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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge Christine M. Arguello

Civil Action No. 09-CV-00717-CMA-BNB

BROKER'S CHOICE OF AMERICA, INC. and  
TYRONE M. CLARK

Plaintiffs,

v.

NBC UNIVERSAL, INC.,  
GENERAL ELECTRIC CO.,  
CHRIS HANSEN,  
STEVEN FOX ECKERT, and  
MARIE THERESA AMOREBIETA

Defendants.

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS  
PLAINTIFFS' AMENDED COMPLAINT

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This matter is before the Court on Defendants' Motion to Dismiss Amended Complaint (Doc. # 49). The case involves an NBC *Dateline* program concerning questionable practices of insurance annuity salesmen.

I. BACKGROUND<sup>1</sup>

A. INTRODUCTION

Plaintiff Broker's Choice of America, Inc. ("BCA") operates as an Independent Marketing Organization ("IMO") in the insurance industry. (Doc. # 39 at ¶ 17.) IMOs

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<sup>1</sup> The description/background of this case is derived from Plaintiffs' Amended Complaint (Doc. # 39) and Defendants' Motion to Dismiss (Doc. # 49).

enter into agreements with insurance companies to market their insurance products. IMO's then recruit and make these insurance products available to independent licensed insurance agents who, in turn, market these products to consumers. (*Id.*) BCA was founded by Plaintiff Tyrone M. Clark ("Clark"). During the relevant period, Clark was the majority owner of BCA and served as BCA's CEO. (*Id.*, ¶ 18.)

Defendant NBC Universal ("NBCU") produced a television report ("Report") broadcast on *Dateline NBC* ("*Dateline*"), which focused on the predatory sales tactics used in the sale of equity-indexed annuities ("EIAs") to senior citizens. (Doc. # 49 at 9.) The Report included a segment about training sessions for insurance agents marketed by BCA under the name Annuity University ("AU"). (Doc. # 39 at ¶ 20.) AU is a two-day training session BCA offers to insurance agents on the sale of annuities. (*Id.*, ¶ 24.) AU seminars are taught by Clark in Centennial, Colorado, in a building owned by a Clark-owned company and leased exclusively to BCA. (*Id.*, ¶ 21.) In order to register with BCA for an AU seminar, participants must be licensed insurance agents, *i.e.*, AU seminars are not open to the general public. (*Id.*, ¶ 22, 79.)

*Dateline* is a weekly television broadcast produced by NBCU and broadcast on NBC affiliated television stations. (*Id.*, ¶ 31.) In 2007, *Dateline* began an investigation into the tactics used by insurance agents selling EIAs to senior citizens. (Doc. # 49 at 12.) Defendant Chris Hansen headed the investigation. (*Id.*) As part of its investigation, *Dateline* arranged for volunteers in Arizona and Alabama to pose as potential customers of insurance agents. These volunteers were equipped with hidden

cameras to record the agents' sales pitches. (Doc. # 39, ¶ 52.) During the sales pitches, the insurance agents failed to disclose the risks associated with EIAs, including the substantial penalties for withdrawing the funds before their maturity dates. (*Id.*, ¶ 76.)

Because annuities are insurance products and the return on fixed-indexed annuities is tied to various securities indexes, the Alabama Department of Insurance ("ALDOI") and the Alabama Securities Commission ("ASC") were interested in regulating the sale and marketing of fixed-indexed annuities. (*Id.*, ¶ 47.) ALDOI and ASC formed a joint task force with the Alabama Attorney General's Office ("AAG's office") with the intent to "work together in investigating and prosecuting improper annuities sales practices." (*Id.*, ¶ 48.) The joint task force was named the Alabama Annuities Task Force ("AATF"). (*Id.*, ¶ 49.) The purpose of the AATF was to "work jointly on investigations of annuity sales, particularly as they apply to the suitability of the products sold to Alabama consumers." (*Id.*, ¶ 50.) Subsequently, AATF and *Dateline* investigated whether misleading, abusive, and criminal annuity sales practices were being conducted in Alabama. (*Id.*, ¶¶ 51-52.) *Dateline* and the AATF officials decided their investigation should include the training of insurance agents in marketing annuities. (*Id.*, ¶ 53.)

#### **B. THE DATELINE INVESTIGATION**

In October of 2007, *Dateline* producers Steven Fox Eckert and Marie Theresa Amorbieta registered for a two-day session at AU held on October 25 and 26, 2007.

(Doc. # 39, ¶ 58.) ALDOI issued Alabama insurance producer licenses to Eckert and Amorebieta with the agreement that they not sell insurance products with these licenses and that they return the licenses immediately after surveilling and gathering evidence about the AU class. (*Id.*, ¶ 57.) BCA checked the licensing status of Eckert and Amorebieta and admitted them to the BCA premises to attend AU. (*Id.*, ¶ 59.) Eckert and Amorebieta attended and recorded the classes. Some of the recorded footage was included within the Report which aired on April 13, 2008. (*Id.*, ¶¶ 60-61, 72.)

## II. PROCEDURAL HISTORY

Plaintiffs initiated this action on March 31, 2009. (Doc. # 1.) In their original Complaint, Plaintiffs asserted the following claims against Defendants: defamation, trespass, fraud, intrusion, and violation of 42 U.S.C. § 1983. On June 1, 2009, Defendants filed a Motion to Dismiss for failure to state claims upon which relief could be granted. (Doc. # 10.) On October 22, 2009, the Court granted the Motion to Dismiss, without prejudice. (Doc. # 38.) On November 20, 2009, Plaintiffs filed an Amended Complaint and Jury Demand. (Doc. # 39.) The primary differences between the factual allegations in the original Complaint and those in the Amended Complaint are that the Amended Complaint includes statements from a sales training seminar in March 2007 (the "March 2007 Seminar") and Plaintiffs' original claims for trespass, fraud and intrusion are no longer alleged, *i.e.*, Plaintiffs now alleges only two claims for relief – defamation and violation of 42 U.S.C. § 1983. For purposes of this order, the Court assumes, as asserted by Plaintiffs, that the March 2007 Seminar "includes

discussions of the same topics presented at all Annuity University classes,” including the October 2007 Seminar covered in the Report, and that it “provides in substance the true context of the snippets selected by *Dateline . . . .*” (Doc. # 39, ¶ 65).

On December 22, 2009, Defendants filed a Motion to Dismiss the Amended Complaint, again asserting that Plaintiffs failed to state claims upon which relief can be granted. (Doc. # 49.) On January 21, 2010, Plaintiffs filed an Amended Brief in Opposition to Defendants’ Motion to Dismiss the Amended Complaint. (Doc. # 61.) On February 5, 2010, Defendants filed a Response to Plaintiffs’ Amended Brief. (Doc. # 64.)

### III. STANDARD OF REVIEW

A court reviewing the sufficiency of a complaint assumes the truth of all well pleaded facts in the complaint, and draws all reasonable inferences therefrom in the light most favorable to the plaintiffs. *Teigen v. Renfrow*, 511 F.3d 1072, 1078 (10th Cir. 2007). In order to defeat a motion to dismiss under Rule 12(b)(6), Plaintiffs must demonstrate that the Amended Complaint alleges “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960 (2009). Plaintiffs need not prove their case at this point; rather, they need only allege a plausible claim for relief. Their “factual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

#### IV. ANALYSIS

Plaintiffs assert two claims in their Amended Complaint: (1) defamation, based on clips of the October 2007 Seminar that were used out of context; and (2) violation of 42 U.S.C. § 1983, grounded in the theory that *Dateline's* partnership with the state of Alabama transformed *Dateline* into a state actor.

##### A. DEFAMATION CLAIM

The tort of defamation exists to redress and compensate individuals who have suffered serious harm to their reputations due to the careless or malicious communications of others. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 11 (1990); *Keohane v. Stewart*, 882 P.2d 1293, 1297 (Colo. 1994). A claim for defamation requires that the plaintiff prove, by a preponderance of the evidence, that the defendant published a defamatory statement. If a public figure or a matter of public concern is involved, a heightened burden applies and plaintiff is required to prove a statement's falsity by clear and convincing evidence rather than a preponderance. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Smiley's Too, Inc. v. Denver Post Corp.*, 935 P.2d 39, 41 (Colo. App. 1996). This heightened burden requires a plaintiff to demonstrate that the statements were made with actual malice, *i.e.*, with knowledge that the statements were false or made with reckless disregard as to their truth or falsity. *New York Times v. Sullivan*, 376 U.S. 254, 285-86 (1964); see also *Lockett v. Garrett*, 1 P.3d 206, 210 (Colo. App. 1997). Actual malice can be shown if the defendant entertained serious doubts as to the truth of the statement or acted with a high degree

of awareness of its probable falsity. *Lewis v. McGraw-Hill Broad. Co.*, 832 P.2d 1118, 1123 (Colo. App. 1992). Under Colorado law, absolute truth is not required. Instead, a defendant need only show substantial truth, *i.e.*, that “the substance, the gist, the sting of the matter is true.” *Gomba v. McLaughlin*, 180 Colo. 232, 236 (Colo. 1972).

