1   The Honorable Thomas S. Zilly

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7   UNITED STATES DISTRICT COURT
                          WESTERN DISTRICT OF WASHINGTON
8   AT SEATTLE

9   TIM and PENNY PATERSON, husband and   )
     wife and the marital community thereof,   )
10   )   No. 2:05-CV-01719-TSZ
                          Plaintiffs,   )
11   )   **DEFENDANTS' MOTION FOR**
           v.   )   **SUMMARY JUDGMENT**
12   )
     LITTLE, BROWN AND COMPANY, a   )   **NOTE ON MOTION**
13   Massachusetts state corporation, TIME   )   **CALENDAR: April 6, 2007**
     WARNER BOOK GROUP, a Delaware state   )
14   corporation, HAROLD EVANS ASSOCIATES   )   **ORAL ARGUMENT**
     LLC, a New York state limited liability   )   **REQUESTED**
15   company, HAROLD EVANS, and DAVID   )
     LEFER,   )
16   )
                          Defendants.   )
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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT   Davis Wright Tremaine LLP
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I.   INTRODUCTION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendants Little, Brown & Co. ("Little Brown"), Time Warner Book Group[1] ("Time Warner"), Harold Evans Associates LLC ("Harold Evans Associates"), Harold Evans, and David Lefer (collectively "Defendants") move for entry of summary judgment dismissing all of the claims asserted by plaintiffs Tim and Penny Paterson's against Defendants.

This lawsuit is subject to dismissal for any of several, multiple independent legal grounds.[2] Because the statements identified by Plaintiffs as defamatory are either true or constitute non-actionable opinion, because Mr. Paterson has candidly acknowledged that he has not suffered any damages attributable to the publication of these statements, and because Plaintiffs have no evidence that any of the Defendants published the statements with constitutional malice, the Court should dismiss Plaintiffs' complaint with prejudice.

II.   STATEMENT OF FACTS

On October 12, 2005, Tim and Penny Paterson[3] sued Defendants for defamation and false light invasion of privacy for statements in the chapter discussing the late computer pioneer Gary Kildall — entitled "Gary Kildall: He saw the future and made it work. He was the true founder of the personal computer revolution and the father of PC software" — contained in the hardcopy edition of the book *They Made America* (the "Book"). The Book, a series of essays on American inventors and innovators, was written

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[1] Time Warner Book Group is now known as Hachette Book Group USA, Inc.

[2] Other bases for dismissal also exist on this record, but to conserve judicial and attorney resources and to avoid unnecessary proceedings, Defendants have confined the pending motion to the grounds stated herein, and expressly reserve their right to bring future summary judgment motions on additional and other grounds.

[3] At his deposition, Mr. Paterson acknowledged that Ms. Paterson was named as a plaintiff "[s]trictly due to marital community." Paterson Dep. 14:23 – 15:5 (relevant excerpts of the transcript of Mr. Paterson's deposition are included as Exhibit A to the Declaration of Kaustuv M. Das in Support of Defendants' Motion for Summary Judgment). This motion therefore focuses on Mr. Paterson.

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1   by Sir Harold Evans and published in 2004 by Little Brown, an imprint of Time Warner.[4]

2   The statements at issue relate to the controversy surrounding Mr. Paterson's

3   creation of an operating system called "QDOS" or "86-DOS," that was licensed and

4   eventually purchased by Microsoft. QDOS,[5] after suitable alterations, was sold by IBM as

5   "PC-DOS" and by Microsoft as "MS-DOS." To understand the claims in this case it is

6   important to first review the existing public controversy relating to QDOS, MS-DOS, and

7   an earlier operating system written by Mr. Kildall called "CP/M."

8   **A.   The Controversy Surrounding QDOS, MS-DOS, and CP/M.**

9   In 1973, Gary Kildall created CP/M (Control Program/Monitor), an operating

10   system for microcomputers, and founded Digital Research to sell the system in 1974. John

11   Markoff, *Gary Kildall, 52, Crucial Player In Computer Development, Dies*, N.Y. Times,

12   July 13, 1994, at D19 (Das Decl. Ex. C). By the late 1970s, CP/M "became the standard

13   operating system for the first generation of 8-bit microcomputers." *Id.*; *see also* Ray

14   Duncan, *Advanced MS-DOS Programming* 4 (Microsoft Press 1986) (Das Decl. Ex. D) (in

15   1980, "Digital Research's CP/M-80[6] was the operating system most commonly used on

16   microcomputers").

17   **1.   The Zilog Z80 Chip and Cromemco's CDOS.**

18   Intel's 8-bit chip, the 8080, was not the only 8-bit chip in the market. There was a

19   competing 8-bit chip called the Z80 manufactured by a company called Zilog. Tim

20   Paterson, *The Right Place . . . The Right Time* at 33 (unpublished) (Das Decl. Ex. E). The

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21   [4] A courtesy copy of that chapter of the book is included as Exhibit B to the Das Declaration.

22   [5] "QDOS" was the term Mr. Paterson used while developing the operating system for his employer Seattle Computer Products. Seattle Computer Products sold the product as "86-DOS." Paterson Dep. 25:11-26:4. For ease of reference, this motion refers to the operating system as QDOS.

23   [6] Digital Research's 8-bit operating system was called "CP/M." It later released a 16-bit operating system called "CP/M-86," which led to people referring to the 8-bit operating system as "CP/M-80" because it was meant for IBM's 8080 chipset and Zilog's Z80 chipset.

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1   Z80 chipset provided additional functionality that was not present in the 8080 chipset.

2   Paterson Dep. 43:13-44:9. Hence, although a program written for the 8080 would run on

3   the Z80, a program that was written to take advantage of the additional functionality of the

4   Z80 would not run on an 8080. Paterson Dep. 44:5-44:9.

5   One such program, written to take advantage of the Z80's additional functionality,

6   was an operating system written by Cromemco, called C-DOS. Das Decl. Ex. E at 34. C-

7   DOS itself would not run on an 8080 machine because it was written to take advantage of

8   the additional functionality of the Z80 chip. Paterson Dep. 43:1-43:12. Mr. Paterson had

9   worked with C-DOS, running on Z80 machine at Seattle Computer Products. *Id.* 36:24-

10   37:11. As Mr. Paterson explained, "C-DOS was a [CP/M] look-alike and so [CP/M]

11   programs ran with C-DOS . . . ." *Id.* 37:16-37:21; Das Decl. Ex. E at 34. Mr. Paterson

12   called C-DOS a CP/M look-alike because any program that was written to run on CP/M

13   would run on C-DOS. Paterson Dep. 37:22-38:8. Mr. Paterson testified that it would be

14   accurate to call C-DOS a "clone" of CP/M and that he himself "viewed it as a ***clone*** at the

15   time." *Id.* 147:17-147:22 (emphasis added).

