

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

TS MEDIA, INC., TAVIS SMILEY
PRESENTS, INC., and THE SMILEY
GROUP, INC.,

Plaintiffs,

v.

PUBLIC BROADCASTING SERVICE, a
District of Columbia nonprofit corporation,
2100 Crystal Drive
Arlington, VA 22202

Defendant.

Case No. 2018 CA 001247 B

Hon. Anthony Epstein

ANSWER TO COMPLAINT, DEFENSES, AND COUNTERCLAIMS

Defendant Public Broadcasting Service (“PBS”), by and through its undersigned counsel, answers Plaintiffs TS Media, Inc. (“TSM”), Tavis Smiley Presents, Inc. (“TSP”), and The Smiley Group, Inc.’s (“TSG”) (TSM, TSP, and TSG are collectively referred to as “Plaintiffs”) Complaint as follows.

PBS launched *Tavis Smiley*, a late night weekday half-hour television program hosted by Tavis Smiley in 2004. For fourteen consecutive years, and over a period of changing PBS programming executives, PBS renewed *Tavis Smiley* typically each fall. PBS was proud to support the *Tavis Smiley* show and left its editorial content to Mr. Smiley. Indeed, in November 2017, PBS renewed *Tavis Smiley* as it had for thirteen past years, with no concerns about the content of *Tavis Smiley* and with no tension with TSM.

On November 21, 2017, days after signing a new agreement with TSM, PBS received a serious complaint from a former subordinate of Mr. Smiley, who reported that Mr. Smiley had engaged in inappropriate behavior and sexual misconduct on multiple occasions. During a

subsequent investigation conducted by an outside law firm, numerous other individuals, many of whom are women of color, who worked with Mr. Smiley or TSM reported detailed accounts of Mr. Smiley engaging in inappropriate behavior and sexual misconduct, including:

- Mr. Smiley’s pattern of having sexual encounters with subordinates;
- Mr. Smiley’s pattern of making unwanted sexual advances toward subordinates, including requests for specific sexual acts;
- Mr. Smiley’s pattern of making inappropriate sexual jokes or lewd comments, including about subordinates’ body parts; and
- Mr. Smiley’s pattern of creating a verbally abusive and threatening work environment, including that he aggressively cursed at and belittled subordinates.

When the investigator hired by PBS interviewed Mr. Smiley on December 13, 2017, he admitted to committing some of the reported conduct, including having multiple sexual encounters with subordinates and engaging in sexual banter and “probably” having made sexual jokes in the workplace. Mr. Smiley also refused to waive non-disclosure agreements that he had required subordinates to sign. Because of those non-disclosure agreements, some of those interviewed were afraid to fully disclose details about past misconduct by Mr. Smiley. Certain witnesses also requested anonymity based on their reported fears of retaliation if they spoke out against Mr. Smiley.

After conducting numerous interviews, including interviewing Mr. Smiley in person, PBS invoked its contractual right to suspend distribution of his show, *Tavis Smiley*, “for any reason.” However, despite the detailed reports regarding Mr. Smiley’s inappropriate behavior and sexual misconduct, PBS responded with restraint in its public statements that it was suspending distribution of *Tavis Smiley*.

Statement of the Case

1. PBS admits that Plaintiffs purport to bring this action against PBS. PBS avers that it contracted with Community Television of Southern California, now d/b/a KCETLink (“KCET”), to distribute Seasons 1 through 7 of *Tavis Smiley*, and that it contracted with THIRTEEN, now d/b/a THIRTEEN Productions LLC (“THIRTEEN”), to distribute Season 8 of *Tavis Smiley*. PBS avers that starting with Season 9 of *Tavis Smiley*, PBS and TSM contracted for PBS to distribute *Tavis Smiley*, including entering a contract for a new season executed on November 16, 2017. PBS avers that of its two daily national shows with solo hosts, Mr. Smiley was the only person of color to serve as a solo host. PBS lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 1.

2. PBS admits that Mr. Smiley was born and has had a broadcasting career and is an author, radio host, and television host. PBS lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2.

3. PBS avers that it began distributing *Tavis Smiley* in 2004 but denies that it “offered very little financial support” for *Tavis Smiley*. PBS denies that it provided less than 20% of the funds for *Tavis Smiley’s* annual budget. PBS avers that it attached its name and logo to *Tavis Smiley*, distributed *Tavis Smiley* to its membership, and strongly endorsed and supported *Tavis Smiley*, and PBS’s payments and distribution helped attract other sponsors. PBS avers that the party with which it contracted, first KCET, then THIRTEEN, then TSM, was responsible for creating the nightly episodes for *Tavis Smiley* as, under the parties’ contracts, the production company, first KCET, then THIRTEEN, then TSM, was responsible for production and PBS was responsible for distribution of *Tavis Smiley*. PBS denies the remaining allegations in Paragraph 3.

4. PBS denies the allegations contained in Paragraph 4.

5. PBS denies the allegations contained in Paragraph 5. PBS avers that TSM, like PBS, decided to renew the parties' agreement for several years and that TSM would not have done so if its relationship with PBS was poor or if PBS's financial commitment was inadequate.

6. PBS denies the allegations in Paragraph 6. Furthermore, PBS avers as follows:

On November 21, 2017, PBS received a serious complaint of sexual misconduct from a former subordinate of Mr. Smiley regarding Mr. Smiley's improper treatment of her. For example, in this initial report and subsequent reports, the former subordinate reported that, in response to her request for career-related assistance, Mr. Smiley inappropriately requested that she come to his house later that night to perform a sexual act on him. She also reported that Mr. Smiley touched her inappropriately in a sexual manner without her consent on multiple occasions.