The Court previously held that the *Dateline* Report was an issue of public concern. It dismissed Plaintiffs’ defamation claim because Plaintiffs failed to provide “non-conclusory factual allegations to support their claim for relief,” and failed to allege sufficient facts demonstrating that Clark’s statements in Defendants’ Report were taken out of context and presented in a false light. (Doc. # 38 at 3-6.)

In the Amended Complaint, Plaintiffs attempt to provide context for the October 2007 Seminar by referencing statements made at a March 2007 Seminar.<sup>2</sup> Plaintiffs’ new allegations elaborate upon allegations made in the original Complaint, in particular, that the AU seminar included information about technical aspects of annuities, annuity regulations, and common misunderstandings about annuities and annuity contracts. Plaintiffs allege that the statements contained in the preview to the broadcast or the broadcast itself are “false characterizations.”

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<sup>2</sup> The Court recognizes Plaintiffs have not been afforded an opportunity through discovery to obtain a copy of Defendants’ camera footage of the October 2007 Seminar statements. However, the Amended Complaint quotes Clark’s statements from the March 2007 Seminar. Plaintiffs allege the statements from the March 2007 Seminar are substantially the same statements Clark would have made in the October 2007 Seminar and provide the true context of Clark’s October statements featured in Defendants’ Report. For purposes of this Order, the Court assumes that the statements made in the March 2007 Seminar are substantially the same as those made in the October 2007 Seminar. (Doc. # 39, ¶ 65.)

The Court considers each statement in turn:

1. Statement # 1.

In the first minutes of the program, the host made the following introductory statement:

Hansen: Join us in a ground-breaking hidden-camera investigation, as we go behind the scenes to uncover the techniques they use: inside sales meetings – where we catch the questionable pitches; inside training sessions– where we discover agents being taught to scare seniors; and finally, inside seniors’ homes to reveal the tricks some agents use to puff their credentials to make a sale.

(Doc. # 39, ¶ 73.)

Plaintiffs contend that Statement # 1 as presented in the context of the Report is defamatory because it implies that Clark teaches insurance agents to scare seniors when selling annuities. (Doc. # 39, ¶ 74.) They explain that Clark does not teach “scare tactics,” rather, he addresses a legitimate and important aspect of financial management for seniors. (Doc. # 39, ¶ 75.) Plaintiffs explain that Clark instructs insurance agents how to identify potentially frightening or disturbing issues to determine the “suitability of insurance products.” (*Id.*)

Defendants, on the other hand, assert that Plaintiffs fail to offer any factual allegations to support their assertions that Clark does not teach scare tactics.

Thus, Defendants argue Plaintiffs have failed to show a lack of substantial truth.

Clark admits that he tells attendees of his seminars that he raises issues with potential purchasers that “disturb the hell out of them” and that he “brings out the stuff that—where they can’t sleep at night.” (Doc. # 39, ¶ 88.) Clark also teaches insurance

agents that the value they “bring to the table is when you disturb them; when you uncover problems that are lurking in their mind.” (Doc. # 39, ¶ 90.) Given Plaintiffs’ own words, the Court finds that the gist of the characterization of the seminar as teaching “scare” tactics is substantially true. The Court finds that Plaintiffs fail to sufficiently plead facts demonstrating the falsity of Defendants’ Report with respect to Statement # 1.

2. Statement # 2

Plaintiffs next note the following *Dateline* voiceovers:

Hansen: We’ve seen some of the tactics insurance agents use to sell seniors. The agents seem awfully slick. How did they get so good? You are about to witness something few people have ever seen – a school where, authorities say, insurance salesman are being taught questionable tools of the trade.

3. Statement # 3

Hansen: These training sessions are only open to licensed insurance agents. We don’t know whether these salesman we’ve met so far studied here, but the State of Alabama agreed to help us investigate by issuing insurance licenses to two *Dateline* producers, so we could attend – and bring along our hidden cameras.

(Doc. # 39, ¶¶ 78-79.)

Plaintiffs claim that Statement # 2 implies a link between the salesmen shown at the sting house in Alabama and AU and that Statement # 3 omits details of an alleged collusion between *Dateline* and ALDOI. (Doc. # 39, ¶¶ 76-79.) However, Plaintiffs’ allegations ignore the express disclaimer in Statement # 3 that *Dateline* did not know whether these salesman had attended AU.

With regard to Statement # 3, because Defendants merely observed a fact, namely that the State of Alabama agreed to help with their investigation, the statement is substantially true. Plaintiffs allege *Dateline* should have explained the details of the alleged collusion with the State of Alabama, but such an omission, the Court notes, does not render the statement false or defamatory. Accordingly, the Court finds that Plaintiffs fail to sufficiently plead facts demonstrating the falsity of Defendants' Report with respect to Statement ## 2 and 3.

4. Statement # 4

Plaintiffs next note the following *Dateline* voiceover, combined with hidden camera footage of Clark:

(Hidden Camera). Clark: Annuities are not liquid? That is baloney.

Hansen: This is the man in charge of 'Annuity University' –Tyrone Clark, the self proclaimed king of annuity sales. Annuities are legitimate investments for some people, and Clark is a strong advocate for them. He says they're safe and have no risk, which are selling points especially appealing to seniors.

(Hidden camera). Clark: What I sell is peace of mind . . . .

(Doc. # 39, ¶¶ 80-82.)

Plaintiffs allege that Clark's own statements from the March 2007 Seminar are not a sales technique based on deception and scare tactics. Plaintiffs assert that Clark explains that annuities shift the risks of short term economic volatility from the annuity owner to the insurance company; annuities are not subject to volatility risks in various investment options; and consumers who do not want to risk their money should go to a

safer environment. (Doc. # 39, ¶¶ 83-84.) Plaintiffs do not dispute that Clark stated that he sells “peace of mind.” (*Id.*, ¶ 84.) Accordingly, under the doctrine of “substantial truth,” the Court finds that the gist of Dateline’s characterization that Clark associates “peace of mind” with lack of risk in his sales seminar is substantially true.

5. Statement # 5

Plaintiffs next address the following description in the *Dateline* program of a Massachusetts investigation against Plaintiffs:

Hansen: But what else is Tyrone Clark teaching? In 2002, the State of Massachusetts accused Clark and his companies of a ‘dishonest scheme to deceive, coerce and frighten the elderly.’ Part of the evidence was the training manual in which Clark tells agents to sell to seniors by assuming they’re selling to a 12-year-old’ and by hitting their ‘fear, anger or greed buttons.’ Clark settled that case without admitting any wrongdoing. And, now, his company says it’s become ‘an industry leader’ in promoting ethical conduct. But watch what our hidden cameras found, and see if you agree. Remember those scare tactics?

(*Id.*, ¶ 86.)

With respect to Statement # 5, Plaintiffs allege that *Dateline* fails to explain that Massachusetts did not prove those allegations and that it rapidly terminated its claim by settlement. (*Id.*, ¶¶ 86-87.) The Court notes that *Dateline* expressly acknowledges the settlement without admission of wrongdoing. As such, the Court finds Statement # 5 to be substantially true.

6. Statement # 6

Plaintiffs next point to the hidden camera comments by Clark, which were combined with Dateline’s own commentary:

(Hidden Camera). Clark: And I am bringing these things up that disturb the hell out of them.

Hansen: For Tyrone Clark, disturbing people seems to be Annuity Sales 101.

Clark: I bring out the stuff that – where they can't sleep at night.

(Doc. # 39, ¶ 88.)

