UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

GLEN K. ALLEN,	*	
	*	
Plaintiff,	*	
	*	**CIVIL ACTION NO. CCB 18-3781**
v.	*	
	*	**HON. CATHERINE C. BLAKE**
HEIDI BEIRICH, MARK POTOK, and THE SOUTHERN POVERTY LAW CENTER, INC.	*	
	*	
Defendants	*	

*

PLAINTIFF GLEN K. ALLEN'S MEMORANDUM IN OPPOSITION TO THE SPLC DEFENDANTS' MOTION TO DISMISS

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In accordance with FRCP 7 and Local Rule 105, plaintiff Glen Allen submits this memorandum in opposition to the motion to dismiss filed by defendants Southern Poverty Law Center ("SPLC"), Heidi Beirich, and Mark Potok.

PRELIMINARY STATEMENT

The SPLC Defendants' primary approach in their motion to dismiss is to set up a straw man and shoot it full of arrows. Except with respect to Count I (Declaratory Judgment) and Count VIII (defamation based on the SPLC's 2017 Hate Map), the SPLC Defendants' attack on Allen's claims for the most part consists of what may be called an "end run / *Bartnicki*" argument. The essential elements of this argument are as follows: 1) the only claim Allen could have made based on the SPLC Defendants' August 17, 2016 article ("August 17 Article") would have been a defamation claim that would have been barred by the statute of limitations and the opinion doctrine in *Milkovich v. Lourain Journal Co.*, 497 U.S. 1 (1990); 2) Allen's RICO claims and most of his state law claims are "thinly disguised" versions of this defamation claim (a defamation claim Allen never brought), and are therefore also time-barred and barred by *Milkovich,* and 3) Allen, in pursuing this evasive "end run" tactic, collides with the First Amendment privilege described by the Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and his claims are therefore barred by *Bartnicki* as well. As discussed in this memorandum, however, the Defendants' argument breaks down at every critical juncture:

- Allen's RICO and state law claims are *not* merely disguised versions of a defamation claim based on the August 17 Article; they are independent claims
- Accordingly, they stand or fall on their own merits – and in this case they stand, for none of the Defendants' rather cursory arguments undermine their validity
- In particular, Allen has adequately alleged proximate cause in his RICO claims in accordance with the Supreme Court's decision in *Bridge v. Phoenix Bond &*

Indemnity Co., 553 U.S. 639 (2008), a case unmentioned in the Defendants' memorandum, and related cases

- Allen's state law claims have all been pled in accordance with *Twombly* standards and are based on abundant factual allegations
- The First Amendment privilege described in *Bartnicki* does not apply because in this case, unlike in *Bartnicki,* the Defendants participated in the unlawful acquisition of the documents they used to destroy Allen's career
- The Defendants' "reputational damage, therefore First Amendment defense" argument fails because Allen seeks pecuniary as well as reputational damages, and in any event, the *Hustler / Food Lion* doctrine the SPLC Defendants invoke should not be extended to the SPLC, a 501c3 public interest law firm subject to rules of professional ethics and strict IRS regulations.

Defendants' arguments against Allen's Count I and Count VIII claims fail as well. As to Count I, Allen is not foreclosed by 28 U.S.C. § 2201(a)'s "except for federal taxes" exception because he is not seeking a determination of taxes due from the SPLC; and he has standing because he can show particularized injury. As to Count VIII, in accordance with *Flamm v Am. Ass'n. of Univ Women*, 201 F.3d 144 (2nd Cir. 2000) and *Samuels v. Tschechtelin*, 135 Md. App. 483 (2000), the SPLC Defendants' statements on their Hate Map Flyer that the SPLC had conducted an "investigation" that determined Allen had "infiltrated" the Baltimore City law department with "neo-Nazi" ideas cannot be dismissed as mere "loose figurative language."

Allen in this case seeks not only to redress the harms done to him but to vindicate fundamental principles of the rule of law and free expression – namely, that a law abiding person, also an ethical and quietly competent lawyer, should be given space to explore controversial topics without having a purported 501c3 law firm, motivated by fundraising aims and political animus, destroy his career. He seeks only that he not be foreclosed by the SPLC Defendants' ill-founded invocation of controlling law from his day in court to establish his claims.

ALLEN'S FACTUAL ALLEGATIONS

The SPLC Defendants spend several pages summarizing, in many instances tendentiously, the allegations in Allen's complaint. At this stage, Allen is entitled to have the Defendants' motion decided based on his allegations and not the Defendants' paraphrases or summaries of them. Insofar as the Defendants make statements not included in Allen's complaint – e.g., their remarks about Merlin Miller – they have not sought (and could not obtain) judicial notice and their remarks should be disregarded. As to the interpretation of the August 17 Article and the Chaos at the Compound Article, Allen refers the Court to paragraphs 71-94 of his complaint.

STANDARD OF REVIEW

As Judge Chasanow stated for this Court in *Chambers v. King Buick LLC*, 43 F.Supp.3d 575, 585-86 (D. Md. 2014), a motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. The complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claims showing that the pleader is entitled to relief," but still requires a showing, rather than a blanket assertion, of entitlement to relief. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556, (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (internal quotation marks omitted).

At the motion to dismiss stage, the Court must consider all well-pleaded allegations in a complaint as true and construe all factual allegations in the light most favorable to the plaintiff. *Chambers*, 43 F. Supp.3d at 586. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* Allegations of fraud are subject to a heightened pleading standard under Rule 9(b). In cases involving concealment of material facts, however, meeting

Rule 9(b)'s particularity requirement will likely take a different form. *Chambers,* 43 F. Supp. 3d at 586. A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied that the defendants have been made aware of the particular circumstances for which they will have to prepare a defense at trial and the plaintiff has substantial prediscovery evidence of those facts. *Id.*

The SPLC Defendants, citing several defamation cases, urge "early judicial action" in this case. This assertion rests on their incorrect contention, repeated throughout their memorandum, that Allen's claims are nothing more than ”thinly disguised defamation claims." In any event, under any relevant standard Allen's claims are substantial, grounded on ample factual allegations, and supported by controlling law, and should not be dismissed before Allen has a fair chance to prove the truth of his claims.

ARGUMENT

I. THE FIRST AMENDMENT PRIVILEGE DESCRIBED IN *BARTNICKI V. VOPPER* DOES NOT PROTECT THE SPLC DEFENDANTS IN THIS CASE

The SPLC Defendants rely on *Bartnicki* at several key points in their memorandum. For the following reasons, this reliance is misplaced.

A. The Facts and Holding in *Bartnicki*

In *Bartnicki*, an unidentified person intercepted and recorded a cell phone conversation between the president of a local teachers' union, Anthony Kane, and the union's chief negotiator, Gloria Bartnicki. The conversation concerned negotiations between the union and the local school board, which were acrimonious. A radio commentator named Vopper played a tape of the intercepted conversation on his radio show. Bartnicki and Kane brought actions for illegal wiretapping. After filing suit, they learned that Vopper had obtained the tape from a man named Yokum, who testified that he found the tape in his mailbox.

The defendants raised a First Amendment defense, which the trial court rejected. The Third Circuit reversed and the Supreme Court accepted review, expressing the issues as follows:

> The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. *The persons who made the disclosures did not participate in the interception, but they did know—or at least had reason to know—that the interception was unlawful*.

532 U.S. at 517-18 (emphasis added). Against this backdrop, the Court affirmed the Third Circuit, holding that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535. The Court's emphasis on the facts that the persons "who made the disclosures did not participate in the interception" and "played no part in the illegal interception" logically implies that the First Amendment privilege at issue does *not* apply to persons who participated or played a role in the illegal interception. The correctness of this implication is confirmed by Footnote 19 of the opinion.

