

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,)	CIVIL ACTION
)	File No. 1:16-CV-01460-ELR-WEJ
v.)	
)	
CLAYTON COUNTY,)	
)	
Defendant.)	

**PLAINTIFF’S REPLY IN SUPPORT OF OBJECTIONS TO MAGISTRATE
JUDGE’S ORDER DENYING MOTION FOR LEAVE TO FILE THIRD
AMENDED COMPLAINT**

I. INTRODUCTION

In his opening brief in support of his Objections, Mr. Bostock established that the Magistrate Judge erred in denying Plaintiff’s Motion for Leave to file a Third Amended Complaint. [Doc. 51.]

Defendant raises several meritless arguments in opposition. As set forth below, and in Plaintiff’s initial brief, these arguments fail. Accordingly, this Court should overrule the Magistrate Judge’s Order, and allow Mr. Bostock to amend his Complaint to add a claim for post-employment retaliation.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Apply the *De Novo* Standard of Review

In his initial brief, Mr. Bostock established that when a magistrate judge denies a motion to amend on the grounds of futility, as was the case here, the magistrate judge has engaged in a Fed. R. Civ. P. 12(b)(6) analysis and decided the amendment fails to state a claim, thus making the decision dispositive and subject to *de novo* review.

Defendant argues, however, that because motions to amend are not expressly listed under 28 U.S.C. § 636 (b)(1)(A) they cannot ever be treated as dispositive under Fed. R. Civ. P. 72 or L.R. 72.1 (B). Defendant's argument exalts form over substance and is contrary to the intent behind Fed. R. Civ. P. 72 which is to "permit[] the courts to reach commonsense decisions rather than becoming mired in a game of labels." 12 Fed. Prac. & Proc. Civ. § 3068.2 (3d ed.). Under Fed. R. Civ. P. 72, the distinction between dispositive and non-dispositive matters is "in keeping with the legislative intent; at the very least, the eight motions listed in the statute will be governed by the procedures and *de novo* review of Rule 72(b), and those procedures should also apply to *any other pretrial matters or other "additional duties" that, in a particular case, may be "dispositive of a claim or defense of a party."* 12 Fed. Prac. & Proc. Civ. § 3068.2 (3d ed.) (emphasis added).

Defendant's myopic reading of the rule and statute would prevent the Court from reviewing *de novo* a magistrate judge's ruling unless the title of the motion at issue were specifically enumerated under § 636(b)(1). To do so would result in injustice where, as here, the effect of the ruling is the equivalent of a motion to dismiss for failure to state a claim, which *is* expressly listed under § 636(b)(1). The cases cited in Plaintiff's opening brief recognize this and apply a functional and common sense analysis that is in keeping with the letter and spirit of Rule 72. This Court should do the same and apply *de novo* review. Regardless of the standard the Court applies, however, the Magistrate Judge erred for the reasons set forth below.

B. The Magistrate Judge Failed to Properly Apply the "Plausibility" Standard in His Futility Analysis

The Magistrate Judge engaged in improper factual inquiry, determination and analysis as part of his erroneous decision that the proposed amendment would be futile. Defendant attempts to portray this error as merely part of the *Twombly/Iqbal* "plausibility" inquiry. But as set forth below, the Magistrate Judge far exceeded the boundaries of the plausibility inquiry and made impermissible factual determinations.

"To survive...a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 2007).

This plausibility standard “does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [supporting the claim].” *Twombly*, 550 U.S. at 556. Further, the court must draw all reasonable inferences in the light most favorable to the plaintiff. *Id.* at 555-556. Where there are well-pleaded factual allegations, the court must “assume their veracity and ... determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679.

Instead of conducting a plausibility inquiry the Magistrate Judge made a detailed factual inquiry into Plaintiff’s allegations. The Magistrate Judge exceeded even the *already improper* “probability inquiry” because the court’s role at this stage is to determine *only* the appropriateness of a motion to amend and not to make any factual findings as to what the evidence may be. *Duling v. Domino's Pizza, LLC*, No. 1:13-CV-01570-WCO, 2014 WL 11955397, at *3 (N.D. Ga. Sept. 2, 2014).

