest rung of constitutional protection. Two Rivers' civil conspiracy claim against Cirignano fails as a matter of law.

CONCLUSION

Because Cirignano's constitutionally protected expression is the only thing that gives rise to Two Rivers' claims against him and because his speech unquestionably was concerning a matter of public interest, the Anti-SLAPP Act requires that Two Rivers demonstrate, with actual evidence and not mere reliance on allegations, that it is likely to succeed on the merits of its claim against Cirignano. Two Rivers has not and cannot meet that demanding burden. As a threshold matter, Two Rivers does not have members and therefore cannot assert associational standing as a matter of settled and binding law. As an indisputable act of constitutionally protected expression, Cirignano's speech cannot serve as the basis for an intentional infliction of emotional distress claim and cannot constitute extreme or outrageous conduct. Cirignano is also not alleged to have participated in any event that resulted in severe emotional distress. Finally, Two Rivers cannot assert a separate and independent private nuisance claim because it does not exist. But, even if such a claim exists, Two Rivers' cannot succeed on that claim as a matter of binding law because one act of alleged speech in a traditional public forum is neither

continuous, recurring, or displaying any degree of permanence, and it was not unlawful or unreasonable. Two Rivers' claims against Cirignano therefore fail as a matter of law. This Court should reverse the Superior Court's denial of Cirignano's special Anti-SLAPP motion to dismiss, and order on remand that Two Rivers' claims against Cirignano be dismissed with prejudice.

Respectfully submitted,

/s/ Mathew D. Staver

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed this May 28, 2019 through the Court's EFS system, which effect electronic service on the following parties or counsel of record:

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