B. Subsequent Cases Interpreting *Bartnicki*

Allen's research has uncovered no case in the Fourth Circuit that has interpreted *Bartnicki. Bartnicki,* however, was comprehensively examined in a succession of cases in the Federal Circuit: *Boehner v. McDermott*, 332 F.Supp.2d 149 (D.D.C. 2004), *aff'd, Boehner v. McDermott*, 441 F.3d 1010 (D.C. Cir. 2006), *vacated for en banc hearing,* D.D.C. June 23, 2006, and *aff'd, Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007) (*en banc*). In all these cases the courts held, although on somewhat different rationales, that where the party who received and made use of unlawfully obtained information was more than a mere innocent recipient, the *Bartnicki* First Amendment privilege does not apply.

In the first District of Columbia Circuit Court decision, at 441 F.3d 1010 D.C. Cir. 2006), a divided panel affirmed the District Court. Writing for the majority, Judge Randolph stated:

> *The difference between this case and Bartnicki is plain to see. It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift. See* MODEL PENAL CODE § 223.6(1) (1962); D.C. CODE § 22-3232.

441 F.3d at 1016-17 (footnotes omitted) (emphasis added). The D.C. Circuit Court (484 F.3d 573) granted a hearing *en banc* and vacated its decision at 441 F.3d 1010. The *en banc* court again affirmed the trial court, and the inapplicability of the *Bartnicki* First Amendment privilege, but on a different rationale. Finding that House Ethics Committee Rule 9 imposed a duty of nondisclosure on McDermott and that he had broken this rule, the court affirmed his liability on this ground and rejected his First Amendment argument.[1]

C. Application to Facts Alleged in Allen's Complaint

In accordance with the text of *Bartnicki* and the cases discussed above (except the *Boehner en banc* opinion), the *Bartnicki* First Amendment privilege does not apply where the person

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[1] In *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001), mentioned in *Bartnicki* (532 U.S. at 521 & 521 n.5), a reporter interacted with the persons who made illegal recordings knowing the recordings were illegal and who made them. As the Supreme Court summarized in *Bartnicki*, in *Peavy* "the media defendant in fact participated in the interceptions at issue." 532 U.S. at 521 n. 5. On these facts the Fifth Circuit in *Peavy* rejected a First Amendment challenge to the Wiretap statute. 221 F.3d at 193. The Supreme Court, in the same order in which it took certiorari in *Boehner* and remanded for consideration in light of the *Bartnicki* decision, denied certiorari in *Peavy,* thus strongly indicating that the *Peavy* case was consistent with *Bartnicki.*. 532 U.S. 1051 (May 29, 2001). *See also Branzburg v. Hayes, et al*., 408 U.S. 665, 691-92 (1972) ("It would be frivolous to assert ... that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news."); *Council on American-Islamic Relations Action Network v. Gaubatz,* 793 F.Supp.2d 311, 331-32 (D.D.C. 2011) (holding that where plaintiff alleged that defendants had obtained information from an employee in violation of the employee's contractual, fiduciary, and other legal obligations, the *Bartnicki* privilege was unavailable).

invoking it participated in the unlawful disclosure of information at issue; and such participation is sufficiently established from knowledge by that person that the information was obtained unlawfully and by whom. Allen's detailed factual allegations in his complaint, particularly those in Paragraphs 54 through 75, abundantly support a plausible conclusion under *Twombly* that the SPLC Defendants met these minimal criteria for participation.

But Allen's allegations support much more than this. They plausibly support a conclusion that the SPLC Defendants not only knew the Dilloway documents were stolen and subject to a confidentiality agreement but encouraged, aided, and abetted Dilloway's unlawful conduct and compensated him for it. As to the *Boehner en banc* rationale, here too the *Bartnicki* privilege would be unavailable, for the SPLC Defendants were in "positions of trust involving a duty not to disclose" that the *en banc* opinion held precluded invocation of the *Bartnicki* privilege. The SPLC Defendants, as a law firm and its staff, are subject to ethical rules that preclude immediate disclosure of confidential and privileged documents that fall into their hands, as explained in Paragraphs 72-75 of Allen's complaint. Moreover, the SPLC, as a purported 501c3 public interest law firm, is subject to IRS requirements that it not engage in illegal activities and abide by all ethical rules, as explained in Paragraphs 22-24 of Allen's complaint. The SPLC Defendants were as subject to a duty restricting disclosure as Congressman McDermott in the *Boehner* cases, the newspapers in *Cohen v. Cowles Media, Inc*., 501 U.S. 663 (1991), who identified the plaintiff in violation of a confidentiality agreement, the newspapers in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), who were subject to a court's protective order, and other parties in analogous

circumstances. *See also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech,* 96 NW. U.L. REV. 1099, 1126-32 (2002).[2]

II. THE SPLC DEFENDANTS' "REPUTATIONAL DAMAGES, THEREFORE FIRST AMENDMENT DEFENSE" ARGUMENT FAILS FOR TWO REASONS

Another argument the SPLC Defendants weave into their memorandum rests on their assertion that Allen in all his claims seeks "reputational damages" and therefore all his claims are subject to First Amendment defenses that defeat them. Defendants rely here primarily on *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) and *Food Lion, Inc. v. Capital Cities / ABC, Inc*., 194 F.3d 505 (4th Cir. 1999). There are two major flaws in the Defendants' argument.

A. Allen Has Alleged Pecuniary as Well as Reputational Damages

First, Allen does not seek only reputational damages. His complaint consistently identifies the termination from his position at the Baltimore City law department as a separate component of

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[2] The SPLC Defendants do not and cannot dispute that they are subject to rules of legal ethics and 501c3 requirements. They do assert, however, laconically and in a footnote, that "documents without any commercial market are not subject to the National Stolen Property Act and their theft does not constitute a predicate act," SPLC Memo. at 23 n.8 (citing *In Re Carol Vericker*, 446 F.2d 244 (2d Cir. 1971)), and "[p]ayment of a source does not constitute 'bribery' under RICO, which is limited to bribery of public officials and witnesses," *id*. (citing *U.S. v. Ferriero*, 866 F.3d 107 (3d Cir. 2017)). It is not true, however, that documents such as the Dilloway stolen documents can never have commercial value. *See, e.g., U.S. v. Farraj*, 142 F.Supp.2d 484, 487-90 (S.D.N.Y 2001) (discussing *Vericker* case and holding that electronic transfer of excerpts of trial plan for tobacco class action fell within purview of statute barring interstate transportation of stolen property); *see also U.S. v. Weinstein*, 834 F.2d 1454, 1463 (9th Cir. 1987) (recognizing property to be subject to commerce if it can be sold "even on a thieves market"). It is also not true that bribery as a predicate act under RICO is limited to bribery of public officials and witnesses. *See, e.g., Perrin v. U.S.*, 444 U.S. 37, 49-50 (1979) (holding that bribery of private employee prohibited by state criminal statute violates the Travel Act).

Although Allen has responded to the Defendants' footnote, the proper course, he submits, is to consider the SPLC's arguments inadequately raised. *See, e.g., National Oilseed Processors Ass'n v. OSHA,* 769 F.3d 1173, 1184 (D.C. Cir. 2014) ("the court generally declines to consider an argument if a party buries it in a footnote and raises it in only a cursory fashion"). Allen objects to the Defendants further developing these contentions in their reply memorandum.

his damages. He separately describes this termination in Paragraphs 95-98 of his complaint and in six of his claims states that the SPLC Defendants "caused Allen damages, including the loss of his employment at the City of Baltimore and severe damage to his reputation as an attorney."

Allen's loss of employment is pecuniary, not reputational damage. This is decisively established by the Supreme Court's *Cohen v. Cowles Media* case, from which the Fourth Circuit quoted in *Food Lion*: "Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages for breach of a promise that caused him to lose his job and lowered his earning capacity." *Cohen*, 501 U.S. at 671, quoted in *Food Lion*, 194 F.3d at 523. *See also Snyder v. Phelps,* 580 F.3d 206, 218 n. 11 (4th Cir. 2009 (noting that the First Amendment "is inapplicable ... when the plaintiff seeks damages for actual pecuniary loss, as opposed to injury to reputation or state of mind."), *aff'd,* 562 U.S. 443 (2011). Accordingly, even assuming, contrary to fact, that the Defendants could properly invoke the *Food Lion* First Amendment defense, they could do so only as to his claim for damage to his reputation and not for the distinct and separable actual pecuniary loss he suffered because he lost his job.