1. The Magistrate Judge Erred in Finding that Judge Teske Was Not Defendant’s Employee and Agent

Plaintiff has already briefed at length Judge Teske’s and others’ statements regarding his role in the process, the capacity in which he acted as Plaintiff’s “supervisor” and the expectation that he would have a “significant say” going forward. [Doc. 57 at 7-8.] Since Judge Teske supervised Plaintiff and was the

decision maker for his termination, the statements he made *about those very actions* were made in that same capacity.

The Magistrate Judge, however, performed his own research and analysis into the issue.¹ But the Magistrate Judge failed to account for issues such as Defendant's financial contribution to the Juvenile Court or its authority and input with respect to Juvenile Court personnel. This is not mere speculation or supposition. *See*, O.C.G.A. § 15-11-52 ("The compensation of the full-time or part-time juvenile court judges shall be set by the superior court *with the approval of the governing authority or governing authorities of the county or counties* for which the juvenile court judge is appointed)(emphasis added); O.C.G.A. § 15-11-54 ("The governing authority of the county of residence of each juvenile court judge shall offer the juvenile court judge insurance benefits and any other benefits except retirement or pension benefits equivalent to those offered to employees of the county, with a right to contribution from other counties in the circuit for a pro rata contribution toward the costs of such benefits, based on county population."); O.C.G.A. § 15-11-54 ("Except for state grants provided by Code Section 15-11-52, all expenditures of the court are declared to be an expense of the court and payable

¹ Defendant did not even raise this argument in its opposition to Plaintiff's Motion. The Magistrate Judge apparently took it upon himself to object to this proposed amendment to the complaint.

out of the county treasury with the approval of the governing authority or governing authorities of the county or counties for which the juvenile court judge is appointed.”) All of this illustrates why such analysis is not proper at this stage in the pleadings and why the Magistrate Judge erred on this issue.

2. Plaintiff Properly Pleaded an Adverse Action

Plaintiff has properly pleaded an adverse action by alleging that Judge Teske’s retaliatory remarks caused Plaintiff significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects. (*Id.* ¶ 33.) The Magistrate Judge erroneously resolved what is clearly an issue of fact and a merits-based issue – the interpretation of Judge Teske’s statements and his intent – with his own erroneous subjective interpretation of Judge Teske’s remarks.

Defendant adopts this same flawed logic in defending Judge Teske’s remarks as merely non-retaliatory denials of Plaintiff’s allegations. In the first place, this characterization improperly makes an interpretation that is the province of the jury, not Defendant or the Magistrate Judge. A district court recently rejected this same argument. In *Savignac v. Jones Day*, Civil Action No. 19-2443, USDC DC, February 11, 2021 (copy attached hereto as Exhibit A and submitted as supplemental persuasive authority), the plaintiffs moved to amend their lawsuit to include a retaliation claim that arose eleven months after the lawsuit was filed. The

retaliation claim arose from a press release that the defendant-law firm issued responding to the allegations in plaintiffs' lawsuit, which plaintiffs claimed were false and retaliatory statements. The press release, among other things, asserted that the plaintiffs' claims were false and not made in good faith (implying that the plaintiffs were not being truthful, like Teske said about Bostock in this case). Defendants argued that the proposed supplement was futile because they were simply defending against plaintiffs' allegations rather than retaliating against plaintiffs. The court's analysis and conclusion is particularly relevant in this case given the similar context in which the retaliatory comments were made. In support of its decision allowing the plaintiffs to supplement their complaint, the court stated:

Defendants cite no caselaw holding that public statements relating to a matter in litigation, but not made in the litigation itself, are protected. Nor do they cite to any caselaw holding that opinions are protected in the retaliation context, and, indeed, that proposition is difficult to square with the text or purpose of the relevant anti-retaliation provisions. There is no reason to believe, for example, that an employee would have no recourse if her employer published career-damaging "opinions" about her because the employer was angry that the employee had filed an equal employment opportunity complaint and wanted to dissuade other employees from doing so. And, even if the press release merits similar treatment to a statement made in court filings or in the courtroom—a conclusion that is questionable—the authority cited by Defendants makes clear that there is no "absolute litigation privilege" because "some actions taken in the course of litigation could conceivably constitute retaliation." *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998). **Because the inquiry into**

retaliation is highly context-dependent, it is inappropriate for the Court to deem Plaintiffs' motion futile at this stage on these grounds.