After learning of the former subordinate's allegations against Mr. Smiley, PBS immediately hired an outside law firm, Mitchell Silberberg & Knupp ("MSK"), to conduct an investigation. In the course of the investigation, the investigator interviewed over twenty individuals who worked for or with Mr. Smiley or TSM. Many of these witnesses reported numerous, detailed accounts of Mr. Smiley making inappropriate sexual comments or engaging in inappropriate sexual behavior and other inappropriate behavior. Indeed, over a dozen individuals reported that they were either subjected to or witnessed unwelcome, inappropriate sexual comments or conduct or otherwise inappropriate behavior by Mr. Smiley or were informed of the misconduct. Numerous individuals reported that Mr. Smiley had multiple, potentially concurrent, sexual relationships with subordinates; that he made unwanted sexual advances and persistently pursued subordinates for sex; and that he made inappropriate sexual jokes or comments in the workplace. Numerous witnesses also described a verbally abusive and

threatening work environment, including reports that Mr. Smiley aggressively cursed at and belittled subordinates.

The investigator also attempted to speak with TSM's subordinates, but Mr. Smiley refused the investigator's request that TSM assure its subordinates, whom Mr. Smiley had previously required to sign nondisclosure agreements, that they were free to speak with the investigator and that TSM would not retaliate against them for doing so. Further, Mr. Smiley stated that he would only speak with the investigator under certain conditions, including his demand that the investigator reveal the names of the witnesses who had been interviewed, even though he would not reveal the names of the subordinates with whom he had had sexual encounters out of alleged concern for their privacy. To protect individuals' privacy, and based on reported fears witnesses had raised about retaliation, the investigator would not agree to the conditions Mr. Smiley sought to impose on the investigation. On December 12, 2017, after PBS's attorneys made it clear that, based on the interviews to date, PBS was inclined to suspend distribution, Mr. Smiley finally agreed to sit for an interview without any conditions. The investigator interviewed Mr. Smiley the next morning, as soon as he was available. During the interview, Mr. Smiley admitted to committing certain acts and doing certain things which PBS reasonably believed might tend to bring Mr. Smiley into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on PBS. Following Mr. Smiley's interview on December 13, 2017, based on the results of the investigation as of that date, PBS notified him that it was invoking its contractual right to suspend distribution of *Tavis Smiley* for "any reason" and that PBS reserved all rights and remedies under the PBS-TSM agreements, including the right to terminate the agreement under the morals clause. PBS's decision was not made lightly or rashly. Moreover, PBS did not need a pretext to end its relationship with TSM, as it could

have simply chosen not to renew the parties' contract in November 2017, nor was PBS's decision based on a deteriorated relationship. Instead, PBS decided to suspend distribution of *Tavis Smiley* based on a careful factual investigation that gathered information from numerous witnesses, including Mr. Smiley.

7. PBS denies the allegations in Paragraph 7. Furthermore, PBS avers as follows: The outside law firm made it clear to Mr. Smiley and his attorney, well before December 12, 2017, that the investigator was planning to interview Mr. Smiley. Mr. Smiley informed PBS that he would only speak with the investigator under certain conditions, including his demand that the investigator reveal the names or other identifying information of the witnesses the investigator had interviewed, while Mr. Smiley himself refused to reveal the names of the subordinates with whom he admitted having sexual encounters purportedly because he wanted to protect their privacy. To protect the witnesses' privacy, and based on concerns witnesses had raised about retaliation, PBS would not agree to the conditions Mr. Smiley sought to impose on the investigation. As explained above, after improperly trying to limit the conditions under which he would be interviewed, Mr. Smiley ultimately agreed to an interview and was given the opportunity to tell his side of the story. PBS agreed to defer making a decision until after the interview on whether to exercise its contractual right to suspend distribution of *Tavis Smiley*.

8. PBS denies the allegations in Paragraph 8. Furthermore, PBS avers as follows: On December 12, 2017, after PBS's attorneys made it clear that, based on the interviews to date, PBS was inclined to suspend distribution, Mr. Smiley finally agreed to sit for an interview without any conditions. The investigator interviewed Mr. Smiley the next morning, as soon as he was available. During the interview, Mr. Smiley admitted to committing some of the reported conduct that witnesses had brought to PBS's attention. In particular, Mr. Smiley admitted to

having multiple sexual relationships with subordinates, and even acknowledged the possibility that there may have been overlap between these encounters, although he said there was no intentional overlapping. While Mr. Smiley stated publicly that no one ever told him that his actions made them uncomfortable, during his interview he acknowledged that (a) a subordinate had complained to him that his dating within the office did create tension in the workplace and (b) he, himself, was aware that these encounters did, at times, create tension in the workplace because, as he stated, “with women, that stuff can get in the way.”

Also contrary to his public, vehement statement that he has never been accused of doing anything wrong in 30 years and that no complaints were ever filed, Mr. Smiley informed the investigator that he has, in fact, been the subject of two workplace discrimination or harassment/retaliation claims. Witness statements confirmed Mr. Smiley’s inappropriate behavior through various examples, including (i) Mr. Smiley commenting about subordinates’ body parts in the presence of a colleague; (ii) informing a female subordinate that he would like to see her on her back more often; (iii) informing a subordinate that he thought she must be good in bed; (iv) persistently pursuing subordinates for sex; (v) having or requesting sexual encounters with subordinates in hotels or at his home; and (vi) telling a subordinate not to tell anyone they were having sexual encounters.

Mr. Smiley also acknowledged during his interview that he has “probably” told jokes in the workplace involving sex or sex acts, and he asserted that banter of that sort is more accepted among members of the African American community. Finally, when asked whether he had ever sent pornographic images to subordinates, Mr. Smiley confirmed that he may have done so.

9. PBS admits that following Mr. Smiley’s interview, PBS notified him on December 13, 2017 that it was invoking its contractual right to suspend distribution of *Tavis*

Smiley “for any reason” and that PBS reserved all rights and remedies under the PBS-TSM agreements, including the right to terminate the agreement under the morals clause. PBS’s decision was not made lightly or rashly. Instead, it was based on information gathered from numerous witnesses, including Mr. Smiley. The information reported to that point (including consistent and detailed accounts from multiple witnesses and Mr. Smiley’s own admissions) provided sufficient grounds for PBS to determine there were multiple, credible allegations of Mr. Smiley engaging in sexual conduct and other behavior highly inappropriate for the workplace. As such, PBS determined to indefinitely suspend distribution of *Tavis Smiley*, consistent with its contractual rights.