16   **2.   Intel Introduces the 16-bit 8086 Chip.**

17   In 1978 Intel introduced its 16-bit chip, the 8086. Microsoft Press, *The MS-DOS

18   Encyclopedia* 12 (Ray Duncan ed. 1988) (Das Decl. Ex. F). Mr. Paterson designed a

19   central processing unit ("CPU") card incorporating the 8086 chip for Seattle Computer

20   Product in 1979. *Id.* Around June 1979, Mr. Paterson and Digital Research were in talks

21   regarding the development of 16-bit CP/M, generally referred to as CP/M-86. *Id.* "When

22   CP/M-86 had still not become available by April 1980, Seattle Computer Products decided

23   to develop a 16-bit operating system of its own." *Id.* This operating system was called

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QDOS, for "Quick and Dirty Operating System," by Mr. Paterson. *Id.*; *see also* Paterson

Dep. 31:25-32:4.[7]

One of the crucial features of Intel's 8086 chip was that although it "was not

compatible with the 8080, . . . 8080 source code could be mechanically translated to run on

it." Das Decl. Ex. F at 11. Not only could 8080 source code be mechanically translated to

run on the 8086, Z80 source code could be mechanically translated to run on it also. In

fact, Mr. Paterson wrote such a mechanical translator for 8080 source code and Z80 source

code to 8086 source code. Das Decl. Ex. E at 42. The ability to mechanically translate

8080 source code to 8086 source code "was a major influence on the design of Tim

Paterson's operating system for the 8086 and, through Paterson's work, on the first

released version of MS-DOS." Das Decl. Ex. F at 11.

Microsoft first licensed, and then later purchased, QDOS from Seattle Computer

Products and "[w]ith lots of modifications, the system became the Microsoft Disk

Operating Sytem, or MS-DOS. [Mr. Paterson] became, in effect, the father of MS-DOS."

Bill Gates, *The Road Ahead* at 53-54 (Penguin Books 1996) (Das Decl. Ex. R).

3.   The Primary Design Requirement of QDOS—Translation Compatibility.

In an article Mr. Paterson published as early as 1983, Mr. Paterson explained that:

"The ***primary design requirement*** of MS-DOS was CP/M-80 translation compatibility,

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[7] The history of the development of QDOS has been told and retold numerous times by other authors, well before publication of the Book, including: (a) Das Decl. Ex. D; (b) James Wallace & Jim Erickson, *Hard Drive: Bill Gates and the Making of the Microsoft Empire* 182-85 (John Wiley & Sons, Inc. 1992) (Das Decl. Ex. G); (c) Stephen Manes & Paul Andrews, *Gates: How Microsoft's Mogul Reinvented an Industry-and Made Himself the Richest Man in America* 157-58 (Doubleday 1993) (Das Decl. Ex. H); (d) Andrew Schulman et al., *Undocumented DOS: A Programmer's Guide to Reserved MS-DOS Functions and Data Structures* 181-82 (Addison-Wesley 1994) (Das Decl. Ex. I); and (e) Tim Paterson himself in Tim Paterson, *The Origins of DOS: DOS Creator Gives His View of Relationship Between CP/M, MS-DOS*, Microprocessor Report, Oct. 3, 1994, Letter to the Editor (Das Decl. Ex. J).

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1   meaning that if an 8080 or Z80 program for CP/M were translated for the 8086 according

2   to Intel's published rules, the program would execute properly under MS-DOS." Tim

3   Paterson, *An Inside Look at MS-DOS: The Design Decisions Behind the Popular*

4   *Operating System*, Byte, June 1983, 230 (Das Decl. Ex. K) (emphasis added); *see also*

5   David Hunter, *Tim Paterson: The Roots of Dos*, Softalk for the IBM Computer, March

6   1983, fourth page (Das Decl. Ex. L) ("Step one was to write down what CP/M-80 did.").

7   Mr. Paterson has explained how he achieved this translation compatibility. He sat

8   down with the list of CP/M's input/output ("I/O") commands and copied them verbatim.

9   *See, e.g.*, Das Decl. Ex. G at 185 (quoting Mr. Paterson as having said "To do this did not

10   require ever having CP/M. It only required taking Digital's manual and writing my

11   operating system."); Das Decl. Ex. H at 158 ("for programmers' convenience, QDOS

12   mimicked every last internal function call of CP/M"). Mr. Paterson clarified that "[i]n

13   order for [QDOS] to be translation compatible, the numbers assigned to a given function,

14   the registers used to transfer data, the memory structures used to pass information all

15   needed to be identical." Paterson Dep. at 50:25-51:5. As the following table shows, Mr.

16   Paterson was largely successful in his efforts to mimic the CP/M functions—the QDOS

17   functions, the numbers assigned to them, and even their names are nearly identical to the

18   CP/M functions:

19

86-DOS Programmer's Manual (Das Decl. Ex. M) at 4-5		CP/M 2.0 Interface Guide (Das Decl. Ex. N) at 4[8]	
No.	Function	No.	Function
0	Program terminate	0	System Reset
1	Console Input	1	Console Input
2	Console Output	2	Console Output

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23   [8] Although Mr. Paterson did not have a copy of this Interface Guide, he had a copy of the earlier CP/M Interface Guide (Das Decl. Ex. O) and had access to all of the CP/M 2.0 function calls through other books and materials. Paterson Dep. 67:9-68:9.

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3	Auxiliary Input	3	Reader Input
4	Auxiliary Output	4	Punch Output
5	Printer Output	5	List Output
6	Direct Console I/O	6	Direct Console I/O
[QDOS skipped this function and number]		7	Get I/O Byte
[QDOS skipped this function and number]		8	Set I/O Byte
9	Output String	9	Print String
10	Input String	10	Read Console Buffer
11	Check Console Status	11	Get Console Status
[QDOS skipped this function number]		12	Return Version Number
13	Disk System Reset	13	Reset Disk System
14	Select Default Drive	14	Select Disk
15	Open File	15	Open File
16	Close File	16	Close File
17	Search for First	17	Search for First
18	Search for Next	18	Search for Next
19	Delete File	19	Delete File
20	Sequential Read	20	Read Sequential
21	Sequential Write	21	Write Sequential
22	Create File	22	Make File
23	Rename File	23	Rename File
[QDOS skipped this function and number]		24	Return Login Vector
25	Get Default Drive	25	Return Current Disk
26	Set Disk I/O Address	26	Set DMA Address
27	Allocation Address	27	Get Addr (Alloc)
[QDOS skipped this function and number]		28	Write Protect Disk
[QDOS skipped this function and number]		29	Get R/O Vector
[QDOS skipped this function and number]		30	Set File Attributes
31	Parameter Address	31	Get Addr (Disk Parms)
[QDOS skipped this function and number]		32	Set/Get User Code
33	Random Read	33	Read Random
34	Random Write	34	Write Random
35	Get File Size	35	Compute File Size
36	Get File Address	36	Set Random Record

