RECORD NO. 19-2419

In The

United States Court Of Appeals

For The Fourth Circuit

GLEN K. ALLEN,

Plaintiff – Appellant,

v.

HEIDI BEIRICH; MARK POTOK;
THE SOUTHERN POVERTY LAW CENTER, INC.,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT BALTIMORE

OPENING BRIEF OF APPELLANT

Glen K. Allen
GLEN K. ALLEN LAW
502 Edgevale Road
Baltimore, MD 21210
(410) 802-6453

Counsel for Appellant

Frederick C. Kelly, III
LAW OFFICE OF
FREDERICK C. KELLY
One Harriman Square
Monroe, NY 10950
(845) 294-7945

Counsel for Appellant

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ P.O. Box 1460 (23218) ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2419 Caption: Allen v. Beirich, Potok, and Southern Poverty Law Center, Inc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Glen K. Allen
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Glen K Allen Date: 12-26-19

Counsel for: Glen K. Allen

Print to PDF for Filing

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases

Statutes

Constitutional Amendment

Rules

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction under 28 U.S.C. § 1332, 28 U.S.C. § 1331, and 28 U.S.C. § 1367. The District Court issued a memorandum opinion (Joint Appendix 168-85) and final order (J.A. 186) on November 13, 2019, dismissing all of Allen's claims. Allen filed a timely notice of appeal on December 10, 2019. (J.A. 187) This Court has appellate jurisdiction under 12 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred in holding that the Plaintiff / Appellant Allen's Declaratory Judgment claim is precluded by 28 U.S.C. § 2201(a)'s carve out "with respect to federal taxes," even though Allen's action is not concerned with the collection or assessment of taxes?

2. Whether the District Court erred in invoking the First Amendment privilege set forth in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where Allen alleged with particularity that the SPLC Defendants'[1] acquisition of the Dilloway Stolen Documents was unlawful under numerous federal and state laws and in knowing violation of a confidentiality agreement and the legal and ethical regulations to which the SPLC Defendants are subject, Allen plausibly alleged facts showing that

[1] For ease of reference, the three appellees, i.e., The Southern Poverty Law Center, Inc. ("SPLC"), Heidi Beirich, and Mark Potok, will be referred to collectively as the "SPLC Defendants" or as "Appellees." Potok, however, is named in only four of Allen's nine claims.

the SPLC Defendants played a part in the theft of the Dilloway Documents, and the subject matter of the Dilloway Stolen Documents was not a matter of public concern?

3. Whether the District Court erred in holding that, under *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), Allen was required to establish proof of falsity even though none of his tort claims include proof of falsity as a required element; and further erred in holding that the *Cohen v. Cowles Media, Inc.*, 501 U.S. 663 (1991) exception to the *Hustler* doctrine did not apply to Allen's claims, even though he seeks pecuniary damages for the loss of his job.

4. Whether the District Court erred in holding that Allen failed to plead facts showing Constitutional Malice, where the SPLC Defendants deliberately omitted known facts showing Allen's extensive pro bono work for African-Americans and his funding of a scholarship for American Indians?

5. Whether the SPLC Defendants' use of language attacking Allen in his professional capacity as a "neo-Nazi" who "infiltrated" the Baltimore City government could be dismissed as opinion or hyperbole, where it emanated from the SPLC (a law firm) and was couched in the language of neutral reportage?

6. Whether Allen's RICO claims were properly dismissed as lacking sufficient predicate acts even though, under even the most restrictive reading, at least two predicate acts remained along with an open-ended scheme?

7. Whether Allen's other RICO predicate acts involving mail and wire fraud were properly pleaded?

8. Whether the court erred in holding that Allen had failed plausibly to allege he was a third-party beneficiary of the National Alliance / Dilloway confidentiality agreement?

STATEMENT OF THE CASE

The SPLC has long escaped accountability for its unlawful, unethical, and tortious conduct. Allen asks in this appeal no more than that the District Court's error-laden decision dismissing his complaint be objectively examined. If this is done, he will be accorded his day in court, to hold the SPLC Defendants accountable as any other defendants would and should be.