10. The allegations in the first sentence of Paragraph 10 purport to characterize a written document, which speaks for itself. PBS denies the remaining allegations contained in Paragraph 10. PBS avers that it made no decision to suspend distribution of *Tavis Smiley* until after Mr. Smiley was interviewed.

11. PBS lacks knowledge or information sufficient to form a belief as to the truth of the allegation that TSM has laid off 20 employees. PBS denies the remaining allegations contained in Paragraph 11 and avers that any layoff of TSM employees, alleged damage to Mr. Smiley’s reputation, and alleged damages to TSM were caused by Mr. Smiley’s misconduct.

Parties

12. Upon information and belief, PBS admits the allegations contained in Paragraph 12.

13. Upon information and belief, PBS admits the allegations contained in Paragraph 13.

14. Upon information and belief, PBS admits the allegations contained in Paragraph 14.

15. PBS admits that TSM is a corporation owned by Tavis Smiley. PBS admits that TSM is a media company. PBS lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in the first two sentences of Paragraph 15. PBS denies the allegations contained in the third and fourth sentences of Paragraph 15. PBS further avers that Paragraph 4.3 of its agreements with TSM prohibits TSM from using any portion of PBS's payments for any purpose other than producing *Tavis Smiley*.

16. PBS admits that it is a nonprofit corporation that is organized under the laws of the District of Columbia and that its principal place of business is in Arlington, Virginia.

Jurisdiction and Venue

17. The allegation contained in Paragraph 17 sets forth a conclusion of law to which no response is required. To the extent a response is required, PBS admits that this Court has subject matter jurisdiction over this action.

General Allegations

A. Tavis Smiley

18. PBS admits that Mr. Smiley hosted a radio show, *The Tavis Smiley Show*, which was distributed nationally, initially by National Public Radio (NPR) and, more recently, by Public Radio International (PRI). PBS admits that Mr. Smiley hosted *Tavis Smiley*, a nightly half-hour television program distributed by PBS. PBS lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 18.

19. PBS lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 19.

20. PBS denies that it criticized Mr. Smiley for expressing opinions about former President Barack Obama. PBS lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 20.

21. PBS admits that Mr. Smiley is a well-known public figure. PBS lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 21.

B. PBS and its Relationship with TSM

22. PBS admits that it is funded by a variety of sources, including through dues from member stations (which are, in part, funded by viewer contributions) and funding from the Corporation for Public Broadcasting. PBS admits that it has done a remarkable job with children's programming. PBS denies that the vast majority of its daily featured personalities have been white males. Prior to Gwen Ifill's death in 2016, PBS had four "daily featured personalities": Gwen Ifill, Judy Woodruff, Charlie Rose, and Mr. Smiley, 50% of whom are non-white and 50% of whom are not males. PBS denies the remaining allegations contained in Paragraph 22.

23. PBS avers that from 2003 to 2010, it entered into agreements with KCET to distribute *Tavis Smiley*. PBS avers that, in December 2010, it entered into an agreement with THIRTEEN to distribute Season 8 of *Tavis Smiley*. PBS admits that it entered into agreements with TSM beginning in December 2011 to distribute *Tavis Smiley*. PBS admits that these agreements provided that PBS would fund part of the Program Budget for *Tavis Smiley* and avers that its funding was often higher than 20% of *Tavis Smiley's* actual budget. PBS denies the remaining allegations contained in Paragraph 23.

24. PBS denies the allegations contained in Paragraph 24.

25. PBS admits that Mr. Smiley has focused his show on a variety of issues, and that TSM described *Tavis Smiley* to PBS as presenting a "...hybrid of news, issues and entertainment, featuring interviews with politicians, entertainers, athletes, authors and giving voice to up-and-coming talent..." PBS denies the remaining allegations contained in Paragraph 25.

26. PBS denies that it provided minimal assistance over the years but admits that *Tavis Smiley* was successful enough for PBS to renew its agreement to distribute *Tavis Smiley* for fourteen years. PBS denies the remaining allegations contained in the first sentence of Paragraph 26. PBS avers that, beginning with Season 9 of *Tavis Smiley*, it entered into successive contracts for the production and distribution of *Tavis Smiley* with TSM, typically each fall. PBS admits that it entered into an agreement with TSM in November 2016 for the production and distribution of the 2017 season. PBS avers that it was not contractually obligated to pay TSM the final \$100,000 payment described in the Season 14 agreement and therefore has not made that payment to TSM. PBS denies the remaining allegations contained in Paragraph 26.

27. PBS admits that the distribution of Season 15 of *Tavis Smiley* would have commenced in January 2018 but the effective date of, and obligations of the parties under the agreement commenced as of November 1, 2017.

C. Sexual Harassment and the #metoo Movement in America

28. PBS admits the allegations contained in Paragraph 28.

29. PBS denies that its executives criticized Mr. Smiley for taking any controversial positions. PBS avers that Jacques Hyzagi published an article in the *Observer* in February 2017, the content of which speaks for itself. PBS admits that the allegations made in the February Article were, at the time they were made, unsubstantiated. PBS lacks knowledge or information

sufficient to form a belief as to the truth of the allegations contained in the final sentence of Paragraph 29.

30. PBS denies the allegations contained in Paragraph 30.

31. PBS admits that it began negotiations with TSM and Mr. Smiley in the fall of 2017 for the agreement covering the 15th Season of *Tavis Smiley*. PBS denies the remaining allegations contained in the first sentence of Paragraph 31. PBS admits that it entered into a contract for the production and distribution of Season 15 of *Tavis Smiley* on November 16, 2017. PBS avers that the Season 15 contract including Exhibit D sets forth the payment obligations and a payment schedule, the terms of which speaks for itself. PBS admits that it has not made the first payment because it has not been obligated to make such payment under the terms of the contract.