At his deposition, Mr. Paterson further elucidated the extent of his blind reliance on the CP/M manuals in creating the I/O functions for QDOS. Thirteen years before the Book was published, Mr. Kildall was quoted in a newspaper article as saying: "Ask Bill why function code 6 (in DOS) ends with a dollar sign . . . . No one in the world knows that but me." James Wallace & Jim Erickson, *Bill Gates: Of Mind and Money*, Seattle P-I, May 8,

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1   1991, at A4 (Das Decl. Ex. P); *see also* Das Decl. Ex. I at 181 ("function 9 outputs strings

2   terminated with a '$' character in both systems"). In his January 2007 deposition, Mr.

3   Paterson conceded that function 9 was terminated with a "$" sign only "because that was

4   what was in the manual. They published a manual; the manual said put a dollar sign at the

5   end. So I followed the manual." Paterson Dep. at 130:11-131:9.

6   Mr. Paterson's testimony also cleared up another mystery about QDOS's function

7   calls.   Commentators had noted that "MS-DOS did not implement CP/M function 12

8   (0Ch) to get the system version number." Das Decl. Ex. I at 182; *see also* Das Decl. Ex. J

9   (John Wharton's Response to Mr. Paterson's letter to the editor) (raising the issue of MS-

10 DOS not implementing function 12). Mr. Paterson explained that he initially relied on the

11 earlier draft of the CP/M Interface Guide (Das Decl. Ex. O), which had a function 12 that

12 he did not believe belonged in the I/O function list. Paterson Dep. 58:9-58:15. Later,

13 when he relied on the more updated list of CP/M function calls, he did not realize that

14 CP/M had used function 12 for a function that did belong in the I/O function list and so he

15 failed to include that function. *Id.* 68:15-69:4; *compare also* Das Decl. Ex. O at 21

16 (function 12 is "Lift Disk Head") *with* Das Decl. Ex. N at 4 (function 12 is "Return

17 Version Number").

18   The list of I/O functions, their names, and their order were not the only things that

19 Mr. Paterson copied directly from CP/M to achieve his primary goal of translation

20 compatibility. "[T]he structures of 86-DOS's file control blocks, program segment

21 prefixes, and executable files were nearly identical to those of CP/M-80." Das Decl. Ex. D

22 at 4; *see also* Roy Duncan, *Design Goals and Implementation of the New High*

23 *Performance File System*, Microsoft System Journal, Sept. 1989, second page (Das Decl.

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1 Ex. Q) (Paterson "adopted CP/M's limits on filenames and extensions so the critical fields

2 of 86-DOS File Control Blocks (FCBs) would look almost exactly like those of CP/M.

3 The sizes of the FCB filename and extension fields were also propagated into the structure

4 of disk directory entries"). Mr. Paterson has acknowledged that the discussion in these

5 books regarding file control blocks, program segment prefixes, and executable files is

6 accurate. Paterson Dep. 105:21-106:14.

4.   The Reaction to Mr. Paterson's Efforts to Make QDOS "Translation Compatible" with CP/M.

7

8   During the period of CP/M and QDOS, "an operating system provided fundamental

9 I/O capability, input/output capability to programs. Input from a keyboard, output to a

10 screen, storage on a disc. That was essentially the sort of minimum capability and that's

11 what you got in programs like CP/M and North Star DOS and DOS, for that matter."

12 Paterson Dep. 45:13-45:25. *See also Microsoft Corp. v. Lindows.com Inc.*, 64 U.S.P.Q.2d

13 1397, 1398 (W.D. Wash. 2002) ("[a]n operating system is essentially the command center

14 of a personal computer, controlling the allocation and use of computer resources");

15 *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1297 (D. Utah 1999) (noting that

16 "[a]n operating system functions as the control center of the computer. It controls the

17 computer's interaction with peripheral hardware such as keyboards, modems, and printers.

18 . . ."). Because Mr. Paterson had so closely mimicked the I/O functions of CP/M, it is not

19 surprising that even before QDOS, renamed IBM PC-DOS, was released to the mass

20 market, commentators were noting the many conspicuous similarities to CP/M.

21   Indeed, an *InfoWorld* article published even before IBM unveiled its personal

22 computer, noted that "the operating system for this new computer will be *similar to* CP/M

23 in many respects." InfoWorld Staff, *IBM to Pounce on Micro Market*, June 8, 1981, at 1

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1   (Das Decl. Ex. S). Paul Allen and Steve Ballmer, Microsoft executives (the latter is now

2   CEO) who were both intimately involved with Microsoft's acquisition of QDOS from

3   Seattle Computer Products and its licensing that software to IBM, have remarked on the

4   similarity of QDOS to CP/M. Mr. Allen has stated that QDOS was "a very rudimentary

5   operating system that was *kind of like* CP/M." Transcript of the PBS television program

6   "Triumph of the Nerds," at HBG000699 (Das Decl. Ex. T) (emphasis added). Mr. Ballmer

7   has stated: "Tim Patterson's [*sic*] operating system, which saved the deal with IBM, was,

8   well, *adapted from* Gary Kildall's CP/M." *Id.* (emphasis added).

9   It was not just industry observers who recognized the similarities between QDOS

10   and CP/M. Mr. Paterson himself implicitly acknowledged the likelihood that the products

11   would be confused by expressly noting in the preliminary user's guide of QDOS that "86-

12   DOS is not related to the popular CP/M operating system of Digital Research." Das Decl.

13   Ex. H at 158 (remarking that this disclaimer was included because QDOS was "so close a

14   clone" of CP/M). Mr. Paterson himself wrote this disclaimer. Paterson Dep. at 145:24-

15   146:21. Journalists who interviewed Mr. Paterson for their articles, *id.* at 131:15-132:4,

16   quoted Mr. Paterson as having "acknowledge[d] there was some 'low-level borrowing'"

17   from CP/M for QDOS. Das Decl. Ex. P, third page.[9]

18   Others were even more explicit in their opinions about the origins of QDOS:

19   •   "[A] CP/M-look-alike operating system." Kevin Strehlo, *Microsoft Expands,*

20   *Weighs Dependence Against Autonomy*, PC Week, Sept. 1984 (Das Decl. Ex. U).