Allen filed his complaint alleging nine claims against the SPLC Defendants on December 8, 2018. (J.A. 5) His complaint described with particularity the theft in May 2015 by one Randolph Dilloway of confidential and privileged documents (the "Dilloway Stolen Documents") from the National Alliance ("NA") in violation of Dilloway's fiduciary obligations and his confidentiality agreement, and the SPLC's and Beirich's participation in and exploitation of that theft. (J.A. 37-55, 90-

109) More specifically, the complaint alleged with particularity: that the SPLC and Beirich paid Dilloway for the stolen documents knowing they were stolen and knowing they were protected by a confidentiality agreement (J.A. 38-44); that the SPLC's and Beirich's actions constituted crimes under Alabama law for receipt of stolen property and bribery of a fiduciary (J.A. 39) and other crimes, including violations of the National Stolen Property Act and the Travel Act (J.A. 76) ; that their actions also violated numerous legal ethical rules and the requirements for 501c3 tax status (J.A. 16-19, 42-44, 69-70); that the SPLC and Beirich in a widely-published August 17, 2017 article used some of the Dilloway Stolen Documents to "doxx" Allen and orchestrate his firing from the Baltimore City Law Department, where he worked as an independent contractor attorney (J.A. 45-57, 110-119); that in a later "Hate Map" the SPLC not only acknowledged it caused Allen's firing but, for fundraising purposes, boasted about it (J.A. 49, 63-65, 120-22); that in this Hate Map the SPLC also falsely stated that Allen had been "infiltrating" the Baltimore City government with "neo-Nazi" ideas, *id*.; that the SPLC had no evidence, because none exists, that Allen ever let politics affect his work for the City or even ever talked politics at the office (J.A. 34-35, 50, 52); and that the SPLC and Beirich admitted they had no evidence Allen was not a competent attorney and admitted they orchestrated his firing purely because of the political views they ascribed to him, i.e., he had "the worst ideas ever." (J.A. 50).

Based on these factual allegations, Allen alleged the following six state law claims: tortious interference with prospective advantage (for the SPLC and Beirich's' destruction of Allen's at-will employment with the City of Baltimore) (J.A. 81); the SPLC's negligent training and supervision of Beirich and Potok (J.A. 83-84); restitution (for the SPLC's unjust enrichment at Allen's expense) (J.A. 84-85); tortious interference with contract (i.e., Dilloway's confidentiality agreement, with Allen as third-party beneficiary) (J.A. 82-83); aiding and abetting breach of contract (Dilloway's confidentiality agreement, with Allen as third-party beneficiary) (J.A. 88-89); and defamation (SPLC Hate Map false statement that Allen was "infiltrating" the Baltimore City government as a "neo-Nazi") (J.A. 85-87).

Allen's complaint also placed his claims alleging harm to himself in the larger context of the SPLC's decades-long fraudulent, unethical, and unlawful conduct toward a myriad of other victims. The complaint describes with particularity: the SPLC's false statements on a tax form, specifically on the SPLC's 2016 Form 990, in which the SPLC falsely claimed it had not participated in partisan political campaign activity when in reality it had opposed Donald Trump and other conservative republican candidates in over a hundred published statements (J.A. 65-66); multiple instances of mail and wire fraud, (J.A. 57-65, 76-79); numerous violations of attorney Rules of Professional Conduct, (J.A. 57-66); and engaging in actions prejudicial to the administration of justice (J.A. 67-68).

Based on the SPLC's conduct in this larger context plus its actions directed against Allen, the complaint alleged two RICO claims (J.A. 74-81) and sought a declaratory judgment that the SPLC had acted in violation of 501c3 requirements (J.A. 68-74).