Plaintiffs contend Clark's statements are defamatory because they were displayed out of context. Plaintiffs contend that the context supplied by *Dateline* meant and was understood by those watching the Report to mean that Clark teaches scare tactics. (*Id.*, ¶ 89.) They explain that Clark does not mislead seniors into purchasing annuities by means of scare tactics. Rather, Clark's statements from the March 2007 Seminar describe how a "good agent" makes prospective clients aware of problems by uncovering issues they will regard as important but have not considered, or have not realized. (*Id.*, ¶ 90.)

Defendants assert that Plaintiffs' allegations confirm that Clark's goal is to teach agents scare tactics and, thus, the Report with regard to this statement is substantially true. (Doc. # 49 at 32.) As discussed above with regard to Statement # 1, Clark admits that he raises issues that "disturb the hell out of them," and that he "bring[s] out the stuff that – where they can't sleep at night." (Doc. # 39, ¶ 88.) Clark also urges his attendees to prey on the concerns seniors may have about losing their money to nursing homes. Clark states, "[t]he value you bring to the table is when you disturb them; when you uncover problems that are lurking in their mind." (*Id.*, ¶ 90.)

Accordingly, the Court finds the gist of the characterization in Statement # 6 that Clark teaches "scare tactics" to be substantially true.

7. Statement # 7

The next allegedly defamatory statement cited by Plaintiffs is a *Dateline* voiceover, followed by another clip of Clark:

Hansen: And how do you make them worry? One way is to suggest their money may not be safe, even in a bank, by telling a potential client something like this.

Clark: FDIC is insolvent. FDIC only has \$1.37 per every \$100 on deposit.

(Doc. # 39, ¶ 92.)

Plaintiffs allege this is defamatory because "[a]t no point in his discussion of bank accounts and FDIC insurance did Clark instruct attendees to state that their customer's 'money may not be safe even in a bank.'" (*Id.*, ¶ 94.) Plaintiffs explain that Clark's words about the FDIC were merely an observation on the state of the federal insurance deposit fund and were meant to contrast the reserve requirements of the FDIC. (*Id.*, ¶ 99.) In support of their allegations, Plaintiffs offer statements made by the chairman of the FDIC in March 2009, and a Wall Street Journal report about the solvency of the FDIC. (*Id.*, ¶ 95.)

Defendants assert that Plaintiffs offer no new allegations that alter the plain meaning of Clark's statement that the FDIC is insolvent. (Doc. # 49 at 33.)

The Court finds the statements offered by Plaintiffs relay facts about the impact of the financial crisis on the FDIC, and do not alter the substantial truth of *Dateline's*

Report. The *Dateline* Report shows that Clark questions the solvency of banks by stating the FDIC is insolvent. Furthermore, Clark instructs agents to contrast the solvency of banks and the FDIC to the security of the insurance industry in order to raise doubts in seniors' minds about whether their money is safe in a bank. (Doc. # 39, ¶ 96.) Thus, the gist of the characterization of Statement # 7 is substantially true.

8. Statement # 8

The next statement cited by Plaintiffs is another *Dateline* voiceover followed by a clip of Clark:

Hansen: Another way is to mention a senior's natural fear of nursing homes.

(Hidden Camera). Clark: I help my clients to protect their life savings from the nursing home and Medicaid seizure of their assets. See, that is scary, and it should be scary.

(*Id.*, ¶ 100.)

Plaintiffs contend that Statement # 8 is defamatory because Clark does not teach agents to prey on seniors' "natural fear of nursing homes." Plaintiffs explain that Clark discusses the financial implications of nursing homes, a discussion which helps seniors effectively plan their finances. (*Id.*, ¶¶ 102-103.) They contend that mere mentioning of senior financial planning cannot be considered a "scare tactic" and, thus, this statement is defamatory. (*Id.*)

Defendants assert that the allegations do not render false the statement in the Report that Clark "mentions senior's natural fear of nursing homes." The Court agrees.

Clark expressly states that the loss of life savings and Medicaid seizures are “scary” and “should be scary.” Accordingly, the Court finds Statement # 8 is substantially true.

9. Statement # 9

Plaintiffs next reference a series of voiceover and hidden camera combination clips featuring Clark and Attorney General Lori Swanson:

Hansen: The next step? Promise people easy access to their money. Even though, with some exceptions, annuities lock up most of your money for a specified number of years, listen to the sales pitch Tyrone Clark suggests . . . .

(Hidden Camera). Clark: There are more ways to access your money. There are more options. There are more choices to access your money from an annuity than any other financial instrument.

10. Statement # 10

Hansen: We ask Minnesota Attorney General Lori Swanson to watch what our hidden cameras had captured.

Hansen: How would you characterize what this man has said?

Lori Swanson: I think that he is not telling the truth when he tells those agents that an annuity is the most liquid place a senior citizen can put their money. It is simply not true.

(Doc. # 39, ¶¶ 105-106.)

Plaintiffs advance four theories regarding how these statements were defamatory. First, Plaintiffs allege the statements made by *Dateline* and Attorney General Swanson are false and taken out of context with Clark’s statement. (*Id.*, ¶¶ 105-107.) Second, Plaintiffs allege that *Dateline* does not explain how much of the hidden camera footage Attorney General Swanson had watched. (*Id.*, ¶ 106.) Third,

they allege that Clark does not actually say that an annuity is “the most liquid place a senior citizen can put their money.” (Doc. # 39, ¶ 107.) Fourth, they allege that Clark advises attendees that annuities are not a proper financial strategy for people who want to routinely withdraw funds. (*Id.*, ¶108.)

Plaintiffs assert that Clark meant that annuity products are not a proper financial strategy for people who want continual access to their funds, that a bank or a money market would be a more suitable place to hold funds, and that funds in annuities have more options for accessing money than other financial instruments. (*Id.*, ¶ 110.)

Defendants argue Plaintiffs’ explanation does not alter the plain meaning of Clark’s statement that there are more choices to access money from an annuity than from any other financial instrument. (Doc. # 49 at 36.) Clark’s statement from the March 2007 Seminar, “when it truly comes to liquidity options take any other financial instrument . . . . we have more ways to access the money than any other financial instrument,” supports Attorney General Swanson’s statements that Clark tells insurance agents that an annuity is the most liquid place a senior can put their money. (Doc. # 39, ¶ 109.) Like *Dateline’s* other characterizations of Clark’s own words, the Court finds the characterization of Statement ## 9 & 10 to be substantially true.

11. Statement # 11

Plaintiffs next reference a segment of the Report describing a book titled “Alligator Proofing Your Estate” marketed at AU:

Hansen: At Annuity University, this ad says you can be the author of a book called ‘Alligator Proofing Your Estate.’ Apparently, agents like the

idea of pretending to be authors, because *Dateline* found copies of the same 'Alligator' book supposedly co-written by Jeffrey D. Lazarus, Steven Delott, and Ronald and Robert Russell.

(Doc. # 39, ¶ 111.)

Plaintiffs allege this statement is defamatory because at no point do insurance agents pretend to be authors of the "Alligator book." (*Id.* at ¶ 111.) Plaintiffs explain that an agent did, in fact, author a personal chapter of the book, while the rest of the book's chapters were written by an expert. (*Id.*) They also contend that Clark does not teach attendees of the AU seminar to represent themselves as authors of portions of books they have not written. (*Id.* at ¶ 113.) Rather, Plaintiffs contend that Clark instructs agents to build their credibility by "joining organizations, speaking in churches and writing articles" and that they "start their own late-night radio broadcast discussing financial planning to further establish local credibility." (*Id.*)

However, it is undisputed that Defendants correctly identified several agents listed separately as co-authors of the same book. Thus, the Court finds the gist of Statement # 11 to be substantially true.

## 12. The Preview

Plaintiffs next point to two statements made in the preview to *Dateline's* Report, which was aired on NBC's *Today Show*. First, Plaintiffs' argue the *Dateline* voiceover, "Are some agents being coached on how to mislead people when they sell annuities?" was defamatory. (Doc. # 39, ¶¶ 67.) The voiceover aired while showing images of Clark speaking at the October 2007 Seminar. (*Id.*)

Plaintiffs allege this is defamatory because Clark does not teach insurance agents at the seminars scare tactics; rather, he teaches insurance agents how to be honest with prospective clients. (Doc. # 39, ¶¶ 69-70.) Plaintiffs explain that a central theme at Clark's seminars is that insurance agents should always be honest with prospective clients because honesty attracts customers and establishes trust. (*Id.*)

However, as discussed above, given many of the statements Clark undisputedly made at the October 2007 Seminar and the March 2007 Seminar, the Court finds that the rhetorical question posed by *Dateline*, to the extent it suggests Clark coaches agents how to mislead people, is substantially true.