Id. at 5 (emphasis added). Because of the factual disputes concerning the accuracy of the statements and the resulting harm, the court stated that it could not simply reject the plaintiff's contentions at the pleading stage and would grant the motion.

That is *exactly* the situation in this case. The parties may disagree as to the interpretation or meaning of Judge Teske's remarks, but this is for the jury to decide. And it is most certainly *not* the role of the Magistrate Judge to impose his own factual interpretation.

3. Plaintiff has Adequately Pleaded Causation

The proposed Third Amended Complaint alleges that not only did Teske make his retaliatory remarks only *two days after* and in response to the Supreme Court's decision in this case, *he specifically referred to* Mr. Bostock's protected activity by stating that Mr. Bostock "couldn't have gotten there [i.e., the Supreme Court] if he had revealed the whole truth. Because he didn't reveal the whole truth, he got there [to the Supreme Court]." Thus, Mr. Bostock has pleaded not only temporal proximity but other evidence of causation as well - Judge Teske's direct references to Plaintiff's protected activity.

Defendant argues, however, that the causal chain is somehow “backwards” because Judge Teske had made the same comments before. In the first place, these were not simply the same comments Judge Teske made before because he was *specifically referencing* the recent Supreme Court decision and how, among other retaliatory statements, Plaintiff could not have “gotten there” if he had told the truth and that there was “only so long” Plaintiff “could hide from the truth.” Thus, Defendant’s argument is factually incorrect.

It is also legally baseless. Defendant cites three cases in supposed support of its position. Two of these cases, however, are inapposite and Defendant misstates the holding of the third.

Defendant cites *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1245 (11th Cir. 2016). *Quigg* was decided on summary judgment, not at the pleading stage. Moreover, in *Quigg*, the Eleventh Circuit determined that before plaintiff filed her EEOC charge, the defendant school district had already sent documents related to certain school programs to the Georgia Professional Standards Commission (PSC) because various school board members had ethical concerns about the plaintiff’s administration of the programs. *Id.* The Eleventh Circuit further noted that the defendant did not formally lodge the PSC complaint (the alleged retaliatory action) until five months after the plaintiff’s EEOC filing and thus there was no triable

issue of causation. *Id.* In this case, however, Judge Teske could not have begun his retaliatory comments before Mr. Bostock's protected activity (in this case the Supreme Court's decision) because he made the statements in response to the news of the decision. *Quigg* is therefore inapposite.²

Defendant's reliance upon *Drago v. Jenne*, 453 F.3d 1301, 1308 (11th Cir. 2006) is similarly misplaced. Again, *Drago* was a summary judgment case with different standards than apply to this stage of this case. Moreover, the Eleventh Circuit determined that the record evidence was "overwhelming" that the employer contemplated demoting the plaintiff before he ever engaged in protected activity and the plaintiff admitted as much. *Id.* *Drago* simply has nothing to do with the issues in this case.

Defendant also cites *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1259 (11th Cir. 2012) for the proposition that "[t]he denial of a light-duty job cannot, therefore, be a materially adverse action causally connected to her EEOC

² Defendant contends that the Supreme Court decision was somehow not protected activity. [Doc. 61 at 13.] Protected activity, however, includes discrimination-based lawsuits. *Gerard v. Board of Regents of State of Ga.*, 324 Fed. Appx. 818, 825 (11th Cir. 2009) (citing *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1201 (11th Cir. 2001)). Clearly, such a pivotal event in a discrimination-based lawsuit is part of the protected activity. Moreover, as noted above, Mr. Bostock is not relying wholly upon temporal proximity to establish causation given Judge Teske's specific reference to the Supreme Court's decision and Plaintiff's lawsuit.

charge because it happened before Gate Gourmet got notice of the charge and an effect cannot precede the cause.” But that is not what the Eleventh Circuit held. Defendant has quoted a portion of the *Gate Gourmet* defendant’s argument but missed that fact that the Eleventh Circuit *rejected* that argument and instead held that summary judgment was *improper* because the interpretation of the evidence created a reasonable inference that the statutorily protected activity caused the defendant to deny the plaintiff a light-duty position, which was a materially adverse action. *Id.* at 1259. Thus, *Gate Gourmet* when properly cited is of no help at all to Defendant.