B. The First Amendment Defenses Developed in *Hustler* and *Food Lion* Should Not Be Extended to the SPLC Defendants, Who Are Subject to Legal Rules of Ethics and 501c3 Requirements

Both *Hustler* and *Food Lion* involved media defendants. Careful analysis in this case counsels against dilating *Hustler* and *Food Lion* to embrace defendants such as the SPLC Defendants, who are subject to legal ethical rules and 501c3 requirements that would be undermined by the First Amendment defense the SPLC Defendants seek.

Lawyers are subject to greater restrictions on their First Amendment rights than nonlawyers. As the Supreme Court stated in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991), the Supreme Court's cases "have not suggested lawyers are protected by the First

Amendment to the same extent as those engaged in other businesses" and the proper analysis entails "weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." This limitation on lawyers' ability to invoke First Amendment doctrines follows from the importance of the profession in our legal system and form of government. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 460 (1978).

The Supreme Court's opinion in *Rhinehart* further demonstrates the unique factors that come into play in First Amendment analysis when the context involves the workings of our legal system, in that case a protective order to which a newspaper sought access. In denying the newspaper's First Amendment argument, the Court held that the interests of our legal system in protecting against damage to reputation and privacy by protective orders outweighed a newspaper's asserted First Amendment right to information, even if the information was of public concern. 467 U.S. at 35-36.

As the *Bartnicki* case and many others illustrate, First Amendment analysis involves a balancing process. The Defendants' arguments based on *Hustler* and *Food Lion* pit Allen's right to privacy and confidentiality – a right Justice Brandeis described in his dissent in *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928), as "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men"[3] – against the Defendants' right to ferret out information on what they regard as issues of public concern, although Allen would characterize

[3] Professor Smolla described this right in his *Information as Contraband* law review article: "The 'right to be let alone' is not just a right to contemplative silence, it is a right that at times affirmatively encourages expression. Privacy has an empowering quality: it supplies an emancipating permission to speak freely. It is only human nature to speak differently in confidence than one does in public. Whether or not this is an entirely admirable human trait, it is an enduring one. None of us wants to be the object of surveillance or eavesdropping. None of us, from the common citizen to the Commander-in-Chief, wants our private conversations broadcast to the world. Even fear of disclosure after one's own death may temper candor." Smolla, *Information as Contraband*, 96 Nw. U.L. Rev. at 1130.

them as all too frequently issues of fundraising appeal. In the unusual circumstances of this case, another factor weighs heavily in the balance, arising from the fact that the SPLC is a law firm and a tax-favored 501c3 organization. As a law firm and 501c3 organization, the SPLC is subject to stringent rules of ethics and IRS requirements, and so are its officers and employees. Permitting the SPLC Defendants to invoke the *Hustler* and *Food Lion* First Amendment defenses works at cross purposes to ensuring the SPLC's compliance with these rules and requirements. As Allen explained in his complaint, the SPLC Defendants actions violated numerous ethical rules and IRS requirements. The logic of their *Hustler / Food Lion* argument is that they should be given First Amendment protection from the consequences of violating these rules and requirements insofar as the harms they inflict can be characterized as reputational damage. But allowing the Defendants to invoke such a doctrine sets up a huge disincentive for the Defendants to comply with the rules and requirements. Causing reputational damage is one of the SPLC Defendants' chief techniques for achieving their goals of fundraising and destroying their political enemies.

III. ALLEN'S DECLARATORY JUDGMENT CLAIM (1) DOES NOT INVOLVE STATUTORILY FORECLOSED FEDERAL TAXES; (2) INVOLVES AN ACTUAL CONTROVERSY; AND (3) ALLEN HAS STANDING TO ASSERT IT

The SPLC Defendants incorrectly assert that Allen's Count I Declaratory Judgment claim is foreclosed because it is precluded by 28 U.S.C. § 2201(a)'s carve out "with respect to federal taxes,"; because there is no actual controversy; and because Allen lacks standing.

A. Section 2201(a) Does Not Bar Allen's Declaratory Judgment Claim

As Allen has alleged in his complaint and is manifest from common knowledge, the SPLC's gravitas – its renown and stature – arises in large part from its status as a 501c3 nonprofit. Having this status imparts to it the implied imprimatur and support of the government and makes news reporters, employers, and the public much more disposed to listen to and uncritically credit its

accusations. Allen has been a victim of this unmerited gravitas; he was fired within a day of the publication of the SPLC's August 17 Article and found himself presumed guilty of whatever the SPLC chose to say about him. Moreover, he remains vulnerable to similar SPLC attacks in the future. There is no reason to believe that if he were able to find employment in the future, the SPLC, using its 501c3 status as clout, would not again orchestrate his firing. On these facts, Allen seeks a declaration that the SPLC has acted in numerous respects in violation of the requirements for a 501c3. Such a declaration would dissuade the SPLC from attacking Allen again using the Stolen Dilloway Documents and would thus settle uncertainty that hangs over the relationship between Allen and the SPLC. Allen is not seeking any determination as to the SPLC's tax liability.

Against this background, the SPLC Defendants' argument that Allen's declaratory judgment claim is barred by the "except with respect to federal taxes" phrase in Section 2201(a) is groundless. The *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972), decision buttresses this conclusion. In that case an African-American sought to enjoin the Secretary of Treasury from granting tax benefits to nonprofit organizations that denied membership to nonwhites. The Secretary of Treasury contended (apparently) that, given the similarity between injunctions and declaratory judgment, the relief the plaintiff sought was barred by the "with respect to federal taxes" phrase of Section 2201. Rejecting this argument, the court held that the "with respect to federal taxes" exception was coterminous with the Section 7421(a) of the Tax Injunction Act, whose purpose is to assure the proper assessment and collection of taxes. The court continued that "Plaintiff's action has nothing to do with the collection or assessment of taxes . . . It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits this suit." 338 F. Supp. at 452-53 (footnotes omitted).

In this case as well, Allen's declaratory judgment action is not directed to the collection or assessment of taxes. Allen seeks a declaration to underscore the SPLC's noncompliance with 501c3 requirements, with a view to preventing the SPLC from continuing to harass him by means of its noncompliance. In his case as in *McGlotten*, the linkage between declaratory judgments and injunctions is pertinent. These two equitable remedies have much in common. In many contexts they are functional equivalents. *See, e.g., Goldstein v. F.D.I.C.,* 2012 WL 1819284 at *12 (D. Md. May 16, 2012). There are many cases in which plaintiffs have sought injunctions regarding a third party's use of its 501c3 status. *See* Section III(C) of this memorandum. If the need arises, Allen will seek leave to amend his complaint to modify his declaratory judgment count to make it a count seeking an injunction. But as the court in *McGlotten* stated, this would seem "ritualistic" and to elevate form over substance. The proper ground for decision is that Allen's declaratory judgment action does not come within the scope of Section 2201(a)'s "with respect to federal taxes" phrase.[4]

B. There Is an Actual Controversy

The defendants' contention that Allen has failed to plead an actual controversy is merely a variation of its argument, addressed below, that Allen lacks standing. In any event, the defendants mistakenly rely on *Zimmerman v. Cambridge Credit Counseling*, 409 F.3d 473, 477 (1st Cir. 2005). The *Zimmerman* case actually supports Allen's claim. There, the trial court dismissed a complaint in which the plaintiffs alleged that the defendants were operating a sham 501c3 nonprofit in violation of the Credit Repair Organizations Act ("CROA"). The trial court held it lacked jurisdiction to address these kinds of questions but the First Circuit reversed, stating "I]t is already common for courts and administrative agencies to examine whether an entity actually operates as

[4] In *Green v. Connally*, 330 F. Supp. 1150, 1156, 1179 (D.D.C. 1971), *aff'd sub nom. Coit v. Green*, 404 U.S. 997 (1971), which arose on facts similar those in *McGlotten*, the court issued a declaration regarding third parties' use of their Section 501c3 status.

a nonprofit, irrespective of its tax-exempt status. . . . The complaint states that, while Cambridge claimed that its purpose was 'to provide direct aid to financially distressed debtors,' in reality 'Cambridge's primary purpose was to make money for its owners and operators' . . . 409 F.3d at 478, 479-80. In this case as well, Allen is essentially alleging that the SPLC was operating as a sham 501c3 nonprofit. There is certainly an actual controversy as to this issue.