21   •   "The operating system that Gates and Microsoft developed for IBM was

22   _____

23   [9] Although Mr. Paterson stated that he may have been misquoted in this article, he apparently takes issue
only with the particular phrasing attributed to him, rather than the import of the statement. He admits he
never attempted to contact the article's authors after publication of the article to object to, clarify, or
complain about the statement. Paterson Dep. 132:5-133:9.

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1   modelled [*sic*] on CP/M," and QDOS "retained many of the basic features of CP/M."

2   "Some of the most annoying aspects of DOS, such as the eight-character file name limit,

3   the silent A>, and the lack of any confirmation upon erasing a file, are direct imports from

4   CP/M." Randy Dykhuis, *DOS 4.0: Time to Upgrade?*, Computers in Libraries, June 1990

5   (Das Decl. Ex. V).

6   •   "Paterson set out to clone CP/M. The result was what he called QDOS—

7   Quick and Dirty Operating System." Das Decl. Ex. H at 157 (published in 1993).[10]

8   •   QDOS "turned out to borrow ideas and terms freely from DRI's operating

9   system, but this was back in the days before some heavy-duty lawsuits made programmers

10   more cautious about doing knockoffs of someone else's work." Paul Carroll, *Big Blues:*

11   *The Unmaking of IBM* at 24 (Random House, Inc. 1993) (Das Decl. Ex. W).

12   •   "MS-DOS itself started out as a clone of the CP/M operating system from

13   DRI." "Somewhat understandably, Digital Research was upset when it found that

14   Microsoft's new operating system for the IBM PC was a clone of CP/M." "There is no

15   question about MS-DOS's large-scale borrowing from CP/M." "So MS-DOS began life as

16   an enhanced clone of CP/M." Das Decl. Ex. I at 181-82 (published in 1994). It is

17   interesting that these comments were made in the second edition of a book whose first

18   edition Mr. Paterson authored. *Id.* at 48.[11]

19   •   "Through all of this, Kildall remained the gentleman. He repeatedly declined

20   to follow the advice of those who would have him act against Microsoft despite the tales

21   _____

22   10 Interestingly, both of the authors of this 1993 book had interviewed Mr. Paterson, one over the telephone
     and the other in person. Paterson Dep. 143:7-143:19. Mr. Paterson now does not agree with the authors that
     he had set out to "clone CP/M," but back then he did not "consider[] it egregious enough to have instigated
     conversation on this alone." *Id.* 144:19-145:14.

23   11 Mr. Paterson was not an author of the second edition not because of any disagreement with his co-authors,
     but merely because, as he says, he had nothing more to say. Paterson Dep. at 152:21-153:3.

1   that the Redmond giant had infringed on his patents, or that it had borrowed a bit too

2   heavily from CP/M's code in the beginning." Wayne Rash Jr., *A Requiem for the Father*

3   *of Modern Operating Systems*, InternetWeek, July 25, 1994 (Das Decl. Ex. X).

4   •   Tim Paterson "had written a program called QDOS that Kildall always

5   believed was copied largely from CP/M. While Paterson has strongly denied those

6   allegations, such practices were fairly common at the time." Rory J. O'Connor, *Farewell*

7   *to Troubled Genius: Kildall's Work Overshadowed by Rival*, San Jose Mercury News, July

8   31, 1994, at 1A (Das Decl. Ex. Y).

9   •   QDOS "was pretty much a CP/M clone, but it ran on the 16-bit 8086 CPU."

10 Stan Veit, *What ever Happened To . . . Gary Kildall? CP/M Disk Operating System*

11 *Developer*, Computer Shopper, Nov. 1994 (Das Decl. Ex. Z).

12   •   "QDOS, which stood for 'quick and dirty operating system,' was a 16-bit clone

13 of CP/M intended for an 8086-based computer being developed by the small company. All

14 QDOS commands were the same as in CP/M. Paterson admitted to a little 'low-level

15 borrowing' from CP/M, too, but claimed that most of the code was his own." Robert X.

16 Cringley, *Accidental Empires* at 133 (HarperBusiness 1996 ed.) (Das Decl. Ex. AA).

17   •   QDOS "was an obvious CP/M knockoff . . . . Paterson admitted that he had

18 written QDOS with a CP/M manual at his side, intentionally mimicking key components to

19 ease the task of developers accustomed to its popular predecessor (while at the same time

20 improving on the original)." Gary Rivlin, *The Plot to Get Bill Gates* at 34 (Time Books

21 1999) (Das Decl. Ex. BB).

22   •   "Paterson's SCP-DOS operating system was a close but crude imitation of

23 CP/M." Paul Freiberger & Michael Swaine, *Fire in the Valley* at 334 (Mc-Graw Hill 2d

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ed. 2000) (Das Decl. Ex. CC).

- "Q-DOS was basically a rip-off of Kildall's CP/M, but Kildall had never gotten around to suing." Garrett Romaine, *Two Books on Silicon Valley*, Technical Communications, Feb/Mar. 2000, at 111 (Das Decl. Ex. DD).

Commentators and the popular press are not the only ones to refer to QDOS as a "clone" of CP/M or to note that it borrowed heavily from CP/M. Indeed, in a major antitrust ruling involving Microsoft, one federal district court has stated that QDOS was "a *16-bit CP/M clone* . . . ." *Caldera*, 72 F. Supp. 2d at 1298 (emphasis added).[12]

B.   Mr. Paterson's Responses to the Controversy.

In recent years, Mr. Paterson has labored to distinguish his "cloning" of CP/M from "copying" on numerous occasions. As early as 1983 he explained that "[t]he primary design requirement of MS-DOS was CP/M-80 translation compatibility . . . ." Das Decl. Ex. L at 230. Later, Mr. Paterson was interviewed by the authors of *Hard Drive: Bill Gates and the Making of the Microsoft Empire* (Das Decl. Ex. G), Paterson Dep. 134:14-134:20. In that book, the authors discussed a telephone conversation Mr. Paterson described with Mr. Kildall in which Mr. Kildall had accused him of "ripping off" CP/M. Das Decl. Ex. G at 184. Mr. Paterson explained that:

> I told him I didn't copy anything. I just took his printed documentation and did something that did the same thing. That's not by any stretch violating any kind of intellectual property laws. Making the recipe in the book does not violate the copyright on the recipe. I'd be happy to debate this in front of anybody, any judge.

Id. (quoting Mr. Paterson). The flaw in Mr. Paterson's analogy is, of course, that instead

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[12] In his research for the Book, Mr. Evans relied upon the *Caldera* case. *See* Evans Dep. 128:8-128:12. Relevant excerpts of the Evans deposition transcript are included as Exhibit HH to the Das Declaration.