The retaliation claim is sufficiently pleaded and the proposed amendment meets the standards of Rule 15(a)(2). That is all that is required and the Court should reverse the Magistrate Judge and grant Plaintiff’s motion.³

III. CONCLUSION

For the foregoing reasons, and for the reasons raised in his initial brief in support of his Objections, Mr. Bostock requests that the Court reverse the Magistrate Judge’s order and grant Mr. Bostock’s Motion for Leave to File Third Amended Complaint.

³ Plaintiff maintains his objections to the Magistrate Judge’s denial of Plaintiff’s proposed amendment clarifying that he was bringing both single and mixed motive claims.

Respectfully submitted this 19th day of February 2021.

/s/ Thomas J. Mew, IV

Thomas J. Mew, IV

Georgia Bar No. 503447

Edward D. Buckley

Georgia Bar No. 092750

Andrew M. Beal

Georgia Bar No. 043842

Rachel Berlin Benjamin

Georgia Bar No. 707419

BUCKLEY BEAL LLP

600 Peachtree Street, NE, Suite 3900

Atlanta, GA 30308

Telephone: (404) 781-1100

Facsimile: (404) 781-1101

tmew@buckleybeal.com

edbuckley@buckleybeal.com

abeal@buckleybeal.com

rberlin@buckleybeal.com

Counsel for Plaintiff

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,)	CIVIL ACTION
)	File No. 1:16-CV-1460-ELR-WEJ
v.)	
)	
CLAYTON COUNTY,)	
)	
Defendant.)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing has been prepared in Times New Roman 14 font, as approved by the Court in LR 5.1B.

/s/ Thomas J. Mew
Georgia Bar No. 503447

BUCKLEY BEAL, LLP
1230 Peachtree Street NE, Suite 900
Atlanta, GA 30309
Phone: (404) 781-1100
Facsimile: (404) 781-1101

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GERALD LYNN BOSTOCK,)
)
Plaintiff,) CIVIL ACTION
) File No. 1:16-CV-01460- ELR-WEJ
v.)
)
CLAYTON COUNTY,)
)
Defendant.)

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to counsel for Defendant:

Jack Hancock, Esq.
Michael Hill, Esq.
William H. Buechner, Esq.
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway, Suite 1600
Atlanta, Georgia 30339

/s/ Thomas J. Mew
Georgia Bar No. 503447

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARK C. SAVIGNAC *et al.*,

Plaintiffs,

v.

JONES DAY *et al.*,

Defendants.

Civil Action No. 19-2443 (RDM)

ORDER

Plaintiffs Mark Savignac and Julia Sheketoff filed this action in August 2019, challenging the legality of Jones Day’s parental leave policy and alleging that they were subjected to various forms of sex discrimination and retaliation arising from their employment as associates at the firm. Dkt. 1. Almost a year later, Plaintiffs moved for leave to file a supplemental complaint alleging that Jones Day, its managing partner, Stephen Brogan, and others retaliated against them in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e *et seq.*; the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 215; and the D.C. Human Rights Act (“DCHRA”), D.C. Code § 2-1401 *et seq.*, when the firm issued and “widely disseminated” a press release responding to the allegations contained in Plaintiffs’ complaint. Dkt. 25-1 at 1, 16–17 (Proposed Supp. Compl. ¶¶ 3, 96–113). That motion is now before the Court.

Among other things, Plaintiffs’ supplemental complaint, if allowed, would allege that the press release (1) falsely asserts that Plaintiffs filed suit to compel women to make “intrusive disclosures” of medical information to Jones Day, *id.* at 4–5 (Proposed Supp. Compl. ¶¶ 22–26); (2) falsely asserts that Savignac was not fired for challenging the legality of Jones Day’s parental