C. Allen Has Standing

Fulani v. League of Women Voters, 684 F. Supp. 1185 (S.D.N.Y. 1988), *aff'd,* 882 F.2d 621 (2d Cir. 1989) demonstrates why Allen has standing in this case. In *Fulani*, Dr. Fulani was an independent candidate for President during the1988 national elections. The League of Women Voters Education Fund League, a 501c3 charitable organization, organized three nationally-televised primary debates. Dr. Fulani attempted to procure an invitation to participate in these debates but the League refused to invite her. Before the debates took place, Fulani sued the League seeking, inter alia, injunctive and declaratory relief. She contended that the League's exclusion of her violated the League's requirement under 501c3 to refrain from partisan political activity.

The League argued that Fulani lacked standing to assert that it failed to comply with 501c3 requirements. The trial court sidestepped the standing issue and went to the merits. 684 F. Supp. at 1195. On appeal, the Second Circuit addressed the standing issue at length. The court distilled the law on standing into the three core concepts: 1) a personal injury that is (2) fairly traceable to the defendant's allegedly unlawful conduct," and (3) which is likely to be redressed by the requested relief. 882 F.2d at 624. Addressing these inquiries, the Second Circuit held that Fulani had standing to challenged the League's compliance with 501c3 requirements, 882 F.2d at 627-28, although it affirmed the trial court's finding that the League did not violate them.

In Allen's case these core components are similarly satisfied. He has alleged personal, not abstract, injury: he has alleged that the SPLC singled him out after "watching him like a hawk " and by a coordinated attack using its 501c3 clout orchestrated his termination from the City of Baltimore legal department, and that it continues to threaten similar attacks in the future. He has alleged that these harms are "fairly traceable to [the SPLC's] unlawful conduct": he has alleged that the SPLC used stolen documents in its attack and violated numerous ethical rules, all in contravention of 501c3 requirements. He has alleged that the declaration he seeks will deter future attacks by the SPLC, attacks that now hang over him like a sword of Damocles.

IV. THE STATUTE OF LIMITATIONS FOR DEFAMATION CLAIMS IS IRRELEVANT TO ALL OF ALLEN'S CLAIMS EXCEPT HIS COUNT VIII CLAIM FOR DEFAMATION

The SPLC Defendants' repeated assertions that a defamation claim by Allen based on the defendants' August 17 Article, which he never brought, would have been time-barred suggests that the Defendants contend the asserted time-bar on this hypothetical defamation claim somehow affects the claims that Allen did bring. Neither logic nor authority supports such a contention.

First, the *Hustler* and *Food Lion* cases, if applicable at all, stand only for the proposition that defamation-like claims may be sometimes be subject to defamation First Amendment defenses, e.g., Constitutional Malice. The statute of limitations is not a First Amendment defense.

Second, Allen denies that any of the predicate acts supporting his RICO claims is a defamation or defamation-like claim. Even assuming, contrary to fact, that any were, the asserted defamation time-bar would be irrelevant, because the statute of limitations for RICO claims is four years and is unaffected by whether any of the individual predicate acts forming the RICO pattern is time-barred. *See, e.g., Morley v. Cohen*, 610 F. Supp. 798, 810 (D. Md. 1985) ("statutes of limitations for the predicate acts have no bearing on the validity of a RICO claim"); *U.S. v. Wong*,

40 F.3d 1347, 1367 (2d Cir. 1994) (defendant may be liable under RICO for predicate acts the separate prosecution of which would be time-barred).

Third, under Maryland law, the statute of limitations for all his tort claims, except the Count VIII defamation claim based on the SPLC's 2017 Hate Map, is three years. Md. Code Ann. Cts & Jud. Proc. Section 5-101. This would be true even if, contrary to fact, his tortious interference claims were based on defamation as the component wrongful acts. *See Richardson v. Selective Insurance Group, Inc.*, 2007 WL 1657423 at * 5-6 (D. Md. May 31, 2007). Maryland courts have limited the defamation statute of limitations to only defamation, not applying it even to false light claims. *See, e.g., Long v. Welch & Rushe, Inc.*, 28 F. Supp. 3d 446, 457-58 (D. Md. 2014).

V. ALLEN HAS PROPERLY PLED HIS RICO CLAIMS

The SPLC Defendants contend that Allen's RICO claims fail because (1) they are "thinly disguised defamation claims" and (2) they fail adequately to allege proximate cause. Allen addresses these two arguments below. To set the stage, however, it is important to state what the SPLC Defendants are *not* contesting: that Allen failed adequately to allege a RICO pattern; that Allen failed adequately to allege a RICO enterprise distinct from the defendants; that Allen's Count II RICO and Count III RICO conspiracy claims are defective in any way other than the Defendants' two arguments above; and that Allen does not need to prove injury from *all* the predicate acts that make up the pattern, but only from at least one. *Deppe v. Tripp*, 863 F.2d 1356, 1366 (7th Cir. 1988). Against this background, Allen addresses the Defendants' two arguments.

A. Allen's Claims Are Not "Thinly Disguised Defamation Claims"

Defendants cite a lengthy list of cases in support of their assertion that Allen's RICO claims are "thinly disguised defamation claims." Most of the cases are unreported dispositions. The first of them is *Kimm v. Lee*, 2005 WL 89386, (S.D.N.Y. Jan. 13, 2005), *aff'd*, 196 Fed.

Appx. 14 (2d Cir. 2006), a case from the Southern District of New York in 2005. *Kimm* should be considered the seminal case in Defendants' argument, for most of the other cases in the string citation are either cited by *Kimm* or cite to *Kimm.*[5] Standing on *Kimm*, Defendants confidently inform this Court that "for more than 30 years courts universally have held defamation in the form of mail fraud and wire fraud cannot possibly serve as RICO predicate acts." But as the yellow flag at the top of *Kimm's* Westlaw entry indicates, this is not true; indeed, it is not even true within the Southern District of New York. *Frydman v. Verschleiser*, 172 F.Supp.3d 653 (S.D.N.Y. 2016) disproves it. *Frydman* was a RICO case alleging six predicate acts of mail and wire fraud. *Id.* at 659. Notably, four of those six predicates were perpetrated *as defamations* over the mails or wires of the plaintiff's business. *Id.* at 660–61. In denying the dismissal of the RICO claim, the Southern District specifically distinguished *Kimm* along lines that are applicable here:

> *Kimm* is distinguishable because there was no allegation of reliance, whereas, in this case, the plaintiffs allege that Frydman's business associates did rely on the allegedly false representations and that, as a result, Frydman was deprived of money and property . . . . Such lost contracts, loans, and leases would be "something that constitutes 'property' in the hands of the victim." *Hedaithy*, 392 F.3d at 602. . .. Accordingly, the motion to dismiss the RICO claims on this ground is denied. 172 F. Supp.3d at 669–70 (citations omitted).

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[5] Specifically, *Marks v. City of Seattle*, 2003 WL 23024522; *Mansmann v. Smith*, 1997 WL 145009; *Manax v. McNamara*, 660 F.Supp. 657, 658 (W.D.Tex.1978), *aff'd*, 842 F.2d 808 (5th Cir.1988); *Contes v. City of New York*, 1999 WL 500140; *Mount v. Ormand*, 1991 WL 191228; *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel Employees & Rest. Employees Union, AFL-CIO,* 215 F.3d 923, 927 (9th Cir.2000); *Kimberlin v National Bloggers Club*, 2015 WL 1242763; *Mack v. Parker Jewish Inst. for health & Rehab*, 2014 WL 5529746*; Conte v. Newsday, Inc.,* 703 F.Supp.2d 126 (E.D. N.Y. 2010); *Curtis & Associates v. the Law Offices of David M. Bushman*, 758 F.Supp.2d 153 (E.D. N.Y. 2010); and finally, *Creed Taylor, Inc. v.. CBS, Inc.*, 718 F.Supp. 1171, 1180 (S.D.N.Y.1989) fall into these categories.