Second, Plaintiffs contend that the preview displayed a picture of the "Alligator Proofing Your Estate" book, in which the voiceover claimed the book was marketed at AU, and claimed that, for a fee, a salesman could be listed as the exclusive author of the ghost-written book. (*Id.*, ¶ 71.)

They allege this is defamatory because the edition of the book displayed has not been marketed at AU for more than five years, was co-authored by a named qualified estate planning expert along with an agent, and is not "ghost written." (*Id.*)

The Court finds that the way the book is presented, as conveyed in the *Dateline* preview, suggests that insurance agents had much more involvement than they actually had in writing the book. The Court concludes the gist of the preview's characterization of the book as a marketing device that misleadingly bolsters an agent's credibility is substantially true.

In sum, the Court finds that Plaintiffs have failed to meet their burden to plead facts, rather than conclusions, that show that the *Dateline* Report placed the at-issue excerpts in a false light.

**B. CLAIM FOR VIOLATION OF 42 U.S.C. § 1983**

Plaintiffs also allege their constitutional rights were violated and seek damages pursuant to 42 U.S.C. § 1983.<sup>3</sup> Plaintiffs allege Defendants, acting under the “color of state law” by virtue of their alleged interactions with the State of Alabama, violated Plaintiffs’ rights under the Fourth and Fourteenth Amendments to the Constitution, including a violation of their right to be free from unreasonable search and seizures, invasion of their right to privacy and a claim for stigmatization. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) the deprivation of rights by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible and; (2) the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Johnson v. Rodriguez*, 293 F.3d 1196, 1202 (10th Cir. 2002) (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)).

Although Defendants are private parties, Plaintiffs contend the facts of this case support a finding that Defendants were state actors. In order to find that a private party

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<sup>3</sup> “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .” 42 U.S.C. § 1983.

is a "state actor" for purposes of invoking the application of 42 U.S.C. § 1983, the facts must indicate that "the state is responsible for the specific conduct of which the plaintiff complains" and substantial involvement between the state and private officials in carrying out the deprivation of plaintiff's constitutional rights. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *vacated and remanded by*, 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir.1999).

A media entity will not be considered a state actor unless there are sufficient facts to demonstrate joint action and a shared purpose between state authorities and the media entity. *Anderson v. Suiters*, 499 F.3d 1228, 1234 (10th Cir. 2007). In *Anderson*, the plaintiff filed a § 1983 action against a television reporter, a company owned television station, and a police officer (the "media defendants") for violation of her constitutional right to privacy. The plaintiff alleged her estranged husband raped and videotaped her while she was unconscious. *Id.* at 1231. The plaintiff gave the videotape to a police officer with the agreement that the tape would remain confidential and be used only for law enforcement purposes. *Id.* The police officer then authorized the media defendants to record and display the videotape's contents on the air, solely for the purposes of showing a "head shot" of the husband. The plaintiff alleged that the police officer called her on the telephone, on behalf of the media defendants, to encourage her to speak with the media defendants. *Id.* The police officer then put the television reporter on the telephone to speak with the plaintiff. The plaintiff further

alleged that the media defendants then aired more of the videotape than originally authorized by the police officer. *Id.* at 1233. She alleged a working relationship between the media defendants and the police officer, such that the media defendants were state actors.

The Tenth Circuit rejected the plaintiff's argument that the media defendants were state actors. *Id.* The court held that the plaintiff failed to show facts that demonstrated a shared purpose by the police officer and the media defendants that violated plaintiff's constitutional rights. *Id.* In evaluating the complaint, the court stated that "[a]t most, the parties had their own separate goals: [the police officer] wanted to appear on camera, and the media defendants wanted exclusive access to the investigation." *Id.* It further noted that, according to the complaint, the television station, and not the police officer "retained editorial control over the use of the videotape." *Id.*

In the instant case, Plaintiffs assert that the best evidence demonstrating joint action under the "color of state law" between the Defendants and the State of Alabama is the actual agreements signed by Eckert, Amorebieta and ALDOI. (Doc. # 61 at 28.) The signed agreements demonstrate that Eckert and Amorbieta received insurance licenses from the State of Alabama for the purposes of an investigation with clear instruction that the licenses be returned at the conclusion of the investigation. (Doc. # 39-4.) Plaintiffs allege that the State of Alabama sponsored the Defendants' unlawful actions in a series of coordinated activity. (Doc. # 39, ¶¶ 131-132.) They also allege Leon Capuano, an Alabama attorney, posed as a potential customer at the Alabama

sting house and was a social acquaintance of Joseph Borg, Director of the ASC.

(*Id.*, ¶ 52.) Plaintiffs allege Joseph Borg's recommendation that Leon Capuano pose as "a volunteer" at the Alabama sting house further supports their claim of unlawful state action. (*Id.*)

Although it is undisputed that, without the insurance licenses issued to Defendants by ALDOI, Defendants would not have been allowed to attend the October 2007 Seminar, it is also undisputed that Alabama state officers did not attend or record the October 2007 Seminar. The written agreements do not show a joint relationship between the State of Alabama and the Defendants. In fact, the written agreements between Eckert and Amorbieta and ALDOI consist of only the following two sentences:

[Defendant] has received a Producer License from the State Department of Insurance to be used solely for the purpose of an investigation. It is the understanding and agreement of [Defendant] that [he/she] will immediately relinquish this license when the investigation is concluded.

(Doc. # 39-4.)

The purported relationship between Capuano and Borg does not demonstrate that state officials were involved in the production of the Report. Similar to the defendants in *Anderson*, the Defendants in the instant case and ALDOI had "their own separate goals": *Dateline's* goal was to obtain footage for use in its Report and Alabama authorities hoped to learn more about predatory practices toward seniors.

(Doc. # 39, ¶¶ 47-51.) Moreover, Plaintiffs do not allege that the Alabama authorities had editorial control over the use of the material recorded by Defendants at the October 2007 Seminar or that it had any authority over the content aired in *Dateline's* Report.

Even assuming the truth of Plaintiff's allegations, the Alabama authorities and *Dateline* did not engage in behavior that would be considered to be joint action in the production and airing of the Report. Further, there is no allegation that the Defendants did anything at the command of the Alabama authorities that they would not have done in the ordinary course of their own reporting. *Cf., Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *vacated and remanded by*, 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9th Cir. 1999) (media defendants were "state actors" when they participated with federal officers in the execution of a search warrant "and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value." Government officers also had control over the extent of footage the media defendants broadcasted and the officers were "joint participants" in shaping the contents of defendant's broadcast.); and *Frederick v. The Biography Channel*, 683 F.Supp. 2d 798, 801 (N.D. Ill. 2010) (media film crew had a formal contractual agreement linking the media defendants to the city. City's police department took a proactive role in ensuring plaintiff was made available to a film crew during and after her arrest.) The Court finds that Plaintiffs have failed to allege sufficient facts showing state action on the part of these private party Defendants.

Plaintiffs have failed to allege facts demonstrating that the State of Alabama and Defendants were joint participants in creating the broadcast Report. The issuance of insurance licenses by the State of Alabama which enabled Defendants to gain access

into the October 2007 Seminar is insufficient proof to sustain a claim of state action, pursuant to 42 U.S.C. § 1983, against these non-governmental defendants.

**C. WHETHER THE COURT SHOULD DISMISS WITH OR WITHOUT PREJUDICE**

To summarize, then, Plaintiffs' Amended Complaint fails to state plausible claims under Federal Rule of Civil Procedure 12(b)(6). Accordingly, it must be dismissed. The question is whether to dismiss with or without prejudice. Given the extensive allegations in the Amended Complaint, the Court finds it would be futile to allow Plaintiffs another opportunity to plead claims of either defamation or violation of § 1983. Another complaint, for example, would not alter the Court's conclusion that the statements contained in the Report are substantially true. Accordingly, the Court finds it appropriate to dismiss with prejudice. See *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.") (citing *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1126 (10th Cir. 1997)).