leave policy, *id.* at 5–6 (Proposed Supp. Compl. ¶¶ 27–29); (3) falsely asserts that Savignac demonstrated “poor judgment,” “a lack of courtesy to his colleagues,” “personal immaturity,” and “a disinterest in pursuing his career at Jones Day,” *id.* at 6 (Proposed Supp. Compl. ¶ 31); and (4) falsely asserts that Sheketoff’s claims were “false and . . . not made in good faith,” maliciously stated that her “contribution to billable client representation was below expectations” and that her “attention was focused on idiosyncratic concerns,” and deceptively created the impression that the allegation that the firm had “doctored her website photo ‘to confirm to the firm’s Caucasian standards of female beauty,’” was untrue, *id.* at 10, 12–14 (Proposed Supp. Compl. ¶¶ 59, 73, 85–86). According to Plaintiffs’ proposed supplemental complaint, these “malicious statements” were retaliatory and were included with the intent “to destroy Plaintiffs’ reputations; to provide current and prospective employers, other members of the legal profession, and prospective clients with permanently available false and misleading negative information to deter them from hiring, promoting, or doing business with” Plaintiffs. Dkt. 25-1 at 15 (Proposed Supp. Compl. ¶¶ 94–95). The proposed supplemental complaint further alleges that Jones Day, Brogan, and others intended “to deter other victims of illegal discrimination at Jones Day from coming forward by demonstrating Jones Day leadership’s eagerness to destroy the career and reputation of anyone who does so.” *Id.* (Proposed Supp. Compl. ¶ 95).

Federal Rule of Civil Procedure 15(d) provides that “[o]n motion and reasonable notice, the [C]ourt may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Motions to supplement or to amend pleadings “are to be ‘freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the

parties,” *Hall v. CIA*, 437 F.3d 94, 101 (D.C. Cir. 2006) (quoting 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1504, at 186–87 (2d ed. 1990)); *see also Sai v. TSA*, 155 F. Supp. 3d 1, 7 (D.D.C. 2016), absent good reasons for denial, “such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment,” *Foman v. Davis.*, 371 U.S. 178, 182 (1962).

Here, Defendants argue that “[t]he Court should exercise its discretion to deny the motion” because Plaintiffs waited to move until “[e]leven months” after the alleged retaliation, “with a motion to dismiss their [c]omplaint fully briefed.” Dkt. 26 at 1. They further argue—at greater length—that Plaintiffs’ motion should be denied because of the futility of their supplemental claims. *Id.* at 2. As Defendants explain it, Jones Day only prepared its statement after it was contacted by the *New York Times*, at the instigation of Plaintiffs, and the firm only published the statement on its website after the complaint was filed and the *New York Times* ran its story. *Id.* at 1. They took these actions, not to retaliate against Plaintiffs, but to defend the firm’s reputation in the face of Plaintiffs’ well-publicized attack on the firm. As Defendants put it, the “[p]ublic airing of the defendants’ legal and factual positions cannot, in the legally relevant sense,” constitute retaliation; rather, their response was “a natural and inevitable incident of litigation.” *Id.* at 3. “Engaging with the press was part of Plaintiffs’ strategy (and threat) from the start,” and Defendants can—in their view—hardly be faulted for defending themselves in the very forum Plaintiffs’ invoked. *Id.* at 4. Finally, Defendants assert that Plaintiffs’ proposed claims are futile because “Jones Day’s statements were factually true, rational interpretations of disclosed facts, or non-falsifiable matters of opinion.” *Id.* at 2 n.1.

The Court begins with the timeliness of Plaintiffs’ motion. Although Defendants are

correct that Plaintiffs could have sought leave to file a supplemental complaint earlier than they did, Defendants have failed to identify any undue prejudice they will suffer if Plaintiffs' motion is granted. This litigation remains in the relatively early stages, and Plaintiffs' proposed, supplemental complaint does not inject any fundamentally new or unrelated issues into the case. *Cf. Thorp v. District of Columbia*, 325 F.R.D. 510, 514 (D.D.C. 2018) (denying leave to file a supplemental pleading because it prejudiced the defendants by adding new parties and "allegations relate[d] to events fully distinct from those underlying" the case); *Sai*, 155 F. Supp. 3d at 7 (denying leave to file a supplemental pleading adding fourteen new FOIA requests that "would almost certainly delay disposition of the case while [the defendant] processe[d] the new requests"). As a result, Plaintiffs' delay in moving to supplement their complaint is not fatal to their motion.