Likewise, here there is a detailed scheme to defraud laid out in Allen's Complaint, including obvious reliance by the City of Baltimore and the donors alarmed by the SPLC's reports. *Complaint* at ¶¶ 74, 101–115, 145–151. Allen's case is readily distinguishable. Defendants' string citation rests on a misreading of the case law. Moreover, Defendants' argument, distilled to its essence, is an absurdity. It amounts to the assertion that if one perpetrates mail or wire fraud, and exacerbates the evil using the mails or wires to send a defamation, one can immunize oneself from the consequences of RICO. This is untenable, to say the least.

B. Allen Has Adequately Alleged Proximate Cause

Relying on the Supreme Court's decisions in *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258 (1992), *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451 (2006), and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010) – a purported trilogy – the Defendants argue that Allen fails to link, via proximate cause, the predicate acts to his damages. This analysis should be immediately suspect. The Supreme Court's jurisprudence on RICO proximate cause is not a trilogy, but a quartet that includes *Bridge v. Phoenix Bond & Indemnity Co*., 553 U.S. 639 (2008). *Bridge*, missing from Defendants' analysis, undercuts their argument.

In *Bridge* the Supreme Court retreated from the appearance of too narrow a test for proximate cause in the earlier cases of *Holmes* and *Anza*, noting that "[p]roximate cause . . . is a flexible concept that does not lend itself to a black-letter rule that will dictate the result in every case." 553 U.S. at 646 (internal quotations and citations omitted). Under the analysis of *Bridge*, proximate cause is a judicial tool used to limit liability and prevent recoveries by people who are "remotely injured." *Id*. The concept is especially useful in weeding out damages that are speculative because they are attributable to other independent factors. *Id*. Allen, however, has plausibly alleged a massive scheme whereby Defendants intentionally inflate the threat of "hate"

and use such false reporting to benefit themselves by fundraising. Finding a victim such as Allen to "wreck and destroy" is not simply foreseeable but indispensable to the SPLC's *modus operandi*. Further, the victim's destruction is the first and most immediate consequence of their scheme.

The Supreme Court explained how both *Holmes* and *Anza* were consistent with *Bridge,* 553 U.S. at 654-57, and then illustrated RICO proximate cause with an example that parallels the facts of this case: "As an illustration, the Restatement provides the example of a defendant who 'seeks to promote his own interests by telling a known falsehood to or about the plaintiff or his product." *Id*. at 656-57. This is precisely what Allen has alleged the SPLC does.

When considering proximate cause in the context of RICO, the Fourth Circuit has also stressed the need for "directness of injury" over "foreseeability." *Slay's Restoration, LLC v. Wright National Flood Insurance Company*, 884 F.3d 489, 493-495 (4th Cir. 2018). But this should not avail the Defendants because both "directness of injury" and "foreseeability" are present in the mail and wire frauds associated with the publication of the August 17th Article and the Hate Map Flyer. The guiding case for "directness of injury" analysis in the Fourth Circuit is *Novell, Inc v. Microsoft Corp*, 505 F.3d 302 (4th Cir., 2007). In that case, the Fourth Circuit indicated that any attempt to analyze the "direct harm" aspect of proximate cause in RICO should fall under the latter three "AGC Factors." *Id*. at 310-311. (The "AGC Factors" are derived from *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 (1983)). In emphasizing the AGC Factors, the Fourth Circuit is on sure ground: both early and late in their proximate cause quartet, the Supreme Court repeatedly stressed that these are the proper referents for considering directness of injury under RICO. *See*, *e.g., Holmes*, 503 U.S. at 268-70; *Bridge,* 553 U.S. at 654. Thus, the Fourth Circuit's precedent would entail examining: (a) the directness of the injury; (b) the

existence of more direct victims of the alleged injury, and (c) problems of identifying damages and apportioning them among those directly and indirectly harmed. Allen meets all three criteria.

First, Allen was the most directly injured victim of both the August 17th Article and the Hate Map Flyer. Allen was the main subject of the August 17th Article and prominently featured in the Hate Map Flyer. Second, he is at least as direct a victim as the donors upon whom the SPLC preys. Indeed, he is the foremost victim because Allen (like other targets) needed first to be destroyed before the SPLC could fill its coffers. Indeed, Allen's professional destruction was the most immediate consequence of these predicate acts – access to the donors follows, and will generally be dependent on how thoroughly the SPLC showcases the threat of "hate" by destroying its targets. Furthermore, Allen is the most seriously harmed. While most of the donors stood to lose perhaps a few hundred dollars, Allen lost his job and a professional reputation cultivated over nearly three decades.

Finally, there is no handicap to identifying and apportioning damages. There is nothing speculative or unforeseeable about Allen's damages: he was fired and his career wrecked, which is exactly what the SPLC all but called for in their initial August 17th Article – and what they later boasted of in their Hate Map Flyer. Indeed, the "Hate Map Flyer" should be taken as an admission by Defendants that they were the proximate cause of Allen's harms: "Because of our investigation and expose, he was swiftly fired." *Complaint* at ¶ 84. *See also Solomon v. American Web Loan,* 2019WL1320790 at * 11 (E.D. Va. March 22, 2019).

Finally, although Defendants make cursory reference to *Hemi*, that case has little application to the present facts. In *Hemi*, an online company that sold cigarettes in New York failed to file a "Jenkins Act Report" with New York State. Filing the Jenkins Act report was a mandate of federal law (specifically 15 U.S.C §§ 375—378), although the law actually required

the report to be filed with New York State authorities. Neither state, nor federal, nor municipal law required the out of state company to actually collect or remit the taxes. Instead, only the report was to be filed with the state. The obligation to ultimately pay the taxes fell on the individual customers. *Hemi Group,* 559 U.S. at 4 and 9.

In the RICO case that was filed, New York City – not New York State – filed suit against the company alleging a scheme to defraud the City (rather than the State) of tax revenue. *Id.* The Supreme Court rejected this theory, holding it too attenuated even under the broad mandate of RICO: "The City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a fourth party (the taxpayer) to cause harm to the plaintiff (the City). . . . We have never before stretched the causal chain of a RICO violation so far, and we decline to do so today. *Hemi Group,* 559 U.S. at 11.

Here, there is nothing so remotely attenuated as the proximate cause theory at issue in *Hemi*. Instead, we have "a defendant who seeks to promote his own interests by telling a known falsehood about the plaintiff or his product." *Bridge,* 553 U.S. at 656 -57. Allen's theory stresses the obligation not to abuse a man's professional reputation as a means to fill coffers through fundraising alarms, an obligation that clearly runs not only to the recipients of Defendants' direct mailings but to the professional men targeted for destruction. This should suffice for proximate cause, whether analyzed under the Supreme Court's quartet, or the cases within the Fourth Circuit – especially on an issue that "generally is an issue of fact for the jury, to be decided as a matter of law only in 'rare or exceptional cases' where 'the evidence is susceptible to only one inference.'" *Muhler Co., Inc. v. Ply Gem Holdings, Inc*., 637 Fed.Appx. 746, 748 (4th Cir. 2016).