D. PBS's Purported Investigation into Allegations Concerning Tavis Smiley's Misconduct

32. PBS admits that Mr. Smiley's sexual misconduct toward female subordinates dates back to at least February 2017. PBS admits that it was aware of the February Article but PBS did not have knowledge of credible allegations of sexual misconduct until November 21, 2017. PBS avers that it first received a complaint reported directly to PBS about Mr. Smiley's sexual misconduct on November 21, 2017, when a former subordinate of Mr. Smiley reported serious allegations regarding him. PBS admits that Mr. Smiley wrote a book titled *Fail Up*, the contents of which speaks for itself, but denies that he has always been transparent about past errors of judgment or about other aspects of his misconduct. PBS denies the remaining allegations contained in Paragraph 32.

33. PBS admits that it received an anonymous phone call on November 21, 2017, after the 2017 agreement was signed, in which a former subordinate of Mr. Smiley raised

troubling allegations regarding Mr. Smiley. PBS admits that it has not identified the real name of the former subordinate to Mr. Smiley or TSM or provided other information from which Mr. Smiley or TSM could identify the former subordinate. PBS avers that the former subordinate requested to remain anonymous, which was based on her reported fear that Mr. Smiley would threaten, intimidate, or retaliate against her if he knew her identity. PBS denies the remaining allegations contained in Paragraph 33.

34. PBS avers that it entered into a new contract with TSM before the former subordinate reported Mr. Smiley's inappropriate sexual behavior on November 21, 2017. PBS denies the remaining allegations contained in Paragraph 34.

35. To the extent that this paragraph seeks the disclosure of communications protected by the attorney-client privilege, PBS is not required to respond. To the extent that Paragraph 35 purports to state a legal conclusion, PBS is not required to respond. PBS denies the remaining allegations contained in Paragraph 35. PBS avers that it had no need to "find" a reason to suspend or terminate its agreement with TSM. PBS could have chosen not to enter into a new agreement on November 16, 2017 or it could have chosen to cease distribution for any reason at any time.

36. PBS denies the allegations contained in Paragraph 36.

37. PBS denies the allegations contained in Paragraph 37.

38. PBS denies the allegations contained in Paragraph 38.

39. PBS avers that on December 12, 2017, its attorneys made clear to TSM's attorneys that, based on the investigation and interviews completed to date, PBS was inclined to suspend distribution of *Tavis Smiley*, and that a reporter from Variety was calling with a story, verified by two sources, about an investigation of Mr. Smiley. PBS avers that TSM's attorneys

purported to complain about due process but denies that such complaints were valid. PBS avers that TSM's attorneys finally agreed to produce Mr. Smiley for an interview without conditions, and that PBS agreed to defer its decision regarding suspending distribution and returning the reporter's call until after the interview. PBS denies the remaining allegations contained in Paragraph 39.

40. PBS admits that the investigator interviewed Mr. Smiley in the morning on December 13, 2017 in Los Angeles, California. PBS admits that the investigator interviewed Mr. Smiley for approximately three hours. PBS avers that Mr. Smiley admitted to multiple sexual encounters with subordinates but refused to identify them, expressing concerns over their privacy, while simultaneously insisting that PBS reveal the names of witnesses who had expressed concerns over retaliation and their privacy.

PBS avers that the written employee handbook furnished to it by Mr. Smiley speaks for itself. PBS further avers that the handbook Mr. Smiley provided during the investigation strongly discourages sexual workplace relationships, especially between a supervisor/manager and a subordinate because such relationships "may at some point lead to unhappy complications and significant difficulties for all concerned." The handbook also prohibits unwanted sexual advances or requests for sexual favors, sexual jokes and innuendo, verbal abuse of a sexual nature, touching, display or circulation in the workplace of sexually suggestive objects or pictures (including through email). If a formal complaint of sexual harassment is filed, the handbook provides that "confidentiality will be maintained throughout the investigatory process to the extent consistent with adequate investigation and appropriate corrective action," the same practice that Mr. Smiley now claims violated standard procedures for workplace investigations. The handbook requires a supervisor who is in a workplace relationship to report it to Mr. Smiley. He

is empowered to decide whether violations of the handbook occurred, and what remedies should be invoked, which, when the superior is Mr. Smiley, obviously undermines the integrity of the policy and fails to protect subordinates who are victimized by Mr. Smiley.

PBS denies that Mr. Smiley, as the owner of TSM, was not responsible for hiring/firing/promotion decisions concerning any of these employees. PBS admits that its written policies, including the standards of conduct included in its written agreements with third parties, speak for themselves.

PBS denies the remaining allegations contained in Paragraph 40.

41. PBS admits that its written policies, including the standards of conduct included in its written agreements with third parties, speak for themselves. PBS also avers that Mr. Smiley acknowledged on national television that he understands and respects the viewpoint that “any consensual relationship in the workplace is wrong,” that “there is no such thing as a consensual relationship in the workplace,” and that he understood how consensual sexual relationships with subordinates could legitimately be viewed as an abuse of power. PBS further avers that the consistent accounts from multiple witnesses that Mr. Smiley had engaged in sexual conduct that is highly and entirely inappropriate, inconsistent with PBS’s standards and values, and is unacceptable. PBS denies the remaining allegations contained in Paragraph 41.

42. PBS denies the allegations contained in the first sentence of Paragraph 42. PBS is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 42, but avers that such allegations are entirely irrelevant to this matter.

43. PBS admits that its attorney sent a letter to TSM’s attorney on December 13, 2017, as alleged in the first sentence of Paragraph 43, which is the letter TSM’s attorney was

advised on December 12, 2017 PBS was considering sending, the content of which letter speaks for itself. PBS also avers that, on December 13, 2017, prior to the letter being sent, PBS's attorney advised TSM's attorney that the letter discussed on December 12, 2017 would be sent. The allegations in the second and third sentences of Paragraph 43 also purport to characterize a written document, which speaks for itself. PBS denies the remaining allegations of Paragraph 43.