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1   of "making the recipe," he copied multiple recipes verbatim for commercial sale. A chef

2   may make a recipe from a cookbook, but not legitimately copy others' recipes and then

3   publish them as his own work.

4   In 1994, Mr. Paterson wrote a lengthy letter to the editor of *Microprocessor Report*

5   in response to an obituary of Mr. Kildall written by John Wharton, a Kildall colleague.

6   Das Decl. Ex. J. In his letter, published in October 1994, Mr. Paterson attacked the late

7   Mr. Kildall, suggesting he had copied parts of his own program from IBM, and also

8   vehemently denied having copied CP/M, while at the same time admitting that QDOS

9   "generally had all the same application-visible elements as CP/M—the function codes, the

10   entry point of address, part of the File Control Block layout etc. I used the 1976 CP/M

11   Interface Guide for my description of the requirements." *Id.*

12   This was not the last time, however, that Mr. Paterson responded to the controversy

13   of whether QDOS was a clone, "knockoff," or "rip off" of CP/M. As recently as 2000, Mr.

14   Paterson wrote an article for the "Encyclopedia of Computers and Computer History."

15   (Das Decl. Ex. EE); Paterson Dep. 221:1-221:12. In that article, Mr. Paterson defended his

16   role in the creation of QDOS, and (using the third person) asserted: "Paterson's primary

17   objective in the design of DOS was to make it as easy as possible for software developers

18   to write applications for it. To achieve this, Paterson sought to make the Application

19   Program Interface (API) compatible with CP/M. . . . CP/M compatibility of the API was

20   key to making the translated program run correctly." Das Decl. Ex. DD, second page. In

21   writing this article, Mr. Paterson's goal was to address the continuing controversy whether

22   QDOS was a "clone" or "rip off" of CP/M, "thinking if I explain it, you know, fully and in

23   detail people will understand." Paterson Dep. 224:20-225:7.

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1   As with his attempt to make QDOS translation compatible with CP/M, Mr.

2   Paterson was apparently successful in partially addressing this controversy. In a recent

3   British review of the *Encyclopedia of Computer and Computer History*, the author

4   remarked on the fact that "[a] general article on operating systems, by John Deane, tells

5   how Unix inspired CP/M, 'which was copied as QDOS, then reworked by Microsoft for

6   IBM's personal computer.' The 'DOS platform' article tells the tale in more detail.

7   QDOS was no mere copy. It had a CP/M-like interface, but handled files more

8   efficiently." Tony Durham, *Iffy Index No Help to Fuzzy Logic*, The Times Higher

9   Education Supp., Feb. 8, 2002 (Das Decl. Ex. FF).

III.   ARGUMENT

A.   Plaintiffs Bear the Burden of Proof on Each Element of Libel.

12   Under Washington law, "a defamation plaintiff must show four essential elements:

13   falsity, an unprivileged communication, fault, and damages." *Mark v. Seattle Times*, 96

14   Wn.2d 473, 486, 635 P.2d 1081 (1981). Summary judgment must be entered against

15   Plaintiffs if they fail to make a showing sufficient to establish the existence of any element

16   essential to their case. Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317,

17   322-24 (1986).   Defendants need not produce any evidence; they can simply point out that

18   "there is an absence of evidence to support" Plaintiffs' case. *Id.* at 325. To avoid

19   summary judgment, therefore, Plaintiffs must offer evidence that raises a genuine issue of

20   fact as to each element of their claim. *Mark*, 96 Wn.2d at 486. Because Plaintiffs cannot

21   present a *prima facie* case, their defamation claim must fail.[13] For identical reasons, the

22

23   [13] Under the law of Washington, summary judgment is also designed to serve the important First Amendment
goal of eliminating the "chilling effect" of unwarranted defamation litigation. *See Mark*, 96 Wn.2d at 484-87; *see
also Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 937 (E.D. Wash. 1992) ("The public interest is best

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1   invasion of privacy claim is similarly baseless and must also be dismissed with prejudice.

2   **B.   Plaintiffs Cannot Prove the Elements of a Defamation Claim.**

3   **1.   Plaintiffs Cannot Prove the Statements are Defamatory, False
                 Statements of Fact.**

4

5   **a.   Many of the Statements That Plaintiffs Complain of are
                     True.**

6   It is for the Court, in the first instance, to determine whether a statement is capable

7   of defamatory meaning. *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 672, 770 P.2d 203

8   (1989). The law of libel does not make actionable communications that are "merely

9   unflattering, annoying, irksome, or embarrassing, or that hurt[] only the plaintiff's

10   feelings." 1 Robert D. Sack, Sack on Defamation § 2.4.1 (3rd ed. 2005). Additionally,

11   "[d]efamatory meaning may not be imputed to true statements." *Lee v. The Columbian,*

12   *Inc.*, 64 Wn. App. 534, 538, 826 P.2d 217 (1991).

13   The record shows that many of the statements at issue are indisputably true,

14   supported by sworn and other statements by Mr. Paterson himself:

15
No.	Challenged Statement in Book	Supporting Evidence
1	"Paterson did it by taking a ride on Kildall's system with a program he called 'Seattle DOS,' but which he also called QDOS, for Quick 'n' Dirty Operating System." Complaint ¶ 1.4.a.	• "I just took his printed documentation and did something that did the same thing." Das Decl. Ex. G at 184 (quoting Mr. Paterson). • "To do this did not require ever having CP/M. It only required taking Digital's manual and writing my operating system." *Id.* at 185 (quoting Mr. Paterson). • "Step one was to write down what CP/M-80 did." Das Decl. Ex. L (quoting Mr. Paterson). Mr. Paterson "acknowledge[d] there was some 'low-level borrowing'" from CP/M

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served by expeditious disposition of cases raising First Amendment issues.").