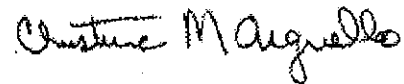
**V. CONCLUSION**

The Court finds that Defendants' broadcast was substantially true and, thus, was not a defamatory portrayal of the at-issue statements. Thus, Plaintiffs' defamation claim fails. Plaintiffs' § 1983 claim fails because they have not adequately alleged that Defendants were state actors. Accordingly, it is ORDERED that:

- Defendants' Motion to Dismiss Amended Complaint (Doc. # 49) is GRANTED.
- This case is DISMISSED WITH PREJUDICE.

DATED: January 11, 2011

BY THE COURT:



---

CHRISTINE M. ARGUELLO  
United States District Judge

**Cynthia Henning**

---

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**U.S. District Court**

**District of Colorado**

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**Case Number:** 1:09-cv-00717-CMA-BNB

**Filer:**

**Document Number:** 77

**Docket Text:**

**ORDER granting [49] Defendants' Motion to Dismiss Amended Complaint. This case is dismissed with prejudice, by Judge Christine M. Arguello on 1/11/11. (mnf, )**

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161eff1ace719a29651832cddcec1734824810d05b983fc26cd11f488f62a]]

1/12/2011

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-00717-CMA-BNB

BROKERS' CHOICE OF AMERICA, INC., and  
TYRONE M. CLARK,

Plaintiffs,

v.

NB UNIVERSAL, INC.  
GENERAL ELECTRIC CO.,  
CHRIS HANSEN,  
STEVEN FOX ECKERT, and  
MARIE THERESA AMBOREBIETA,

Defendants.

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REPORTER'S PARTIAL TRANSCRIPT  
(Motions Hearing Ruling)

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Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 3:01 p.m. on the 22nd day of October, 2009, Alfred A. Arraj United States Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

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DARLENE M. MARTINEZ, RMR, CRR  
United States District Court  
For the District of Colorado



1 that *Dateline's* partnership with the State of Alabama  
2 transformed *Dateline* into a state actor.

3 The Defendants have moved to dismiss the Complaint.  
4 Response and Reply Briefs to the Motion have been filed,  
5 and the Court just heard the oral argument of both  
6 counsel. Therefore, this Motion is ripe for decision.

7 Regarding the standard of review, recently, in  
8 Ashcroft v. Iqbal -- I will omit the citations to those --  
9 the Supreme Court elaborated on the standards for a Motion  
10 to Dismiss. While the Complaint typically need not make  
11 detailed factual allegations, it must do more than  
12 provide, "unadorned, the-defendant-unlawfully-harmed-me  
13 accusations."

14 That is, it cannot merely offer conclusory  
15 statements or "a formulated recitation of the elements of  
16 a cause of action"; it must "contain sufficient factual  
17 matter" to state a claim that is "plausible on its face."  
18 Therefore, this Court reviews the Plaintiffs' Complaint to  
19 determine whether there are sufficient, non-conclusory  
20 factual allegations to support their claims for relief.

21 The Court is first going to consider the  
22 Plaintiffs' defamation claim. Defendants argue that  
23 Plaintiffs have not pled facts showing that the broadcast  
24 was untrue. Where the alleged defamation involves a  
25 matter of public concern, it is the plaintiff's burden to

1 plead, and later prove, that the statements in question  
2 were false. And that's taken from Smiley's Too, Inc. v.  
3 Denver Post Corp., 935 P.2d 39, a Colorado Appellate 1996  
4 case.

5 By "false," the Court means "not substantially  
6 true." In other words, every word of an alleged  
7 defamatory statement need not be true so long as "the  
8 substance, the gist, and the sting of the matter are  
9 true."

10 Whether the broadcast involved a matter of public  
11 concern is a question of law for this Court. In general,  
12 a matter is of public concern when it embraces an issue  
13 about which information is needed or appropriate. The  
14 *Dateline* program purported to expose potential fraud  
15 perpetrated on senior citizens. Information on such fraud  
16 is certainly relevant to a vast majority of the  
17 population, including senior citizens, themselves, and  
18 their families and other loved ones.

19 The Court finds that the NBC *Dateline* program  
20 concerning questionable practices of insurance annuity  
21 salesmen qualifies as an issue of public concern and,  
22 therefore, Plaintiff must plead falsity.

23 Plaintiffs' theory is that the Defendants  
24 selectively edited the seminar and juxtaposed their  
25 statements with introductory comments by *Dateline's* host,

1     therefore, taking the statements out of context and  
2     placing them in a false light. The Defendants argue that  
3     Plaintiffs have not alleged facts showing how the  
4     broadcast statements were taken out of context. The Court  
5     agrees with the Defendants.

6             The vast majority of the references to falsity in  
7     the Complaint simply state that the statements were false  
8     characterizations or were taken out of context. These are  
9     the sort of conclusory statements that Iqbal tells us  
10    cannot survive a Motion to Dismiss. Without factual  
11    allegations of what the context was and, therefore, how  
12    the so-called "selective editing" distorted the statements  
13    that were eventually broadcast, Plaintiffs' defamation  
14    claim cannot proceed.

15            Plaintiffs' allegations of the general content of  
16    the two-day seminar, contained in paragraph 59 of the  
17    Complaint, do not compel a different conclusion.  
18    Paragraph 59 alleges that the seminar covered technical  
19    aspects of annuities, discussed the potential negatives of  
20    annuities, and covered Plaintiffs' code of ethics.

21            However, the NBC *Dateline* program was not a program  
22    dedicated to in-depth coverage of Plaintiffs' seminar,  
23    rather, it was a broader program concerning questionable  
24    practices of insurance annuity salesmen in general, of  
25    which only a small portion included coverage of

1 Plaintiffs' seminar. Nothing in the general description  
2 explains how the broadcast statements were taken out of  
3 context to such an extent as to be rendered false.

4 A look at the specific statements at issue  
5 underscores the Court's conclusion. Plaintiffs' Complaint  
6 highlights 13 allegedly false and defamatory statements  
7 that were contained in either the preview to the broadcast  
8 or the broadcast, itself.

9 Plaintiffs note that in the first few minutes of  
10 the program, the host made the following introductory  
11 statement.

12 "Join us in a ground-breaking hidden-camera  
13 investigation, as we go behind the scenes to uncover the  
14 techniques they use; inside sales meetings, where we catch  
15 the questionable practices; inside training session, where  
16 we discover agents being taught to scare seniors; and,  
17 finally, inside seniors' homes to reveal the tricks some  
18 agents use to puff their credentials up to make a sale."

19 Plaintiffs contend that the "training session" is a  
20 reference to the Annuity University seminar, and suggest  
21 that this is an unfair characterization of the program.  
22 But, as the Court will discuss in this order, Plaintiff  
23 Clark said during the seminar that he brings up things  
24 that, "disturb the hell out of them," and that he "brings  
25 out the stuff that -- where they can't sleep at night."

1 Given Plaintiffs' own words, the Court finds that the gist  
2 of the characterization of the seminar as teaching "scare"  
3 tactics is true.

4 Next, Plaintiffs point to two consecutive  
5 statements made during the host's transition of the  
6 program to the Annuity University footage. This is  
7 contained in the Complaint at paragraphs 68 through 69.

8 "We've seen some of the tactics insurance agents  
9 use to sell to seniors. The agents seem awfully slick.  
10 How did they get so good? You are about to witness  
11 something few people have ever seen -- a school where,  
12 authorities say, insurance salesmen are being taught  
13 questionable tools of the trade"

14 "These training sessions are only open to licensed  
15 insurance agents. We don't know whether the salesmen  
16 we've met so far studied here, but the State of Alabama  
17 agreed to help us investigate by issuing insurance  
18 licenses to two *Dateline* producers so we could attend and  
19 bring along our hidden cameras."

20 Plaintiffs claim that the first statement attempts  
21 to link them to the salesmen featured in the earlier  
22 program. But this ignores the express disclaimer in the  
23 second statement that *Dateline* did not know whether these  
24 salesmen had attended Annuity University. There is  
25 nothing false about this statement.

1           As for the second statement, it is not defamatory,  
2           as it says nothing negative about Plaintiffs. Plaintiffs  
3           may believe *Dateline* should have explained the details of  
4           the alleged collusion with Alabama, but such an omission  
5           does not render the statement either false or defamatory.

6           Plaintiffs next note the following *Dateline*  
7           voiceover, combined with hidden camera footage of  
8           Plaintiff Clark. And this is contained in the Complaint  
9           at paragraph No. 70.