Although Defendants are on firmer ground in arguing that the proposed, supplemental complaint is futile, in light of the liberal rule permitting the amendment or supplementation of pleadings, *see Wildearch Guardians v. Kempthorne*, 592 F. Supp.2d 18, 23 (D.D.C. 2008) ("Motions to amend under Rule 15(a) and motions to supplement under Rule 15(d) are subject to the same standard."); *Foman*, 371 U.S. at 182 (1962) (leave to amend shall be "freely given" (internal quotation marks omitted)), the Court cannot conclude on the current record and in light of the briefs filed to date that Plaintiffs cannot possibly prevail on their new claims. Defendants, to be sure, raise a host of substantial hurdles that Plaintiffs will face in pursuing their claims. But, to the extent they contend that Plaintiffs lose as a matter of law, Defendants fail to develop those arguments with sufficient clarity to permit the Court to resolve the question on the existing record. And, to the extent they contend that Plaintiffs' claims are wrong as factually flawed, this is not the proper stage of the proceeding to resolve that contention.

Anti-retaliation provisions like those at issue here proscribe actions that “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). “[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” *Id.* at 69. Defendants argue that their press release is non-actionable because the statements therein either make true assertions, exist in publicly available court filings, constitute opinions, or cannot possibly inflict any harm beyond the injury Plaintiffs may have inflicted upon themselves by bringing this litigation. Dkt. 26 at 2–5. But Defendants cite no caselaw holding that public statements relating to a matter in litigation, but not made in the litigation itself, are protected. Nor do they cite to any caselaw holding that opinions are protected in the retaliation context, and, indeed, that proposition is difficult to square with the text or purpose of the relevant anti-retaliation provisions. There is no reason to believe, for example, that an employee would have no recourse if her employer published career-damaging “opinions” about her because the employer was angry that the employee had filed an equal employment opportunity complaint and wanted to dissuade other employees from doing so. And, even if the press release merits similar treatment to a statement made in court filings or in the courtroom—a conclusion that is questionable—the authority cited by Defendants makes clear that there is no “absolute litigation privilege” because “some actions taken in the course of litigation could conceivably constitute retaliation.” *Steffes v. Stepan Co.*, 144 F.3d 1070, 1075 (7th Cir. 1998). Because the inquiry into retaliation is highly context-dependent, it is inappropriate for the Court to deem Plaintiffs’ motion futile at this stage on these grounds.

To the extent Defendants contend that all of their assertions were true, that contention is both disputed and premature. Plaintiffs allege that several of the assertions were false or

calculated to mislead, and the Court cannot resolve that difference of views on a motion for leave to supplement. Similarly, Defendants' contention that their press release could not have—and will not—inflict any harm on Plaintiffs beyond that engendered by their complaint and Defendants' right to respond, also turns on questions of fact that the Court cannot resolve in the present context. Defendants may be right that what matters in the court of public opinion (and what is likely to matter to current or future employers) is that Plaintiffs sued their former employer over what Jones Day characterizes as a generous parental leave policy and that Defendants have every right to dispute Plaintiffs' allegations in the pending litigation. But the Court cannot, at this early stage of the proceeding, simply reject Plaintiffs' factual allegations that Defendants' broad dissemination of the press statement has caused, and is likely to continue to cause, significant damage to their professional reputations, above and beyond the filings and arguments made in this case. Even if “recovery is very remote and unlikely,” the Court must accept Plaintiffs non-conclusory, factual allegations as true, and must permit Plaintiffs to proceed if their claims clear the modest hurdle of plausibility. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (quotation omitted). Based on the briefing to date, the Court cannot conclude that Plaintiffs' claims fail as a matter of law.

Finally, Defendants contend that Plaintiffs' supplemental claims are “time-barred for the same reasons as Plaintiffs' original Title VII claim.” Dkt. 26 at 2 n.1. The Court, however, has already rejected this argument in denying Defendants' motion to dismiss Plaintiffs' original Title VII claim. *Savignac v. Jones Day*, No. 19-2443, 2020 WL 5291980, at *6–8 (D.D.C. Sept. 4, 2020).

The Court will therefore grant Plaintiffs leave to file their proposed, supplemental complaint.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion for leave to file a supplemental complaint, Dkt. 25, is **GRANTED**; it is further

ORDERED that the supplemental complaint, Dkt. 25-1, is deemed **FILED**; and it is further

ORDERED that Defendants Jones Day and Brogan shall respond to the supplemental complaint on or before March 5, 2021.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: February 11, 2021