44. PBS admits that it has audit rights under its agreements with TSM and avers that, on December 5, 2017, it invoked its contractual right to request production status reports and financial reports and to schedule an audit of TSM's records relating to *Tavis Smiley* based on information learned during the investigation alleging financial improprieties. PBS denies that its decision to request production status reports and financial reports and to schedule an audit was based on any "stereotypes." Rather, during the course of the investigation, multiple witnesses raised allegations of financial improprieties. PBS admits that it had not previously invoked its contractual audit rights. PBS denies the remaining allegations contained in Paragraph 44.

45. PBS denies the allegations contained in Paragraph 45.

**First Claim for Breach of the November 2016 Agreement
(By TSM against PBS)**

46. PBS incorporates by reference its responses to Paragraphs 1 through 45 as though set forth fully herein.

47. PBS admits that it entered into a written agreement with TSM on November 10, 2016.

48. PBS denies the allegations contained in Paragraph 48.

49. PBS denies the allegations contained in Paragraph 49.

50. PBS denies the allegations contained in Paragraph 50 and denies that TSM is entitled to damages or any other form of relief.

**Second Claim for Breach of the November 2017 Agreement
(By TSM against PBS)**

51. PBS incorporates by reference its responses to Paragraphs 1 through 45 as though set forth fully herein.

52. PBS admits that it entered into a written agreement with TSM but it was on November 16, 2017.

53. PBS denies the allegations contained in Paragraph 53.

54. PBS denies the allegations contained in Paragraph 54.

55. PBS denies the allegations contained in Paragraph 55 and denies that TSM is entitled to damages or any other form of relief.

**Third Claim for Intentional Interference With Contract
(By Plaintiffs against PBS)**

56. PBS incorporates by reference its responses to Paragraphs 1 through 55 as though set forth fully herein.

57. PBS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 57.

58. PBS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 58, except PBS admits it was aware that TSM secured corporate sponsors for *Tavis Smiley*.

59. PBS admits that it was aware that TSM secured corporate sponsors for *Tavis Smiley*. PBS denies the remaining allegations contained in Paragraph 59.

60. PBS denies the allegations contained in Paragraph 60.

61. PBS denies the allegations contained in Paragraph 61.

62. PBS denies the allegations contained in Paragraph 62.

63. PBS lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 63.

64. PBS denies the allegations contained in Paragraph 64 and denies that Plaintiffs are entitled to damages or any other form of relief.

65. PBS denies the allegations contained in Paragraph 65 and denies that Plaintiffs are entitled to punitive damages or any other form of relief.

**Fourth Claim for Tortious Interference with Business Expectancy
(By Plaintiffs against PBS)**

66. PBS incorporates by reference its responses to Paragraphs 1 through 65 as though set forth fully herein

67. PBS admits that TSM secured corporate sponsors for *Tavis Smiley*. PBS lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 67.

68. PBS admits that it was aware that TSM secured corporate sponsors for *Tavis Smiley*. PBS denies the remaining allegations contained in Paragraph 68.

69. PBS denies the allegations contained in Paragraph 69.

70. PBS denies the allegations contained in Paragraph 70.

71. PBS denies the allegations contained in Paragraph 71 and denies that Plaintiffs are entitled to damages or any other form of relief.

72. PBS denies the allegations contained in Paragraph 72 and denies that Plaintiffs are entitled to punitive damages or any other form of relief.

PBS denies that Plaintiffs are entitled to Judgment or to any relief whatsoever, including any of the relief requested in Paragraphs 1 through 6 inclusive of the unnumbered “WHEREFORE” paragraph on page 19 of the Complaint.

DEMAND FOR JURY TRIAL

PBS admits that Plaintiffs purport to demand a trial by jury on all claims properly subject to a jury trial.

DEFENSES

PBS asserts the following defenses without conceding that PBS bears the burden of proof as to any of the following defenses. PBS reserves the right to assert such additional defenses that may appear and prove applicable during the course of this litigation.

1. Plaintiffs’ Complaint, in whole or in part, fails to state a claim for which relief can be granted.
2. PBS has fully performed all of its obligations under the contractual agreements between PBS and TSM.
3. Plaintiffs’ claims are barred, in whole or in part, because TSM failed to fulfill its obligations and conditions precedent under the PBS-TSM contractual agreements.
4. Plaintiffs’ claims are barred, in whole or in part, due to TSM’s own breaches of contract.
5. Any failure of PBS to perform its obligations under the agreements is excused because TSM breached the agreements.
6. Plaintiffs’ claims for relief are barred, in whole or in part, because any actions taken by PBS with respect to the subject matters alleged in the Complaint were undertaken in good faith, and constitute lawful and proper conduct.

7. Plaintiffs' claims for relief are barred, in whole or in part, because PBS acted at all times justifiably, in good faith, and with reasonable care and diligence.

8. Plaintiffs' claims for tortious interference fail, in whole or in part, because PBS did not have general or specific intent, motive, or purpose to interfere with Plaintiffs' alleged third-party contracts or business relations.

9. Plaintiffs' claims for tortious interference fail, in whole or in part, because PBS's conduct that allegedly interfered with Plaintiffs' third-party contracts and business relations was not improper or egregious.

10. Plaintiffs' claims for tortious interference are barred, in whole or in part, because PBS's conduct was legally justified and was not wrongful or accomplished through improper methods.

11. Plaintiffs' claims for tortious interference are barred, in whole or in part, because they are based on PBS providing truthful information.

12. Plaintiffs' claims for tortious interference are barred because PBS's alleged conduct regards matters of public concern that are protected under the First Amendment to the United States Constitution.

13. Plaintiffs' claims against PBS must be dismissed, in whole or in part, because they infringe on PBS's rights under the First Amendment to the United States Constitution.

14. Plaintiffs' claims for tortious interference fail, in whole or in part, because PBS's conduct was motivated by a desire to protect its own contractual, economic, and reputational interests.

15. Plaintiffs' claims for tortious interference fail, in whole or in part, because PBS's alleged conduct is privileged and/or legally justified in that it consists in part of communications

in which PBS had an interest, or had a moral or social duty to communicate, made in good faith and without malice to persons also interested.