Allen has also alleged the following predicate acts perpetrated by the SPLC Defendants in connection with the Dilloway Stolen Documents: violations of 18 USC § 2315 (the Stolen Property

Act), 18 USC § 1952 (the Travel Act), Alabama Code - § 13A-8-16 (Alabama's Receipt of Stolen Property Act), and Alabama Code - § 13A-11-12 (Alabama's Commercial Bribery Act). Defendants argue that because Allen is not the same entity as the National Alliance (from whom the Dilloway Stolen Documents were stolen), Allen cannot possibly link these violations to his own harm via proximate cause. SPLC Memo at 26. Defendants do not discuss any elements of these various crimes; they simply waive them away by conclusorily asserting that there can be no proximate cause between these predicate acts and Allen's harms. But again, Allen need not be harmed by all the predicate acts; he needs only one. *Deppe v. Tripp*, 863 F.2d at 1366. And he need not satisfy a heightened pleading standard to show proximate cause. *Ideal Steel Corp. v. Anza,* 652 F.3d 310, 323-24 (2d Cir. 2011).

A case in point is *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260, 263-64 (4th Cir. 1994). In that case, relying on *Holmes*, the Fourth Circuit vacated an order granting summary judgment because the district court had construed proximate cause too narrowly by placing too much emphasis on the fact that numerous other parties were more directly injured by the defendant's RICO predicate acts. The Fourth Circuit disagreed, for several reasons. First, the court noted that even if the scheme had been initially aimed at defendant's own customers (who were defrauded), Mid Atlantic might be able to show that defendants "broadened the sweep of the intrigue to include Mid Atlantic as a direct target (i.e., to obtain an unfair competitive advantage in recruiting Mid Atlantic customers). Discovery might or might not reveal that the artificially low billings were purposefully devised to lead to harm to Mid Atlantic." *Id.* Second, Mid Atlantic was not seeking to "vindicate the rights of it former customers" (who were now customers of defendant and burdened with fraudulent charges), but was instead claiming "distinct and independent" damages of its own. *Id.* Finally, the Fourth Circuit urged that only after

additional discovery would the court be positioned to evaluate “such factors as the foreseeability of the particular injury, the intervention of other independent causes, and the factual directness of the causal connection." *Id.*

Allen is on stronger footing than the winning plaintiffs in *Mid Atlantic Telecom.* There is no need for discovery to show that the SPLC might have “broadened the sweep” of its several criminal actions to bring harm to Allen. Rather, it is apparent that the reason the SPLC Defendants engaged in such criminal actions in the first place is to search for victims, like Allen, to “wreck and destroy.” *Complaint* at Introduction and ¶¶ 17, 20. And as in *Mid Atlantic Telecom,* Allen “is not seeking to vindicate the rights” of the National Alliance so much his own business rights as a professional attorney. This injury is not derivative of the National Alliance, but centered in Allen. He therefore claims distinct and independent injuries.

The Fourth Circuit outlined three factors for assessing proximate cause in accordance with *Holmes*: 1) foreseeability of the particular injury, 2) the intervention of other independent causes, and 3) the factual directness of the causal connection. *Id.* The first two are in Allen’s camp (“Because of our investigation and expose, he was swiftly fired.” Complaint at ¶ 84. And under the relevant “AGC Factors,” the third – directness of injury– also favors Allen.

The Complaint makes clear that the Dilloway Stolen Documents were covered by an agreement with “extensive confidentiality provisions.” *Complaint* at ¶ 56. Allen has alleged he was a third party beneficiary of these provisions. *Complaint* at ¶ 78. Third-party beneficiary claims based on confidentiality provisions have been recognized by numerous courts. *See, e.g., See Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 214 F. Supp. 3d 808, 832 (N.D. Cal. 2016) (denying motion to dismiss and holding that plaintiff had alleged plausible claim as third-party beneficiary of a confidentiality agreement), *aff’d*, 890 F.3d 828 (9th

Cir. 2018). Such confidentiality provisions permit persons such as Allen to explore taboo topics without the massive recriminations that unfold due to the efforts of organizations such as the SPLC. *Complaint* at Introduction and ¶¶ 17, 20. Thus, the criminal violations that resulted in the SPLC's receipt of the Dilloway Stolen Documents *(Complaint* at ¶¶ *55–70)*, which obliterated the confidentiality restraints on Dilloway, were aimed at and harmed Allen directly.

At this stage of the proceedings, Allen has alleged facts showing he has a plausible claim to proximate cause. This is true whether the angle is foreseeability, the intervention of other independent causes, or the directness of the causal connection. Further, if the pertinent inquiry in determining proximate cause is "whether the conduct has been so significant and important a cause that the defendant should be held responsible," then the conduct of the SPLC Defendants in acquiring the Dilloway Stolen documents through a pattern of several criminal acts bears this weight, too. *See Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 336 (4th Cir. 1996).

VI. ALLEN HAS PROPERLY PLED HIS TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE CLAIM (COUNT IV)

The elements of a tortious interference with prospective advantage claim are: (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting. *Allied Fire Protection, Inc. v. Thai*, 2017 WL 4354802 at * 9-10 (D. Md. October 2, 2017) (citations omitted). The right to be free from interference with prospective advantage applies to a contract terminable at will. *Id*. (citations omitted). Wrongful interference occurs by conduct independently wrongful or unlawful, including common law torts and violation of criminal law.

Id. (citations omitted). It also includes conduct in violation of statutes and regulations. *Restatement (Second) of Torts* Section 767 comment c (1977); *Duggin v. Adams*, 234 Va. 221, 228 (1987).

Allen's allegations satisfy these pleading requirements. He has alleged that the SPLC Defendants (1) intentionally and willfully (2) caused him damage in his lawful business as an attorney by orchestrating his termination from his position as an attorney in the Baltimore City law department, (3) by means of improper methods, including use of stolen documents, bribery of a fiduciary, violations of legal ethics, and violations of IRS regulations, (4) causing the loss of his job and resultant economic harm, and (5) that this interference was done knowingly – "we have been watching Allen like a hawk" – and with malice (because "he had the worst ideas ever").

Defendants assert that Allen's claim fails for several reasons. Defendants' first and second contentions should be considered together: "*First*, Allen offers no explanation as to how the SPLC could have intended in May 2015, when he alleges it received NA documents, to have interfered with an employment relationship he did not enter until January 2016. *Second,* the Complaint alleges that the cause of his firing was the Article in August 2016 . . . not the supposedly improper receipt of news materials in May 2015." SPLC Memo at 28. But these arguments rest on the incorrect premise that Allen's tortious interference claims are predicated on the SPLC Defendants' mere receipt of the Dilloway stolen documents. The Defendants' conduct does not become immunized from a characterization as improper or unethical merely because, after unlawfully, improperly, and unethically obtaining them, they lay in wait for a period of time before using them. In any event, Allen's allegations support a conclusion that the SPLC Defendants did know in May 2015 that they were improperly receiving documents covered by a confidentiality agreement and were thus violating the rights of the class of persons protected by the agreement, including Allen.

The Defendants also make two additional one-sentence arguments against Allen's Count IV claim. They assert that "any harm allegedly arising from publication sounds in defamation." Allen has addressed the fallacy in this argument in Section II of this memorandum, above. Finally, they invoke *Bartnicki.* Allen has addressed the flaws in this argument in Section I.

VII. ALLEN HAS PROPERLY PLED HIS TORTIOUS INTERFERENCE WITH CONTRACT AND AIDING AND ABETTING BREACH OF CONTRACT CLAIMS

The SPLC Defendants address Allen's tortious interference with contract (Count V) and aiding and abetting breach of contract (Count IX) claims together, purporting to dispose of both claims in two paragraphs. Both claims have been properly pled.

Tortious Interference with Contract Claim (Count V). The defendants correctly note in their memorandum that there are six elements to a claim for tortious interference with contract under Maryland law: (1) The existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom. *Interphase Garment Sols, LLC v. Fox TV Stations, Inc*., 566 F. Supp. 2d 460, 465 (D. Md. 2008). Defendants incorrectly assert, however, that Allen has failed properly to allege these elements.