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			for QDOS. Das Decl. Ex. P, third page. Mr. Paterson admits he never attempted to contact the article's authors after publication of the article to object to, clarify, or complain about the statement. Paterson Dep. 132:5-133:9.
2		"Paterson has denied using CP/M source code but admits making the two systems similar to help translate programs into QDOS." Complaint ¶ 1.4.a.	"The ***primary design requirement*** of MS-DOS was CP/M-80 translation compatibility, meaning that if an 8080 or Z80 program for CP/M were translated for the 8086 according to Intel's published rules, the program would execute properly under MS-DOS." Das Decl. Ex. K (article by Tim Paterson) (emphasis added).
3		"What Paterson essentially had done was rewrite the bottom part of the software – improving the way files were stored and adapting the program to a 16-bit machine – while copying most of the top part of Kildall's operating system (the Int 21 commands that allowed the operating system to interact with the application program)." Complaint ¶ 1.4.e.	• "In order for [QDOS] to be translation compatible, the numbers assigned to a given function, the registers used to transfer data, the memory structures used to pass information all needed to be identical." Paterson Dep. at 50:25-51:5. • Paterson "adopted CP/M's limits on filenames and extensions so the critical fields of 86-DOS File Control Blocks (FCBs) would look almost exactly like those of CP/M. The sizes of the FCB filename and extension fields were also propagated into the structure of disk directory entries." Das Decl. Ex. Q. Mr. Paterson acknowledges that this report is accurate. Paterson Dep. 105:21-106:14.
4		"Even if QDOS and CP/M were 80 percent different, as Paterson has said, he took almost unaltered Kildall's Int-21 mechanism – the heart of his innovation. An independent examination of the two systems shows some blatant copies, some slight alterations." Complaint ¶ 1.4.e.	See evidence cited in row 3. See also table comparing the first 36 functions in QDOS and CP/M on pp. 5-6 above. Mr. Paterson's statement that QDOS and CP/M were 80 percent different appears in Das Decl. Ex. J ("86-DOS used a completely different file-storage mechanism than CP/M (representing maybe 80% of the 86-DOS code)").
5		"Paterson copied Kildall's first 36 Int-21 functions into QDOS." Complaint ¶ 1.4.f.	See evidence cited in rows 3 and 4. See also table comparing the first 36 functions in QDOS and CP/M on pp. 5-6 above.
6		"Paterson's file system, Rolander acknowledges, was better for the larger	"MS-DOS did not implement CP/M function 12 (0Ch) to get the system

disks, but he adds that mistakes were made in cloning Kildall's work." Complaint ¶ 1.4.g.	version number." Das Decl. Ex. I at 182. At his deposition, Mr. Paterson explained that this error probably crept in because he relied on two different versions of the CP/M Interface Guide. Paterson Dep. 58:9-58:15; 68:15-69:4.

Because there is no genuine issue as to the truth of any of these statements—

indeed, they reflect Mr. Paterson's own version of the creation of QDOS in both sworn

testimony and in an article he authored for publication and has been published many times

over the last twenty-three years—the statements not only fail to support Plaintiffs' claim

for defamation, but are wholly verified by Mr. Paterson himself.

b.   The Remaining Statements are Nonactionable Opinion.

The remaining statements attacked by Plaintiffs constitute nonactionable opinion.

See Robel v. Roundup Corp., 148 Wn.2d 35, 55, 59 P.3d 611 (2002) (citing *Gertz v. Robert*

Welch, Inc., 418 U.S. 323, 339 (1974), that "[u]nder the First Amendment there is no such

thing as a false idea"); *Dunlap v. Wayne*, 105 Wn.2d 529, 537-38, 716 P.2d 842 (1986)

(adopting *Restatement* test for opinion privilege); *Schmalenberg v. Tacoma News, Inc.*, 87

Wn. App. 579, 590-91, 943 P.2d 350 (1997) (defamation liability requires statement of fact

that is provably false). If a statement does not express or imply provable facts, it expresses

only ideas or opinions and will not support a defamation claim. *Id.* at 591. The following

statements, which Plaintiffs allege are defamatory, constitute opinion:

- "Kildall writes: 'Paterson's Seattle DOS was yet another one of the rip-offs of

the CP/M design. The CP/M machine code was taken apart, using CP/M's own DDT [its

debugger], to determine the internal workings of CP/M in order to make a clone of CP/M

operations." Complaint ¶ 1.4.a.

- "But for Mr. Paterson to cite the unavailability of CP/M-86 as justification for

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appropriating the 'look and feel' of a competing operating system and its utilities seems to

me analogous to telling a judge, 'I needed the car, Your Honor, and the plaintiff wouldn't

sell me his, so I was forced to take it.'" Complaint ¶ 1.4.b.

- "... Paterson's adaptation of Kildall's system . . ." *Id.* ¶ 1.4.c.

- "... Paterson's version of Kildall's program . . ." *Id.* ¶ 1.4.d.

These opinions were based on accurate, disclosed facts as to the creation of QDOS, *see* pp.

10-13 above, and were shared by others. *See, e.g.,* Das Decl. Ex. T at HBG000699 (Steve

Ballmer stating that: "Tim Patterson's [*sic*] operating system . . . was, well, adapted from

Gary Kildall's CP/M"). Because each of these statements is an expression of protected

opinion, Plaintiffs are unable to prove that they are false.

2.   Plaintiffs Cannot Prove the Defendants Acted with Fault.

Every public figure defamation plaintiff must prove, with evidence of convincing

clarity,[14] that Defendants published false and defamatory statements with actual malice.

Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967). As the Court noted in *Gertz,* 418

U.S. at 351, when "an individual voluntarily injects himself or is drawn into a particular

public controversy," he "thereby becomes a public figure" regarding that "range of issues."

Here, it is clear that Mr. Paterson is a public figure in connection with the long-

standing controversy over the origins of QDOS, and the extent to which Mr. Paterson's

operating system copied or relied upon Mr. Kildall's CP/M system. *See, e.g.*, Das Decl.

Exs. H, I, U-DD; *Caldera*, 72 F. Supp. 2d at 1298. The record shows that Mr. Paterson —

championed by Bill Gates in his best-selling 1996 book *The Road Ahead* as "the father of

MS-DOS" — vigorously and repeatedly defended his paternity and the legitimacy of his

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[14] Actual malice must be proved by "clear and convincing" evidence. *See Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir. 2002) (actual malice "must be satisfied by clear and convincing evidence").

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1   offspring, clearly satisfying the public-figure test.[15] *Clardy v. Cowles Publ'g Co.*, 81 Wn.

2   App. 53, 60-62, 912 P.2d 1078 (1996) (adopting public figure test in *Foretich v. Capital

3   Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994)); *see also Newcombe v. Adolf Coors

4   Co.*, 157 F.3d 686, 695 (9th Cir. 1998) (noting "strong argument" that the plaintiff was "at

5   least a limited public figure because he voluntarily thrust himself into the public issue of

6   the anti-alcohol movement"); *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) (limited

7   public figures "have thrust themselves to the forefront of particular public controversies in

8   order to influence the resolution of the issues involved").

9   Actual malice can by proven only by "sufficient evidence to permit the conclusion

10   that the defendant **in fact entertained serious doubts as to the truth** of his publication."