16. Plaintiffs have failed to take reasonable steps to mitigate damages, if any.

17. If Plaintiffs have suffered any damages, such damages were and are the proximate and immediate result of the actions or inactions of Plaintiffs or Mr. Smiley.

18. If Plaintiffs have suffered any damages, such damages were and are the proximate and immediate result of acts or omissions committed by others over whom PBS has no responsibility or control.

19. Plaintiffs are not entitled to any recovery from PBS because the alleged damages, if any, are speculative.

20. PBS is entitled to a set-off or reduction in damages, should any damages be awarded against it, of any amount(s) retained by Plaintiff TSM, including as a result of its failure to pay for NOC origination services. PBS is also entitled to have any damages that may be awarded to Plaintiffs in this action reduced by the value of any other benefit or payment to Plaintiffs from any collateral source that reduces Plaintiffs' loss.

21. Plaintiffs' Complaint fails to plead any legal basis for an award of attorneys' fees and costs.

22. Plaintiffs are not entitled to punitive damages because PBS acted at all times in good faith, without oppression, fraud, or malice.

RESERVATION OF RIGHTS TO ALLEGE OTHER DEFENSES

PBS reserves the right to assert any additional defenses that are supported by information or facts obtained through discovery or other means during this case and expressly reserves the right to amend its Answer to assert such additional defenses in the future.

COUNTERCLAIMS

Counterclaim-Plaintiff Public Broadcasting Service (“PBS”), by and through its attorneys, asserts the following Counterclaims against Counterclaim-Defendant TS Media, Inc. (“TSM”).

PARTIES AND JURISDICTION

1. PBS is a nonprofit corporation organized under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia.
2. Upon information and belief, TSM is a corporation organized under the laws of the State of California with its principal place of business in Los Angeles, California.
3. This Court has jurisdiction pursuant to D.C. Code § 11-921.

FACTUAL BACKGROUND

The PBS-TSM Agreements

4. Beginning in 2003, PBS entered into a series of successive one-year written contracts for PBS to distribute *Tavis Smiley* (the “Program”), a late night weekday half-hour television program hosted by Mr. Smiley and produced by TSM.
5. PBS contracted with Community Television of Southern California, now d/b/a KCETLink (“KCET”), to distribute Seasons 1 through 7 of *Tavis Smiley*, and contracted with THIRTEEN, now d/b/a THIRTEEN Productions LLC (“THIRTEEN”), to distribute Season 8 of *Tavis Smiley*. Starting with Season 9 of *Tavis Smiley*, PBS and TSM contracted for PBS to distribute *Tavis Smiley*.
6. On or about November 17, 2015, PBS and TSM entered into a written Production and Distribution Agreement for Season 13 of *Tavis Smiley*.
7. On or about November 10, 2016, PBS and TSM entered into a written Production

and Distribution Agreement for Season 14 of *Tavis Smiley*.

8. On or about November 16, 2017, PBS and TSM entered into a written Production and Distribution Agreement for Season 15 of *Tavis Smiley*.

9. The Specific Terms of the parties' Production and Distribution Agreements (collectively, the "Agreements") establish a Total Budget for the Program and PBS's Program Payment.

10. Paragraph 4.3 of Attachment 2 to the Agreements, the Standard Terms and Conditions ("Standard Terms"), prohibited TSM from using any portion of the Program Payment "for any purpose other than Program production or acquisition." Paragraph 4.3 of the Standard Terms also stated that "this provision allows all payments made hereunder to be commingled only with other funds for the sole purpose of Program production or acquisition."

11. Paragraphs 5.1 and 5.3 of the Standard Terms grant PBS the right to request status and financial reports from TSM and also the right to examine and audit TSM's financial records pertaining to PBS's Program Payment and costs and expenses incurred in Program production or acquisition. Paragraph 5.1 of the Standard Terms also requires TSM to submit a final and complete financial report to PBS within 90 days after delivery of the Program. Schedule D of the Standard Terms provides that PBS must receive and approve the final financial report before payment is due.

12. Paragraph 5.2 of the Standard Terms provides: "If upon completion of production and delivery of the Program to PBS, the actual, documented costs of production of the Program are less than the approved Program Budget (the difference being referred to as the 'Savings'), then Producer [TSM] shall promptly return an amount of the Savings proportional to PBS's Budget contribution to PBS, or PBS, at its election, may offset the Savings against any remaining

installments of the PBS Program Payment payable hereunder.”

13. The Agreements also contain a “morals clause.” In particular, Paragraph 15.5 of the Standard Terms states that:

Producer shall not commit any act or do anything which might tend to bring Producer into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on PBS, any stations broadcasting or scheduled to broadcast a program, any licensee of PBS, any sponsor of the program, or to injure the success of any use of the Program. Producer agrees that these same “morals” standards shall apply to all talent hired, retained or utilized by Producer to work on, or in connection with, the Program (“Program Personnel”), including but not limited to the talent to be featured in the Program. In the event Producer or any Program Personnel violates this clause, PBS shall have the right to immediately terminate this Agreement upon giving written notice to Producer of same. In the event of any such termination, Producer shall promptly return to PBS any amounts paid by PBS to Producer hereunder, and the parties shall have no further obligations to each other under this Agreement other than any obligations that survive termination of the Agreement, if any.

The Investigation of Allegations That Mr. Smiley Engaged in Inappropriate or Unwelcome Sexual Conduct

14. On November 21, 2017, PBS received a serious complaint of sexual misconduct from a former subordinate of Mr. Smiley, which raised troubling allegations of Mr. Smiley engaging in inappropriate or unwelcome sexual conduct.

15. In this complaint and subsequent conversations with PBS, the former subordinate reported that, in response to her request for career-related assistance, Mr. Smiley inappropriately requested that she come to his house later that night to perform a sexual act on him. She also reported that Mr. Smiley touched her inappropriately in a sexual manner without her consent on multiple occasions.