The essence of Allen's allegations in support of his Count V tortious interference claim is as follows. Randolph Dilloway was party to an employment agreement with the National Alliance that contained a confidentiality provision covering the documents Dilloway was reviewing for the National Alliance. *Complaint* at ¶ 56. Allen was a third party beneficiary of that confidentiality agreement. In breach of this confidentiality agreement, Dilloway stole confidential documents and

took them to the SPLC Defendants, who, in breach of their ethical and legal duties and requirements as a 501c3, received these stolen documents knowing they were stolen, paid Dilloway for them, and used them to orchestrate Allen's termination from his employment as a lawyer for the City of Baltimore, thus causing Allen economic harm.

These allegations satisfy all elements for a tortious interference with contract claim. The SPLC Defendants, however, contend that Allen's claim "fails . . because Allen lacks standing. The Complaint fails to allege any facts that would identify the existence of this document or explain how Allen was an intended third-party beneficiary." SPLC Memo at 29. But Allen has certainly described when the document was created, who the parties were, and its general nature. And there is nothing remotely implausible about Allen's allegations that Dilloway was subject to a confidentiality agreement and that Allen was a third party beneficiary of it. Doxxing – the malignant practice of obtaining and using private and confidential information about people to harm them socially, vocationally, and emotionally – has unfortunately been a weapon of choice for many years in the culture wars. See *How 'Doxxing' Became a Mainstay in the Culture Wars*, Nellie Bowles, NY Times, August 30, 2017. As Allen explains in his complaint, the SPLC is a master at it. Moreover, the SPLC over the past few decades has written numerous tabloid-style attack articles specifically about the National Alliance. Consequently, it would have been surprising for Williams *not* to have protected, by means of a confidentiality agreement, third parties who purchased books, attended conferences, sent money to, or otherwise connected themselves with the National Alliance. *See Catalyst Capital Group, Inc. v. Silver Point Capital L.P.*, 2005 WL 1274206 at * 5 (Sup Ct. Conn. May 4, 2005) (upholding third-party beneficiary status for the plaintiff and including quote from another case: "it is hard to see how the plaintiff could not have been an intended [third-party] beneficiary"); *Southridge Capital Management,*

LLC v. Lowry, 188 F. Supp. 2d 388, 397 (S.D.N.Y. 2002) ("Looking at the facts in a light most favorable to [the plaintiff], [the plaintiff] alleges a viable claim to a third party beneficiary status [of a confidentiality agreement]." At a minimum, the SPLC's motion to dismiss should be denied and Allen should be allowed discovery into the factual question of whether he was an intended third-party beneficiary. *See Planned Parenthood Federation of America, Inc.*, 214 F. Supp. 3d at 832 (N.D. Cal. 2016) (denying motion to dismiss and holding that plaintiff had alleged plausible claim as third-party beneficiary of a confidentiality agreement), *aff'd*, 890 F.3d 828 (9th Cir. 2018).

A tortious interference claim based on the defendant's interference with the plaintiff's rights as a third-party beneficiary is recognized in Maryland, as elsewhere. *See, e.g., Baron Financial Corp. v. Natanzon*, 471 F. Supp.2d 535, 540 (D. Md. 2006). Defendants' *Bartnicki* and *Hustler* arguments are flawed for the reasons set forth herein in Argument Sections I and II.

Aiding and Abetting Breach of Contract Claim (Count IX). Allen's aiding and abetting breach of contract claim is based on the same allegations as those supporting his Count V tortious interference claim and is viable for the same reasons. The difference between the two causes of action is that in the aiding and abetting claim there is less emphasis on the defendants' improper acts; assisting the breach is sufficient. Several Maryland courts have stated that "[a]s the breach of a contract is unlawful, it is unlawful for a third person knowingly to aid the maker of a contract in breaking it." *See, e.g., Western Maryland Dairy, Inc. v. Chenowith*, 180 Md. 236, 243 (1942); *Continental Casualty Co. v. Board of Education of Charles County, Maryland,* 302 Md. 516, 534-35 (1985). These cases suggest that Allen's aiding and abetting claim might more artfully have been pled as a conspiracy to breach contract claim, but on the factual allegations in this case the two causes of action are essentially the same.

VIII. ALLEN HAS PROPERLY PLED HIS NEGLIGENT TRAINING AND SUPERVISION CLAIM

As Defendants note, under Maryland law the elements of a negligent training and supervision claim are: (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring, supervising, or retaining employee as the proximate cause of plaintiff's injuries. *Jarvis v. Securitas Sec. Servs*., 2012 WL 527597 at * 5 (D. Md. Feb. 16, 2012). Allen's allegations pass the *Twombly* test as to all of these elements.

The first element is uncontested. As to the second and fourth elements, Allen's allegations describe in detail how both the August 17 Article and Chaos on the Compound articles "address (both explicitly and implicitly), erroneously and without any evidence of supervision by a lawyer, important legal issues, including disclosure of privileged and confidential documents, alleged justifications for breaching a confidentiality agreement, alleged justifications for invasion of privacy, alleged justifications for defamation, and the propriety of a 501c3 organization engaging in one-sided, tabloid-style journalism." *Complaint* at ¶ 176. As to the third element, it should be beyond reasonable dispute that the SPLC, as a law firm and a 501c3 organization, had at least constructive knowledge of the actions of such powerful and prominent nonlawyer officers as Beirich and Potok, especially when the SPLC is subject to an ethical duty to supervise its employees. As to the fifth element, Allen's allegations plausibly support a conclusion that Beirich's and Potok's unethical and unlawful actions in obtaining the Stolen Dilloway Documents and using them to orchestrate Allen's firing directly and proximately caused that firing and his damages. All elements of this claim, accordingly, have been properly pled.

Recent scandals at the SPLC that have included the firing of Morris Dees, the resignations of Rhonda Brownstein (the SPLC's chief legal counsel) and Richard Cohen (the SPLC's President), and damaging admissions by a former staffer, Bob Moser, who described the SPLC as a "highly profitable scam," indicate a longstanding dysfunctional culture within the SPLC and are corroborative of Allen's negligent training and supervision claim. In the event the Court were to dismiss this claim, Allen requests leave to amend to include these new developments.

IX. ALLEN HAS PROPERLY PLED HIS RESTITUTION CLAIM

In *Berry and Gould v. Berry*, 360 Md. 142, 151 (2000), the Maryland Court of Appeals stated the general principle of unjust enrichment / restitution: "A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment." Similarly, the Restatement of Restitution takes as its point of departure the following core principle: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *See Alternatives Unlimited, Inc. V. New Baltimore City Board of School Commissioners,* 155 Md. App. 415 (2004) (discussing Maryland law on restitution).

The phrase "receives a benefit by reason of an infringement of another person's interest" aptly describes exactly what the SPLC Defendants did to Allen. Allen's allegations abundantly support the proposition that the SPLC is motivated in large part if not primarily by fundraising aims and is unscrupulous and masterful at achieving these aims. He has concretely and plausibly alleged that Beirich orchestrated his termination by exploiting her media contacts, sending press releases or similar materials to a dozen or more news media about her August 17 Article. It is elementary common sense that creating a media furor such as Beirich did bolstered the SPLC's renown and added to the donations finding their way into the SPLC's bulging coffers. The

SPLC's actions were achieved by unethically and illegally using stolen documents at Allen's expense, who lost his job as a result. The SPLC defendants' strategy and motivations were fully corroborated by the SPLC's 2017 Hate Map Flyer, in which, using Allen's photograph, it boasted of its prowess in ferreting out "neo-Nazis" who "infiltrated" the government. The SPLC's hate maps, as is well known, are one of its most effective fundraising techniques. Undoubtedly millions if not tens of millions of dollars in donations can be directly linked to the publication of its hate maps. The SPLC thus unscrupulously infringed on Allen's rights and interests to further its own financial interests, and should be required to disgorge its ill-gotten gains. *Cf. Restatement (First) of Restitution* Section 136 (1937) (A person who has tortiously used a trade name, trade secret, franchise, profit a prendre, or other similar interest of another, is under a duty of restitution for the value of the benefit thereby received).