11   *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added). Actual malice means

12   that a publication was made "with knowledge that it was false or with reckless disregard of

13   whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80

14   (1964); *see also Flowers*, 310 F.3d at 1130 (actual malice is established by "showing either

15   that the defendant knew his statements were probably false, or that he disregarded obvious

16   warning signs of falsity"); *Hoppe*, 53 Wn. App. at 676 (actual malice requires a showing

17   that "the declarant knew the expression was false, acted with a high degree of awareness of

18   its probable falsity, or in fact entertained serious doubts as to the statement's truth").

19   As discussed above in Section III.B.1, the statements that Plaintiffs complain of are

20   true or constitute opinion and cannot give rise to any reasonable inference of falsity or

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22   [15] And there is reason to believe that Mr. Paterson's defense of his paternity and the legitimacy of his
offspring has been successful. Das Decl. Ex. FF ("[t]he 'DOS platform' article tells the tale in more detail.
QDOS was no mere copy. It had a CP/M-like interface, but handled files more efficiently"); *cf. Gertz*, 418

23   U.S. at 344 ("public figures usually enjoy significantly greater access to the channels of effective
communication and hence have a more realistic opportunity to counteract false statements than private
individuals normally enjoy").

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1   reckless disregard of the truth. Indeed, as Mr. Evans, the author of the Book, explained at

2   his deposition, extensive research gave him no reason to believe any of the statements were

3   false because he relied on material that "recapitulate[d] and state[d] what eleven, twelve,

4   fifteen other books [said] and there [was] no public outcry, no public corrections, no

5   website corrections, no criticism in reviews [that any of the accounts were erroneous.]"

6   Evans Dep. 114:4-114:21. Given the widespread consensus and criticism that QDOS and

7   MS-DOS were clones of CP/M, *see supra* pp. 9-12, Mr. Evans — plus his editors and his

8   technical and academic advisors — had no reason to believe that the statements at issue

9   were untrue and every reason to credit the information upon which he relied. *Id.* 153:25-

10   154:154:25 ("I'm not inventing stuff. I'm reporting from the industry"). Thus, Plaintiffs

11   cannot meet their burden of proof with **any** evidence, let alone with convincing clarity.

12   **3.   Plaintiffs Cannot Prove Any Compensable Damages.**

13   Under Washington law, unless a publication constitutes libel *per se*, a defamation

14   plaintiff must allege and prove special damages, that is, some specific pecuniary loss

15   occasioned by the defamatory statements. *Purvis v. Bremer's, Inc.*, 54 Wn.2d 743, 747,

16   344 P.2d 705 (1959). Such damages must be pleaded with particularity. Fed. R. Civ. P.

17   9(g); *Purvis*, 54 Wn.2d at 747 ("The general allegation that the publication has 'injured

18   plaintiff in the practice of his profession, thereby causing plaintiff special damage in the

19   sum of $75,000.00' is insufficient to place the issue of special damages before the court.");

20   *see also Denney v. Northwestern Credit Ass'n*, 55 Wash. 331, 335, 104 P. 769 (1909).

21   Plaintiffs have neither alleged libel *per se* nor pleaded special damages with

22   particularity. Plaintiffs have merely alleged that Mr. Paterson was "greatly injured in his

23   character and reputation . . . and has endured great pain and mental anguish to his damage .

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1   . . ." Complaint at ¶ 1.8. These do not constitute special damages. *See, e.g., Farrar v.*

2   *Tribune Publ'g Co.*, 57 Wn.2d 549, 553, 358 P.2d 792 (1961) (reputation and mental

3   distress are general damages). More importantly, Mr. Paterson acknowledged that he has

4   not "consulted any physician or received any medical care relating to any pain or anguish

5   or emotional distress arising from the publication in question," and does not plan on doing

6   so. Paterson Dep. 236:7-236:14. There is simply **no evidence** supporting Mr. Paterson's

7   allegations of pain and mental anguish.

8   Plaintiffs apparently hoped to plead special damages ("the loss of potential business

9   opportunities") but omit the detailed pleading required by Rule 9(g) and case law. In

10 response to pointed discovery requests, Mr. Paterson simply reiterated his conclusory

11 plaints as "involving loss of reputation in the community, the inability to obtain financing

12 for current projects and having to defend himself in a close knit software creators

13 community." Das Decl. Ex. GG (Response to Interrogatory No. 2).[16] Because Plaintiffs

14 failed to plead special damages, their only possible recovery against Defendants must be

15 that the statements assailed are libelous *per se*.[17] As discussed above in Section III.B.2,

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17 [16] Mr. Paterson's sworn testimony belies both this theory and the existence of any specific causally-related
    losses. Mr. Paterson admitted that no one he has approached for funding has even mentioned the statements
18 at issue; in fact, Mr. Paterson has not sought any funding at all. Paterson Dep. 234:6-234:11. He cannot
    point to a single sale that was lost because of the Book. *Id.* 237:10-237:17. Nor has he lost any other
19 business opportunity because of the Book, partially because he has not even sought venture capital. *Id.*
    237:18-237:25. Mr. Paterson concedes that no one has refused him funding based on the statements at issue.
    Id. 238:12-238:16. No one, outside the media, has even mentioned the Book to Mr. Paterson or indicated he
20 or she has read it. Id. 234:12-234:21. In fact, no one outside the media has mentioned the subject matter at
    issue to Mr. Paterson since the Book was published. *Id.* 234:22-235:8. Mr. Paterson's assertions regarding
    unknown lost business opportunities and the need to defend himself "in a close knit software creators
21 community" constitute nothing other than pure speculation. *Cf. Kim v. O'Sullivan*, 133 Wn. App. 557, 566,
    137 P.3d 61 (2006).
22 [17] A statement is libelous *per se* if it "tends to expose a living person to hatred, contempt, ridicule or obloquy,
    or to deprive him of the benefit of public confidence or social intercourse, or to injure him in business or
23 occupation." *Purvis*, 54 Wn.2d at 751. However, "[i]n Washington, a libelous *per se* statement is actionable
    without proof of special damages only if the defendant acted **with actual malice**." *Demopolis v. Peoples
    Nat'l Bank of Washington*, 59 Wn. App. 105, 116, 796 P.2d 426 (1990) (emphasis added).

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1   there is no evidence – let alone evidence of convincing clarity – to support that allegation.

2   Finally, Plaintiffs must prove that "the false statement has resulted in damage

3   which is distinct from that caused by true negative statements also contained in the same

4   report." *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 771, 776 P.2d 98 (1989). An

5   inaccurate statement that does not alter the "sting" of the publications as a whole is not a

6   basis for a defamation claim. *Id.* at 771-72; *see also Schmalenberg*, 87 Wn. App. at 598.[18]

7   Given Mr. Paterson's repeated concessions that "translation compatibility" was his primary

8   consideration in writing QDOS, that he wrote QDOS with a CP/M manual by his side, and

9   that he copied the commands in the I/O functions in the CP/M manual, he can hardly

10   complain about a statement that QDOS was a "rip-off" of the CP/M design.