10           "(Hidden camera). Tyrone Clark: Annuities are not  
11           liquid? That is baloney."

12           "This is the man in charge of "Annuity  
13           University" -- Tyrone Clark, the self-proclaimed king of  
14           annuity sales. Annuities are legitimate investments for  
15           some people, and Clark is a strong advocate for them. He  
16           says they're safe and have no risk, which are selling  
17           points especially appealing to seniors."

18           Plaintiffs content that Plaintiff Clark never said  
19           that annuities "have no risk," and that he, in fact,  
20           explained the risk in the seminar. However, Plaintiffs do  
21           not dispute that Plaintiff Clark stated that he sells  
22           "peace of mind," that he helps "protect" his clients' life  
23           savings, and that "there are more choices to access your  
24           money from an annuity than from any other financial  
25           instrument."

1           In the Complaint, itself, the Plaintiffs describe  
2           annuities as "relatively risk-free." Under the doctrine  
3           of substantial truth, the gist of *Dateline's*  
4           characterization is not false.

5           Plaintiffs next point to the following description  
6           in the *Dateline* program of a Massachusetts investigation  
7           against Plaintiffs. And this comes from paragraph 72 of  
8           the Complaint.

9           "But what else is Tyrone Clark teaching? In 2002,  
10          the State of Massachusetts accused Clark and his companies  
11          of a "dishonest scheme to deceive, coerce and frighten the  
12          elderly." Part of the evidence was the training manual in  
13          which Clark tells agent to sell to seniors by assuming  
14          they're "selling to a 12-year-old," and by hitting their  
15          "fear, anger or greed buttons." Clark settled that case  
16          without admitting any wrongdoing. And now his company  
17          says it's become "an industry leader" in promoting ethical  
18          conduct. But watch what our hidden cameras found and see  
19          if you agree. Remember those scare tactics?"

20          Plaintiffs contend that *Dateline* did not "explain  
21          that Massachusetts provided nothing of the kind" and  
22          "rapidly terminated its claim." This argument is nothing  
23          more than a quibble over semantics. *Dateline* expressly  
24          acknowledged the settlement without admission of  
25          wrongdoing. The statement is at least substantially true.

1           Plaintiffs next point to the following hidden  
2 camera comments by Plaintiff Clark, which were combined  
3 with *Dateline's* own commentary. And this is taken from  
4 paragraph 73 of the Complaint.

5           "(Hidden camera). Tyrone Clark: And I am bringing  
6 these things up that disturb the hell out of them."

7           "For Tyrone Clark, disturbing people seems to be  
8 Annuity Sales 101."

9           "Tyrone Clark: I bring out the stuff that -- where  
10 they can't sleep at night."

11           Plaintiffs' argue that these statements were  
12 displayed out of context. But, again, they do not offer  
13 factual allegations about what the larger context was.  
14 Plaintiff Clark made the statements, and *Dateline's*  
15 comment that he was "disturbing people" is consistent with  
16 Mr. Clark's own words.

17           The next allegedly defamatory statement cited by  
18 Plaintiff is the following *Dateline* voiceover, followed by  
19 another clip of Plaintiff Clark. This is taken from  
20 paragraph 75 of the Complaint.

21           "And how do you make them worry? One way is to  
22 suggest their money may not be safe, even in a bank, by  
23 telling a potential client something like this."

24           "(Hidden cam). Tyrone Clark: FDIC is insolvent.  
25 FDIC only has \$1.37 per every \$100 on deposit."

1           Plaintiffs again argue that this statement is  
2 false, was taken out of context, but, again, do not  
3 explain what the correct context was. Plaintiffs also  
4 argue that Plaintiff Clark did not actually say seniors'  
5 money may not be safe in a bank, but that is the clear  
6 import of his statement concerning FDIC's insolvency.

7           The next statement cited by Plaintiffs is, again, a  
8 *Dateline* voiceover followed by a clip of Plaintiff Clark.  
9 This is taken from paragraph 78 of the Complaint.

10           "Another way is to mention a senior's natural fear  
11 of nursing homes."

12           "(Hidden camera). Tyrone Clark: I help my clients  
13 to protect their life savings from the nursing home and  
14 Medicaid seizure of their assets. See, that is scary, and  
15 it should be scary."

16           Again, there is no allegation of how this statement  
17 was taken out of context or what context would have  
18 demonstrated that *Dateline's* characterization of Plaintiff  
19 Clark's statement was false.

20           Plaintiffs' next reference is another  
21 voiceover/hidden camera clip combination. This is taken  
22 from paragraph 79 of the Complaint.

23           "The next step? Promise people easy access to  
24 their money. Even though, with some exceptions annuities  
25 lock up most of your money for a specified number of

1 years, listen to the sales pitch Tyrone Clark suggests."

2 "Tyrone Clark: There are more ways to access your  
3 money. There are more options. There are more choices to  
4 access your money from an annuity than any other financial  
5 instrument."

6 Plaintiffs argue that this statement was taken out  
7 of context without alleging what the complete context was.  
8 The voiceover simply characterized what Plaintiff Clark  
9 actually said; that annuities provide more choices to  
10 access money.

11 Plaintiffs next point to the following exchange  
12 between *Dateline* and the Minnesota Attorney General. This  
13 is taken from paragraph 80 of the Complaint.

14 "We ask Minnesota Attorney General Lori Swanson to  
15 watch what our hidden cameras had captured."

16 "Chris Hansen: How would you characterize what  
17 this man has said?"

18 "Lori Swanson: I think that he is not telling the  
19 truth when he tells those agents that an annuity is the  
20 most liquid place a senior citizen can put their money.  
21 It is simply not true."

22 Plaintiffs contend that *Dateline* did not explain  
23 how much of the hidden camera footage General Swanson had  
24 watched. But it is clear from her statement that she is  
25 referring to Plaintiff Clark's statements about accessing

1 money from an annuity.

2 Plaintiffs also argue that Plaintiff Clark did not  
3 actually say that an annuity is "the most liquid place a  
4 senior citizen can put their money." But Plaintiff Clark  
5 said substantially the same thing: That there are more  
6 choices to access money from an annuity than from any  
7 other financial instruments. Like *Dateline's* other  
8 characterization of Plaintiff Clark's own words, this  
9 characterization is substantially true.

10 Plaintiffs reference one other portion of the  
11 broadcast, which is the following description of a book  
12 called "Alligator Proofing Your Estate," which is marketed  
13 at Annuity University. This is taken from paragraph 81 of  
14 the Complaint.

15 "At Annuity University, this ad says you can be the  
16 author of a book called "Alligator Proofing Your Estate."  
17 Apparently, agents like the idea of pretending to be  
18 authors, because *Dateline* found copies of the same  
19 "Alligator" book supposedly co-written by Jeffrey D.  
20 Lazarus, Steven Delott, and Robert Russell."

21 Plaintiffs claim that the agents did, in fact,  
22 author a personal chapter of the book, while the rest of  
23 the book's chapter were written by an expert. However,  
24 Plaintiffs do not dispute that, in fact, several different  
25 agents were identified in separate books as the

1 "co-author". Identifying agents who write a chapter to be  
2 dropped into a pre-fabricated book as "pretending" to be  
3 authors is not a false statement; the gist of the  
4 characterization is true.

5 Finally, Plaintiffs point to two statements made in  
6 the preview to *Dateline's* broadcast show, which was aired  
7 on NBC's *Today Show*. First, they cite a *Dateline*  
8 voiceover which asked, "Are some agents being coached on  
9 how to mislead people when they sell annuities?", and  
10 which was said while showing images of Plaintiff Clark  
11 speaking at the seminar. But given many of the statements  
12 Plaintiff Clark undisputedly made at the seminar, which  
13 the Court has already mentioned, the Court finds this  
14 rhetorical question to be substantially true.

15 Second, Plaintiffs note that the preview displayed  
16 a picture of the "Alligator Proofing Your Estate" book,  
17 claimed the book was marketed at Annuity University, and  
18 claimed that, for a fee, a salesman could be listed as the  
19 exclusive author of the ghost-written book. Plaintiffs  
20 claim that the edition of the book displayed has not been  
21 marketed at Annuity University for more than 5 years, and  
22 that currently, salesmen co-author the book with an  
23 expert.