16. After learning of the former subordinate’s allegations against Mr. Smiley, PBS hired an outside law firm, Mitchell Silberberg & Knupp (“MSK”), to immediately conduct an investigation into the former subordinate’s allegations about Mr. Smiley.

17. On November 30, 2017, MSK informed Mr. Smiley that it was investigating

information that had come to PBS's attention that may constitute a breach of the morals clause in the Agreements.

18. In the course of the investigation, the investigator interviewed over twenty individuals who worked for or with Mr. Smiley or TSM. Several of these witnesses, many of whom were women of color, reported numerous, detailed accounts of Mr. Smiley engaging in inappropriate or scandalous behavior and sexual misconduct.

19. Over a dozen individuals reported that they were either subjected to or witnessed unwelcome, inappropriate sexual comments or conduct or otherwise inappropriate behavior by Mr. Smiley or were informed of the misconduct contemporaneously. In sum, the investigation revealed allegations by numerous individuals that Mr. Smiley had multiple, potentially concurrent, sexual relationships with subordinates; that he made unwanted sexual advances and persistently pursued subordinates for sex; and that he made inappropriate sexual jokes or comments in the workplace.

20. Numerous witnesses also described a verbally abusive and threatening work environment, including reports that Mr. Smiley aggressively cursed at and belittled subordinates.

21. Several witnesses also described an atmosphere of intimidation and expressed legitimate fears of retaliation, if they spoke out against Mr. Smiley.

22. During the course of the investigation, witnesses raised concerns about financial improprieties. For example, one witnesses stated that Mr. Smiley had commingled funds that TSM received from PBS. Another witness more broadly stated that the production budget and finances for *Tavis Smiley* did not add up and that PBS should look into TSM's finances.

23. Based on information from witnesses about financial improprieties, PBS invoked its contractual rights under Paragraph 5.1 of the Agreements to request production status reports

and financial reports from TSM and under Paragraph 5.3 of the Agreements to audit TSM's records.

24. On December 5, 2017, PBS gave the required 30-day notice to TSM that it was electing to undertake an audit of TSM. The audit commenced on March 14, 2018.

25. For several seasons of *Tavis Smiley*, the actual, documented costs of production of *Tavis Smiley* were less than the contractual, approved Program Budget.

26. For Season 13 (FY 2016), the contractual Program Budget was \$5,057,035 but the actual, documented costs of production were \$4,694,592. For Season 14 (FY 2017), the contractual Program Budget was \$5,940,690 but the actual, documented costs of production were \$3,749,783.

27. In fact, for each completed season that PBS contracted with TSM (seasons 9 through 14, FY 2012-2017), the actual, documented costs of production of *Tavis Smiley* were less than the contractual, approved Program Budget.

28. TSM did not, however, return a pro rata share of the difference between the contractual Program Budget and the lower actual costs of production as required under the Agreements.

29. As part of the investigation, the investigator interviewed Mr. Smiley on December 13, 2017.

30. During the interview, Mr. Smiley admitted committing certain acts and doing certain things which PBS reasonably believed might tend to bring Mr. Smiley into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on PBS.

31. In particular, Mr. Smiley admitted to having multiple sexual encounters with subordinates and even acknowledged the possibility that there may have been overlap between

these encounters, although he said there was no intentional overlapping. While Mr. Smiley stated publicly that no one ever told him that his actions made them uncomfortable, during his interview, he acknowledged that (a) a subordinate had complained to him that his dating in the office did create tension in the workplace and (b) that he himself was aware that these encounters did, at times, create tension in the workplace.

32. Witness statements confirmed this behavior through various examples, including (i) Mr. Smiley commenting about subordinates' body parts in the presence of a colleague; (ii) informing a female subordinate that he would like to see her on her back more often; (iii) informing a subordinate that he thought she must be good in bed; (iv) persistently pursuing subordinates for sex; (v) having or requesting sexual encounters with subordinates in hotels or at his home; and (vi) telling a subordinate not to tell anyone they were having sexual encounters.

33. Mr. Smiley also acknowledged during his interview that he engaged in sexual banter and has "probably" told jokes in the workplace involving sex or sex acts. Finally, when asked whether he had ever sent pornographic images to subordinates, Mr. Smiley confirmed that he may have done so.

34. Also contrary to his public, vehement statement that he has never been accused of doing anything wrong in 30 years and that no complaints were ever filed, Mr. Smiley informed the investigator that he has, in fact, been the subject of two workplace discrimination or harassment/retaliation claims.

35. The consistent and detailed statements from multiple witnesses, coupled with Mr. Smiley's own admissions, were sufficient for PBS to believe there were multiple, credible allegations of Mr. Smiley engaging in sexual conduct and other behavior that was highly inappropriate for the workplace.

36. PBS notified TSM and Mr. Smiley on December 13, 2017 that it was invoking its contractual right to indefinitely suspend distribution of *Tavis Smiley* “for any reason” and that PBS reserved all rights and remedies under the Agreements, including the right to terminate the agreement under the morals clause.

37. PBS’s decision was not made lightly or rashly. Instead, it was based on an investigation that gathered information from dozens of witnesses, including Mr. Smiley. Although the investigation had not been completed, the information its investigators had received to that point (including consistent and detailed accounts from multiple witnesses and Mr. Smiley’s own admissions) provided sufficient grounds for PBS to determine there were multiple, credible allegations of Mr. Smiley engaging in sexual conduct highly inappropriate for the workplace. As such, PBS determined to indefinitely suspend distribution of *Tavis Smiley*, consistent with its contractual rights.

38. Mr. Smiley also appeared on Good Morning America, a nationally televised morning show, on December 18, 2017. During his appearance on Good Morning America, Mr. Smiley acknowledged that individuals could legitimately view his admitted sexual encounters with subordinates as an abuse of power. Specifically, Mr. Smiley was asked “You admit to having consensual sexual relationships with your subordinates, do you understand how that could be viewed as an abuse of power?” Mr. Smiley responded: “[o]h, absolutely. I certainly understand people have a viewpoint that any consensual relationship in the workplace is wrong. There are some people who believe there is no such thing as a consensual relationship in the workplace. I hear that point of view and I respect it.” Mr. Smiley made a similar comment during his December 18, 2017 interview on Tucker Carlson Tonight when he stated: “I certainly understand there are people who believe there is no such thing as a consensual relationship in the

workplace. I hear that and I will respect that point of view.”