11   **C.   Plaintiffs' False Light Invasion of Privacy Claim Must be Dismissed.**

12   **1.   Failure to Prove Actual Malice is Fatal to Plaintiffs' Claim of
                        False Light Invasion of Privacy.**

13

14   Failure to prove actual malice also dooms Plaintiffs' false light claim. *See Flowers*,

    310 F.3d at 1132 ("And just like public figure defamation, it [false light] requires actual

15   malice – knowing or reckless disregard of the truth."); *Berry v. Nat'l Broad. Co., Inc.*, 480

16   F.2d 428 (8th Cir. 1973) (dismissing false light claim for failure to prove actual malice);

17   *Hoppe,* 53 Wn. App. at 677 (same). As shown above in Section III.B.2, Plaintiffs cannot

18   prove that Defendants acted with actual malice, which is fatal to their false light privacy

19   claim as well as their defamation claim.[19]

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_____

22   [18] *See also Mark*, 96 Wn.2d at 496 ("Mark has provided no evidence that the inaccurate statements caused
      him any further damage than has resulted from the conviction and sentence on a grand larceny charge. . . .
      [T]he errors here under review did not materially add to the damage suffered by Mark by reason of the
23   truthful publication of matters relating to the charge and conviction for grand larceny.")
      [19] Plaintiffs' failure to prove falsity to support their defamation claim is also fatal to their false light claim.

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2.   Dismissal of Plaintiffs' Defamation Claim Mandates Dismissal of Their Parasitic Invasion of Privacy Claim.

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Dismissal of their defamation claim likewise requires dismissal of Plaintiffs'

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parasitic claim for false light invasion of privacy. Any cause of action alleging damages

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from supposedly false and defamatory speech must satisfy the same standards as

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defamation; if the defamation claim fails, the dependent claims must be dismissed as well.

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See, e.g., Hoppe, 53 Wn. App. at 675-76; *Aitkin v. Reed*, 89 Wn. App. 474, 491, 949 P.2d

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441 (1998); *see also McClatchy Newspapers, Inc. v. Superior Court*, 234 Cal. Rptr. 702,

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704 (Cal. 1987) (false light claim based on same facts as libel claim must be dismissed).

10

3.   Washington Has Not Adopted the False Light Tort Theory.

11

Summary judgment may also be granted on the privacy claim because Washington

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has not recognized the tort. *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 473-74,

13

722 P.2d 1295 (1986); *Hoppe*, 53 Wn. App. at 677 n.5 ("[T]he trial court could have

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properly dismissed Hoppe's false light claim on the basis that thus far, Washington has not

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recognized the tort."). Thus far, Washington's Supreme Court has expressly refused to

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embrace the tort, noting the "duplication inherent in false light and defamation claims" that

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have prompted many states to explicitly reject it. *Eastwood*, 106 Wn.2d at 473-74. Many

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other jurisdictions have also failed to adopt the tort,[20] recognizing, among other

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[20] *See Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998) ("We decline to recognize the tort
of false light publicity at this time. We are concerned that claims under false light are similar to claims of

20

defamation, and to the extent that false light is more expansive than defamation, tension between this tort and
the First Amendment is increased."); *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475, 478 (Mo. 1986);
Renwick v. News and Observer Publ'g Co., 312 S.E.2d 405, 412 (N.C. 1984) (rejecting false light as an

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"inherently constitutionally suspect claim[] for relief" and as duplicating defamation claims, adding to
tension between the First Amendment and tort law and reducing judicial efficiency); *Costanza v. Seinfeld*,

22

693 N.Y.S.2d 897, 899 (N.Y. Sup. Ct. 1999) (rejecting plaintiff's false light claim and finding no common
law right to privacy); *Yeager v. Local Union 20*, 453 N.E.2d 666, 669-70 (Ohio 1983); *Brown v. Pearson*,

23

483 S.E.2d 477, 484 (S.C. Ct. App. 1997) ("As to Appellants' claim of 'false light,' no South Carolina case
has recognized this tort."); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579-80 (Tex. 1994) ("We reject the false
light invasion of privacy tort for two reasons: 1) it largely duplicates other rights of recovery, particularly

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rationales[21] the inherent risks to free speech.[22] Accordingly, false light is "the most widely criticized of the four privacy torts." *Lake*, 582 N.W.2d at 235. The false light claim must be dismissed.

IV.   CONCLUSION

For each of the foregoing reasons, Defendants' motion for summary judgment should be granted, and the action should be dismissed with prejudice.

DATED this 15th day of March, 2007.

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defamation; and 2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law."); *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204, 1206 (W.D. Va. 1981) (holding that Virginia courts do not recognize a common law cause of action for false light invasion of privacy).

[21] First, it often duplicates the recovery available under defamation law. *Renwick*, 312 S.E.2d at 412. Second, it would "add to the tension already existing between the First Amendment and the law of torts." *Id.*; *Lake*, 582 N.W.2d at 235; *Cain,* 878 S.W.2d at 579-80. Third, the tort could chill speech by "saddl[ing] the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter." *Lake*, 582 N.W.2d at 236 (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). Fourth, the tort reduces judicial efficiency by burdening courts with two almost identical – if not identical, as in this case – claims for the same relief. *Renwick*, 312 S.E.2d at 413.

[22] *See Cain*, 878 S.W.2d at 583 (noting that editors "may guard against defamation by being alert to facts which tend to diminish reputation" but under the more expansive false light regime, "any fact … no matter how seemingly innocuous, may prove to be the basis for liability").

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT - 24
(05-CV-01719)

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CERTIFICATE OF SERVICE

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I hereby certify that on the 15th day of March, 2007, I caused to be filed

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electronically with the court using the CM/ECF system, which will send notification of

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such filing, and I served a true and correct copy of the within and foregoing document

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entitled exactly:

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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

by the method indicated below and addressed as follows:

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D. Michael Tomkins   ____ ___ U.S. Mail
Dietrich Beimiller   ____ ___ Hand Delivery

10

8420 Dayton Avenue North   _____ Overnight Mail
Seattle, WA 98103   _____ Facsimile

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Tel: (206) 547-1000   ___X___ CM/ECF Notification
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DATED this 15th day of March, 2007.

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By /s/ Bruce E. H. Johnson

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Bruce E. H. Johnson

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CERTIFICATE OF SERVICE
(05-CV-01719)
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