24 However, as the Court just discussed, the Court  
25 finds that the way the book is presented suggests that

1 agents had much more involvement than they actually had in  
2 the publication of that book. The gist of the preview's  
3 characterization of the book as essentially a marketing  
4 device that misleadingly bolsters a salesman's credibility  
5 is substantially true.

6 To summarize, the Court finds that Plaintiffs have  
7 failed to meet their burden to plead facts, rather than  
8 conclusions, that show that the *Dateline* broadcast took  
9 Plaintiffs' comments out of context and placed them in a  
10 false light. At best, the Complaint demonstrates that  
11 *Dateline* exercised its editorial discretion to compile and  
12 characterize actual statements of Plaintiff Clark.

13 A party has no right to sue a news organization for  
14 simply choosing what parts of the party's statements to  
15 broadcast. The Court finds particularly instructive the  
16 words of the Colorado Supreme Court in NBC Subsidiary  
17 (KCMC-TV) Inc. v. Living Will Center, 879 P.2d 6, at page  
18 15, a Colorado 1994 Supreme Court case, which quoted from  
19 the Eighth Circuit's decision in Janklow v. Newsweek, 788  
20 F.2d 1300, an Eighth Circuit case from 1996:

21 "Every news story, (like every judicial opinion)  
22 reflects choices of what to leave out, as well as what to  
23 include. We can agree that this story would have been  
24 fairer to plaintiff and more informative to the reader if  
25 the chronology had be more fully explained. Courts must

1 be slow to intrude into the area of editorial judgment not  
2 only with respect to choices of words, but also with  
3 respect to inclusions in or omissions from news stories.  
4 Accounts of past events are also selective, and under the  
5 First Amendment, the decision of what to select must  
6 almost always be left to writers and editors. It is not  
7 the business of Government."

8 For these reasons, the Court grants Defendants'  
9 Motion to Dismiss the Defamation Claim.

10 Next, the Court will consider the Plaintiffs'  
11 claims for trespass, fraud and intrusion. Defendants  
12 argue that because all of these claims seek compensation  
13 for the allegedly defamatory broadcast, the standards  
14 applicable to defamation claims, and specifically the  
15 requirement of falsity applies to these claims, as well.

16 This legal principle cited by Defendants is beyond  
17 dispute. In Hustler v. Falwell, 485 U.S. 46, a 1988  
18 Supreme Court case, the Supreme Court held that a public  
19 figure offensively parodied in a magazine cartoon could  
20 not recover tort damages for intentional infliction of  
21 emotional distress without making the same showing  
22 necessary to recover for defamation; that the statement  
23 was false, and that it was made with actual malice.  
24 Otherwise, a plaintiff could avoid the heightened First  
25 Amendment protections given to allegedly defamatory

1 statements by simply re-labeling their claims.

2 Other courts, including the Tenth Circuit in  
3 Jefferson County School District No. R-1 v. Moody's  
4 Investor's Services, Inc., 175 F.3d 848, a Tenth Circuit,  
5 1999 case, have noted that Hustler's principles apply to a  
6 broad range of tort claims seeking damages resulting from  
7 First Amendment-protected speech. The Court must,  
8 therefore, determine whether these other causes of action  
9 were brought to seek recovery for the allegedly defamatory  
10 broadcast, and the Court finds that they are.

11 Tellingly, in the portion of Plaintiffs' Complaint  
12 titled "Damages," Plaintiffs, themselves, link their  
13 injuries directly to the broadcast, stating: "The fallout  
14 from *Dateline's* defamatory program has been severe."  
15 Indeed, in each individual claim, Plaintiffs make clear  
16 that their real harm stemmed from the broadcast.

17 With respect to the trespass claim, Plaintiffs  
18 allege that Defendants "trespassed upon Plaintiffs'  
19 property for the sole purpose of recording secretly the  
20 Annuity University seminar, editing snippets of Clark's  
21 presentation for sensationalistic effect, broadcasting  
22 their footage in an untruthful and defamatory context, and  
23 sharing the footage with Alabama."

24 Plaintiffs further allege they were "harmed by  
25 Defendants' tortious and malicious conduct and are

1 entitled to damages for this unlawful trespass and the  
2 broadcast, which was its intended result."

3 With respect to the fraud claim, similar to their  
4 trespass claim, Plaintiffs allege that Defendants made  
5 allegedly false representations of being licensed  
6 insurance producers "for the sole purpose of infiltrating  
7 Annuity University, recording secretly Plaintiffs'  
8 seminar, editing snippets of Clark's presentation for  
9 sensationalistic effect, and broadcasting their footage in  
10 an untruthful and defamatory context." They further  
11 allege that they "were harmed by Defendants' fraudulent  
12 misrepresentations and the broadcast which was their  
13 intended result."

14 With respect to the intrusion claim, again,  
15 Plaintiffs allege that Defendants "intentionally violated  
16 Clark's expectation of privacy for the sole purpose of  
17 infiltrating" -- and I am changing that because it had  
18 "infiltrated" -- "Annuity University under false  
19 pretenses, secretly recording Clark's seminar, and  
20 broadcasting selectively edited portions of this seminar  
21 in a false and defamatory context created by Defendants  
22 and wildly at odds with Clark's actual content on national  
23 television."

24 Plaintiffs further state that "Clark has been  
25 harmed by Defendants' public disclosure of Clark's edited

1 statements gained by intrusion into the private and  
2 restricted setting of Clark's own lecture facility for the  
3 purpose of obtaining images and recorded statements for a  
4 nationally televised broadcast. As a result of  
5 Defendants' actions, Clark has been defamed and humiliated  
6 on national television."

7 Plaintiffs' tort claims are all tied to the  
8 broadcast. As such, plaintiffs cannot bypass the  
9 protections afforded defendants under the First Amendment  
10 by couching these claims as non-defamation torts. Thus,  
11 Plaintiffs' failure to plead falsity demands dismissal of  
12 these claims, as well.

13 Further, even assuming the falsity standard did not  
14 apply to these additional tort claims, the Court would  
15 still find those claims could not survive a Motion to  
16 Dismiss. For example, on Plaintiffs' trespass action,  
17 Defendants argue that Plaintiffs consent to their entry  
18 into the seminar destroys any claim of trespass, even if  
19 that consent was procured through misrepresentation.

20 Plaintiffs point to cases from other jurisdictions  
21 finding, in some circumstances, that fraud vitiates  
22 consent, but neither party cites any Colorado Supreme  
23 Court or Tenth Circuit case directly addressing this  
24 issue. In the absence of binding authority, the Court  
25 finds persuasive the reasoning of Judge Posner in the

1 Seventh Circuit's Desnick case, found at 44 F.3d 1345.

2 In Desnick, as in this case, plaintiff sued for  
3 trespass as a result of a hidden camera investigation in  
4 which the Defendants concealed their identity. The Court  
5 noted that consent obtained by fraud sometimes was, but  
6 sometimes was not, effective, depending on the type of  
7 tort case.

8 Noting that both classes of cases involve  
9 misrepresentations, Judge Posner reasoned that the  
10 distinction, therefore, had to turn on the interests that  
11 the torts in question sought to protect. Finding that the  
12 hidden camera investigation had invaded none of the  
13 interests trespass sought to protect, the Court affirmed  
14 the lower court's dismissal of the claim.

15 This Court finds the same is true in this case.  
16 Defendants were present on the part of the property open  
17 to the registered insurance agents attending the seminar.  
18 They did not disturb or disrupt the seminar. They did not  
19 invade home or other intimately private place. They did  
20 not publish embarrassingly private information. And they  
21 did not steal any of Plaintiffs' property.

22 The fact that Plaintiffs' posted signs in the  
23 seminar room prohibiting recording does not change that  
24 result. Those signs were not aimed at presenting  
25 trespass. The signs are explicitly aimed at paying

1 attendees of the seminar, who are, by definition, not  
2 trespassing. Perhaps, by ignoring those signs, Defendants  
3 breached some sort of agreement or promise implicit in  
4 their attendance, but ignoring the signs in the seminar  
5 room did not constitute a trespass.

6 Plaintiffs' fraud claims also falls short.  
7 Colorado law requires a plaintiff to show that he was  
8 damaged because of the false representation. Plaintiffs  
9 argue that the Complaint pleads that they have been harmed  
10 "by Defendants' fraudulent misrepresentations and the  
11 broadcast," which they contend is an allegation of  
12 pre-broadcast damages.