39. During his television appearances and in town halls that he hosted, Mr. Smiley spoke poorly of PBS and made comments that tended to reflect unfavorably on PBS.

**FIRST COUNTERCLAIM – BREACH OF CONTRACT
VIOLATION OF PARAGRAPH 15.5 OF THE STANDARD TERMS**

40. PBS restates and adopts the allegations contained in Paragraphs 1 through 39 of the Counterclaims as if fully set forth herein.

41. The Agreements between PBS and TSM were enforceable contracts.

42. PBS has performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms of the Agreements.

43. Under Paragraph 15.5 of the Standard Terms to the Agreements (the “morals clause”), TSM and “all talent hired, retained or utilized by Producer [TSM] to work on, or in connection with, [*Tavis Smiley*]” had a duty to “not commit any act or do anything which might tend to bring Producer into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on PBS, any stations broadcasting or scheduled to broadcast a program, any licensee of PBS, any sponsor of the program, or to injure the success of any use of the Program.”

44. Based on its terms, Paragraph 15.5 extended to Mr. Smiley’s individual conduct.

45. By Mr. Smiley’s course of conduct set forth in Paragraphs 14 through 39, including his admissions that he had multiple sexual encounters with subordinates and engaged in sexual banter and “probably” made sexual jokes and comments in the workplace and his unfavorable comments about PBS in television appearances and in town halls, TSM breached Paragraph 15.5 of the Standard Terms.

46. On March 20, 2018, PBS provided written notice to TSM that it was terminating

the 2015, 2016, and 2017 Agreements pursuant to Paragraph 15.5 of the Standard Terms and Conditions of those Agreements.

47. TSM has not returned to PBS any amounts paid by PBS to TSM under those Agreements.

48. As a direct and proximate result of TSM's breach of the morals clause, PBS has been damaged by TSM's failure to promptly return to PBS any amounts paid to TSM under the Season 13 and Season 14 Agreements and is entitled to the return of those monies, in an amount not less than \$1,900,000.

49. As a direct and proximate result of TSM's breach of the morals clause, PBS has suffered other monetary damages, the precise amount of which will be proven at trial.

SECOND COUNTERCLAIM – ACCOUNTING

50. PBS restates and adopts the allegations contained in Paragraphs 1 through 49 of the Counterclaims as if fully set forth herein.

51. TSM owes an accounting to PBS.

52. For example, Paragraph 5.3 of the Agreements provide that TSM "shall maintain, in accordance with generally accepted accounting principles, auditable books, records, documents and other evidence ("Producer Records") pertaining to (a) the expenditure of any portion of the Program Payment; and (b) the source of all grants, facilities, goods and services used in, and all costs and expenses incurred in, Program production or acquisition hereunder to the extent and in such detail as shall properly reflect all costs, direct and indirect, of labor materials, equipment, supplies and services, and other costs and expenses for production of the Program."

53. Paragraph 5.3 of the Agreements also provide that "PBS shall have the right, at its

expense, upon thirty (30) days written notice to Producer and no more than once during any one (1) year period, to undertake, or have undertaken by an independent public accounting firm, an examination and audit of all Producer Records that, in PBS's reasonable judgment, relate to the production of any Program and all related financial matters, including, if applicable, the pertinent segregated production account, and Producer agrees to cooperate with PBS during any such audit."

54. PBS has made a demand for an accounting.

55. No accounting has been completed.

THIRD COUNTERCLAIM – DECLARATORY JUDGMENT

56. PBS restates and adopts the allegations contained in Paragraphs 1 through 55 of the Counterclaims as if fully set forth herein.

57. PBS and TSM entered into a series of Agreements with TSM starting in 2011.

58. PBS and TSM have a current and justiciable dispute concerning the terms and conditions under which PBS must make payments to TSM pursuant to the Agreements.

59. Accordingly, PBS seeks the following declarations:

a. A declaration and order that PBS has performed all conditions, covenants, and promises required on its part to be performed in accordance with the terms of the Agreements;

b. A declaration and order that by committing certain acts and doing certain things which PBS reasonably believed might tend to bring Mr. Smiley into public disrepute, contempt, scandal, or ridicule, or which might tend to reflect unfavorably on PBS, TSM breached Paragraph 15.5 of the Agreements;

c. A declaration and order that, in light of TSM's material breach of the 2015

Agreement, PBS is entitled to the repayment of any payments to TSM under the 2015 Agreement;

d. A declaration and order that, in light of TSM's material breach of the 2016 Agreement, PBS was not required to make the last payment to TSM under the 2016 Agreement, and PBS is entitled to the repayment of any payments to TSM under the 2016 Agreement;

e. A declaration and order that, in light of TSM's material breach of the 2017 Agreement, PBS was not required to make any payments to TSM under the 2017 Agreement;

f. A declaration and order that, in light of TSM's material breaches of the Agreements, TSM cannot enforce the terms of the Agreements against PBS; and

g. For such other declarations and orders as may be just and equitable.

PRAYER FOR RELIEF

WHEREFORE, PBS prays for judgment in PBS's favor against TSM as follows:

1. For general damages according to proof;
2. For special damages according to proof;
3. For an accounting;
4. For the declarations and orders requested above;
5. For attorneys' fees and costs and interest; and
6. For such other and further relief as the Court may deem just and proper.

JURY DEMAND

Counterclaim Plaintiff PBS requests a trial by jury on all counterclaims properly subject to a jury trial.

Dated: March 20, 2018

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Grace E. Speights

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March 2018, a true and correct copy of the foregoing was served by e-mail and was filed electronically with the Clerk of the Court using the CaseFile Xpress system, which caused notification of such filing to be sent to the following:

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