X. ALLEN HAS PROPERLY PLED HIS COUNT VIII DEFAMATION CLAIM

The SPLC Defendants conflate (1) Allen's Count VIII defamation claim, based on the SPLC's Hate Map that was published after Allen had been fired in 2016, and (2) a hypothetical defamation claim based on the August 17, 2016 Article, a defamation claim Allen never brought. Those two claims, however are distinct. The viability of Allen's Count VIII defamation claim does not depend on the viability of a hypothetical defamation claim based on the 2016 Article.

The Hate Map stated the following regarding Allen, right under a photograph of him:

EXPOSING RACISTS WHO INFLITRATE PUBLIC INSTITUTIONS

"Hate group members and followers of their ideologies sometimes manage to obtain important positions of power. When the city of Baltimore recently hired Glen Keith Allen, a neo-Nazi, nobody knew of his involvement with white supremacist groups, except for us. Because of our investigation and expose, he was swiftly fired."

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One way the SPLC Defendants try to combine the Count VIII defamation claim and the hypothetical defamation claim is to assert that the Hate Map "incorporated by reference" the August 17 Article. SPLC Memo at 16. The Hate Map, however, says nothing more than "because of our investigation and expose, he was swiftly fired." It does not identify where or when the expose was published or even if it was published. This can hardly be described as "fully disclosed facts," which the Fourth Circuit has held is required. *Biospherics, Inc. v. Forbes, Inc.,* 151 F.3d 180 (4th Cir. 1998). Moreover, the Hate Map was apparently mailed by U.S. mail to hundreds of thousands of recipients, a significant portion of whom would not have had access to the SPLC's website on which the Article was published. So the Article cannot fairly be described as "readily available," at least to a large population. Accordingly, given that the Hate Map, on undisclosed facts, characterizes Allen as a person in a "position of power" who was "infiltrating" Baltimore City with neo-Nazi ideas, the standard is whether the statements imply false and defamatory facts. *See Restatement (Second)* of *Torts* Section 566. This, as Allen explained in his complaint, they clearly do: "infiltrate" carries the normal meaning of "subvert," as in "infiltration by Communist subversives." Such infiltration violates an attorney's ethical duties. *See Maryland Rules of Prof. Conduct* 8.4 (e) (it is professional misconduct to "knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion [or] national origin"). The Mate Map, accordingly, implies unethical conduct by Allen.

In any event, even assuming the August 17 Article were incorporated by reference into the later Hate Map, the statements in the Hate Map are still defamatory – in fact their defamatory nature is crystallized. In the Article, the SPLC's acknowledges Allen "may well be a skillful attorney." By a process of elimination, the only cause for getting him "swiftly fired" would have been his alleged ethical failings of allegedly infiltrating neo-Nazi ideas into Baltimore City

government. This inference is enhanced by the Article's pronounced focus on the *Burgess* case and inference that Baltimore City government is deliberately targeting innocent African-Americans. The SPLC, however, argues that the Hate Map's statements were mere "loose, figurative, and hyperbolic" language protected as opinion under *Milkovich*. SPLC Memo. at 15-16. Examination of two factors reveals the flaws in this argument: 1) the stature and character of the speaker, and 2) the nature of the words spoken.

The Stature and Character of the Speaker. The Second Circuit has explained that the nature of the source of offending statements substantially affects the credibility of the statements. *See Flamm v Am. Ass'n. of Univ. Women*, 201 F.3d 144, 152 (2nd Cir. 2000). In *Flamm*, a non-profit academic organization's directory of attorney referrals described the plaintiff as an "ambulance chaser" who was interested only in "slam dunk" cases. The attorney sued for defamation and the nonprofit invoked the "loose, figurative" language defense. The Second Circuit rejected this argument, holding that "[e]xaggerated rhetoric may be commonplace in labor disputes, but a reasonable reader would not expect similar hyperbole in a straightforward directory of attorneys and other professionals." Thus, the source of the statements provided a context that precluded dismissal on grounds of hyperbole and opinion. This principle applies with full force to the SPLC's language about Allen in the Hate Map. The SPLC is a law firm, so the general public would assume it well positioned to know if an ideologically crazed attorney was "infiltrating" a municipal law department and abusing his power. It would also assume the SPLC was abiding by its ethical requirements.

Moreover, the SPLC is not simply a law firm but a 501(c)(3) nonprofit purportedly dedicated to an educational mission. It has the imprimatur of the government. And it is a 501c3 that proclaims itself, on its hate maps, its website, its media appearances, and elsewhere, as "the

nation's leading source for reliable analysis of the radical right." *Complaint* at ¶¶ 93 and 124. Given that the SPLC enjoys the mantle of a respectable, government-approved organization, the public will assume that its Hate Map was prepared in conformity with governing laws and regulations. The SPLC's gravitas as a respected law firm with 501(c)(3) status lead a reasonable reader far away from expectations of "loose, figurative, hyperbolic" language.

Even aside from its stature, Defendants cannot retreat behind the shield of "opinion" where they have deliberately omitted known facts to such an extent as to evince Constitutional Malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692-93 (1984). The Defendants' false portrayal of Allen was so distorted, incomplete and one sided that Defendants would lose all protection under *Milkovich*. The Complaint plausibly alleges that the SPLC Defendants knew, among other things, that Allen had undertaken significant *pro bono* work over and above what was requested on behalf of African –Americans (including the defense of a black man who had shot and killed a white man), and had also established a scholarship for American Indians. *Complaint* at ¶¶ 47—48. Neo-Nazis do not do such things, let alone "well known neo-Nazi lawyers." The SPLC Defendants knew this. But portraying the truth about Allen would undercut the message that the SPLC constantly sends in order to fundraise: that vicious race hate "infiltrates" the highest levels. Therefore, rather than accurately portray what the SPLC surely knew about Allen, they deliberately omitted facts that did not fit their narrative. This is tantamount to lying. *Harte-Hanks Communications*, 491 U.S. at 692-93 (1989).

Nature of Words Spoken. No one reading the Hate Map language about Allen "infiltrating public institutions" would mistake it as other than a factual assertion. The key words chosen by Defendants to set the context for their attack on Allen – "investigation" and "exposé" – are those of neutral reportage, not rhetoric and editorializing. Such seeming neutrality is well

received by a public concerned about evil persons abusing positions of power. The words "investigation" and "expose" are not mere "loose, figurative" language. When a prominent 501c3 law firm announces that its "investigation" has revealed that Allen, a person in "a position of power," has infiltrated a city government, the public will receive it as a factual assertion.

The difference between loose figurative language and language purporting to be factual was explored at length by Judge Hollander in *Samuels v. Tschechtelin*, 135 Md. App. 483, 543 (2000). In *Samuels*, the President of a college publically stated of the plaintiff that "after long consideration the Board of Trustees concluded that Dr. Samuels' performance was poor." *Id*. at 543. The plaintiff sued for defamation and the defendant urged the "loose figurative language" defense but Judge Hollander, after reviewing Supreme Court and Maryland precedents, rejected it. *Id*. at 445-50. The statements on the SPLC's Hate Map that after an "investigation" Allen was terminated for "infiltrating" the City government with "neo-Nazi" ideas are just as factual as the statements in *Samuels* that the plaintiff had been terminated for "poor performance," in *Batson v. Shiflett*, 325 Md. 684, 726 (1992) (discussed in *Samuels*) that the plaintiff was trying to steer readers' attention away from the plaintiff's crimes, and in *Flamm* that the plaintiff was an "ambulance chaser." The SPLC's "loose, figurative" language defense, accordingly, fails.

CONCLUSION

Allen requests that the SPLC Defendants' motion to dismiss be denied in its entirety.

Respectfully Submitted,
______ /s __________

Glen K. Allen, Bar No. 06150

______ /s __________

Fred C. Kelly, Admitted pro hac vice

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, I caused a true and correct copy of the foregoing Memorandum in Opposition to the SPLC Defendants' Motion to Dismiss to be served via the court's Electronic Case Filing system on: Chad R. Bowman, Esq. and Elizabeth R. Connell, Esq., counsel for all defendants.

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Glen K Allen, Esq. and Pro Se

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