13 The Court finds that this allegation is conclusory,  
14 as Plaintiffs have stated no facts indicating damages  
15 unrelated to the broadcast. Because Plaintiffs have not  
16 pled damages because of the misrepresentation, rather than  
17 simply damages because of the subsequent broadcast, the  
18 fraud claim must be dismissed.

19 Finally, Plaintiffs have not pled a valid claim for  
20 intrusion. The tort of intrusion focuses on invasion of  
21 the "solitude or seclusion" of the Plaintiff in his  
22 "private affairs or concerns." The cases cited by the  
23 parties confirm this point, as they generally involve  
24 either the invasion of some intimate personal space or,  
25 more often, some private, personal conversation or

1 subject.

2 In this case, Plaintiffs were giving a business  
3 seminar, and there is no indication that anything even  
4 remotely personal was discussed. While Plaintiffs allege  
5 an invasion of "a zone of privacy where Clark could speak  
6 freely, pose rhetorical questions, discuss hypothetical  
7 scenarios, and seek to engage his students," the fact  
8 remains that this was a business lecture on insurance  
9 products given to insurance salesmen. The facts of this  
10 particular business transaction simply do not support a  
11 claim of an invasion of the "solitude or exclusion" of the  
12 Plaintiff in his "private affairs or concerns."

13 Finally, the Court turns to Plaintiffs' claim for  
14 violation of 42 United States Code Section 1983. The  
15 Defendants argue this claim is a nonstarter, because they  
16 were not acting on behalf of the state.

17 As the Supreme Court has explained, in order to  
18 find that a private party is a "state actor" sufficient to  
19 invoke Section 1983, the facts must indicate that "the  
20 state is responsible for the specific conduct of which the  
21 plaintiff complains." That is taken from Brentwood  
22 Academy v. Tennessee Secondary School Athletic  
23 Association, 531 U.S. 288, at page 295, a 2001 opinion.

24 Although the determination of what is state action  
25 is a fact-specific inquiry not capable of easy

1 delineation, courts have developed several tests to aid in  
2 the analysis. Plaintiffs have focused on two such tests:  
3 The "nexus" test and the "joint action" test.

4 Under the "nexus" test, a state normally can be  
5 held responsible for a private decision only when it has  
6 exercised coercive power or has provided such significant  
7 encouragement, either overt or covert, that the choice  
8 must in law be deemed to be that of the state.

9 Mere governmental assistance, or the state's  
10 approval of or acquiescence in the initiative of a private  
11 party, is not sufficient to justify a finding of state  
12 action. Rather, the connection between the state and the  
13 challenged conduct must be so close that the seemingly  
14 private action "may be fairly treated as that of the  
15 state, itself." That is taken from Gallagher v. Neil  
16 Young Freedom Concert, 49 F.3d 1442, at page 1449, a Tenth  
17 Circuit 1995 case.

18 Under the "joint action" test, the party may be  
19 deemed to be a state actor when state officials and  
20 private parties have acted in concert in effecting a  
21 particular deprivation of constitutional rights. Like the  
22 nexus test, mere acquiescence by the state is not  
23 sufficient. Instead, the Courts consider whether the  
24 state and the private party share a common,  
25 unconstitutional goal, or whether there is a substantial

1 degree of cooperation between the two.

2           The United States Supreme Court in Lugar v.  
3 Edmonson Oil Company used the following language as the  
4 basis for establishing the requisite "state action" to  
5 trigger 1983: "The conduct allegedly causing the  
6 deprivation of a federal right must be fairly attributed  
7 to the state."

8           While the Plaintiff does make several allegations  
9 in its 1983 claim with respect to what they are alleging  
10 the Defendants did under color of state right, the Court  
11 believes that paragraph No. 116 sums it all up. Paragraph  
12 116 alleges "each act was" -- and I am excluding the  
13 irrelevant portions and including the appropriate words.  
14 "Each act was intended to obtain images and recorded  
15 statements for a national television broadcast, and  
16 Plaintiffs have been damaged in excess of \$20 million."

17           Even assuming arguendo that the State of Alabama's  
18 issuance of the insurance license to Defendants were  
19 enough to trigger "action under color of state law" for  
20 gaining of entrance into the seminar, the state action  
21 conduct was limited to issuance of the insurance license  
22 which allowed Defendants to gain access to that seminar.  
23 There are no non-conclusory allegations that the state was  
24 in any way involved in the production of the program,  
25 itself, and it is the program that was the conduct that

1 allegedly has caused the damages; in other words, the  
2 defamation.

3           Moreover, even if the Court were to find that the  
4 Plaintiffs have alleged sufficient allegations for this  
5 Court to find that Defendants did act under color of state  
6 law with respect to the entry into the seminar.  
7 Plaintiffs' Fifth Cause of Action which pleads violation  
8 of 42 United States Code Section 1983, seeks to hold the  
9 non-state Defendants liable for the same causes of action  
10 set forth in Plaintiffs' First through Fourth Causes of  
11 Action.

12           Thus, we are brought full circle back to the  
13 principles described by this Court with respect to claims  
14 1 through 4. In particular, the principles of the Hustler  
15 case would apply to Plaintiffs' 1983 cause of action  
16 because Plaintiff is seeking to recover defamation-type  
17 damages under the guise of the non-defamation cause of  
18 action.

19           The key, according to Hustler and subsequent cases,  
20 is the damages sought. The Court finds particularly  
21 relevant the Fourth Circuit's characterization of the  
22 doctrine in Food Lion, Inc. v. Capital Cities/ABC, Inc.,  
23 194 F.3d 505, Fourth Circuit, 1999 case, in which the  
24 Court noted that where a plaintiff "uses a law to seek  
25 damages resulting from speech covered by the First

1 Amendment, the plaintiff must satisfy" the heightened  
2 First Amendment pleading standards.

3 In conclusion, for the reasons just articulated,  
4 the Court grants the Defendants' Motion to Dismiss in  
5 full, and this case is dismissed without prejudice.

6 Counsel, is there anything further?

7 MR. WALSH: Did I hear the words "without  
8 prejudice" at the end?

9 THE COURT: Without prejudice.

10 MR. WALSH: To be formal about it, Your Honor, I  
11 hereby request, on behalf of the Plaintiffs, lead to  
12 replead the defamation action and the 1983 action.

13 THE COURT: All right. And you may do so subject  
14 to taking into account what I have ruled that I believe  
15 the law is.

16 How long do you think you need to replead?

17 MR. WALSH: I think there are certain inquiries  
18 that have to be made. We can do that within 30 days.

19 THE COURT: All right. Plaintiff is given 30 days  
20 within which to file its Amended Complaint. The Court  
21 will note that pursuant to Iqbal, the Supreme Court did  
22 state that while Rule 8 does allow broader pleading, it  
23 does not unlock the doors of discovery for a plaintiff who  
24 has -- it does not unlock the doors of discovery for a  
25 plaintiff that has armed itself with nothing more than

1 conclusions.

2 So the Court is not going to allow -- the discovery  
3 stay will remain in effect. And I would encourage you,  
4 Mr. Walsh, to thoroughly review my ruling because you will  
5 have to address the issues that I raise if you intend to  
6 survive another Motion to Dismiss.

7 MR. WALSH: It was thorough, it was complete, and  
8 we are taking every word of it into account, Your Honor.

9 THE COURT: All right.

10 MR. WALSH: Thank you.

11 THE COURT: Is there anything further?

12 MR. KELLEY: Only for the record, Your Honor. I  
13 wouldn't want my silence to be taken as acquiescence in  
14 repleading authorization. But I understand your ruling.

15 THE COURT: Well, and it is mostly because I am  
16 dismissing the Motion to Dismiss based on the lack of  
17 facts alleged. And I do believe Plaintiff should be  
18 entitled to be given at least another opportunity.

19 MR. KELLEY: Thank you.

20 THE COURT: Thank you very much, counsel.

21 Court will be in recess.

22 (Proceedings conclude at 3:36 p.m.)

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R E P O R T E R ' S   C E R T I F I C A T E

I, Darlene M. Martinez, Official Certified  
shorthand Reporter for the United States District Court,  
District of Colorado, do hereby certify that the foregoing  
is a true and accurate transcript of the proceedings had  
as taken stenographically by me at the time and place  
aforementioned.

Dated this 23rd day of October, 2009.

\_\_\_\_\_  
s/Darlene M. Martinez  
RMR, CRR