In March 2019, the SPLC Defendants filed a Rule 12(b)(6) motion to dismiss. (J.A. 4, Docket Entry 9). Defendant Potok also filed a separate motion to dismiss for lack of personal jurisdiction. (J.A. 4, DE 10) After the motions were fully briefed in April 2019, on November 13, 2019 the trial court issued a memorandum opinion and order denying Potok's motion to dismiss for lack of personal jurisdiction but granting the SPLC Defendants' 12(b)(6) motion and dismissing Allen's complaint in its entirety, with prejudice and no opportunity to amend or for discovery. (J.A. 4, DE 24, 25; J.A. 168-86).

Allen timely filed a notice of appeal on December 10, 2019. (J.A. 187)

SUMMARY OF ARGUMENT

1. The District Court incorrectly held that Allen's Declaratory Judgment claim is precluded by 28 U.S.C. § 2201(a)'s carve out "with respect to federal taxes." The SPLC's power arises in large part from its status as a 501c3 nonprofit. 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. On these facts, Allen seeks a declaration that the

SPLC has acted in violation of the requirements for a 501c3. Such a declaration would dissuade the SPLC from attacking Allen again using the Stolen Dilloway Documents. Allen does not seek any determination as to the SPLC's tax liability.

McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972) supports the conclusion that Allen's claim is not barred. There, the court held that the "with respect to federal taxes" exception was coterminous with Section 7421(a) of the Tax Injunction Act, whose purpose is to assure proper assessment and collection of taxes. The court concluded 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." *Id.* at 452-53 (footnotes omitted). Allen's declaratory judgment action is also not directed to the collection or assessment of taxes. In several cases plaintiffs have successfully obtained rulings from courts regarding a third party's misuse of its 501c3 status. S*ee, e.g.*, *Zimmerman v. Cambridge Credit Counseling,* 409 F.3d 473, 477 (1st Cir. 2005).

2. For three reasons**,** the District Court erred in applying the *Bartnicki* First Amendment privilege to Allen's claims. First, while it may be true as the lower court asserted that a third party's mere knowledge that documents had been stolen is not enough to defeat the privilege, the SPLC's and Beirich's conduct involved much more than mere knowledge. It involved multi-layered affirmative unlawful and unethical conduct: paying Dilloway to breach his confidentiality agreement and his

fiduciary duties, which constitute the crimes of receipt of stolen property and bribery of a fiduciary under Alabama law; violating the SPLC Defendants' ethical duties as a law firm and law firm employees; and violating the IRS requirements for a 501c3. Denying the *Bartnicki* privilege on these facts is consistent with *Bartnicki* itself and many other cases, *e.g., Council on American-Islamic Relations Action Network v. Gaubatz,* 793 F.Supp. 2d 311, 331-32 (D.D.C. 2011).

Second, the *Bartnicki* decision adopted a balancing test that assigns weight to the competing fundamental interests involved. On one side of the scales, the opinion gives weight to the public's right to truthful information, lawfully acquired by the defendants, on an issue of public concern. 532 U.S. at 517-18, 535-36. On the other side, the opinion gives weight to individual privacy and fostering private speech. *Id.* at 518, 533, 538-40. Balancing these interests, the opinion concludes 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.

In this case, the balancing test weighs decisively against the *Bartnicki* privilege for two important reasons. The first is that, in this case, the SPLC Defendants *unlawfully* acquired the information at issue. The second concerns the nature of the privacy interests at stake. A primary component of the SPLC Defendants' disclosures of the Dilloway Stolen documents consists of documents linking Allen to membership in the NA. The Supreme Court and lower federal

courts, however, have been solicitous to protect the privacy of membership information for unpopular organizations, because they have recognized the profound effect public disclosure of such information has on the fundamental right to freedom of association, *e.g., Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87, 95-101 (1982). Hence, the privacy interests at issue here merit greater weight than those weighed in the balance in *Bartnicki*. This, plus the removal of the lawfulness factor from the pro-privilege side of scales tilts the balance decidedly against a *Bartnicki* privilege for the SPLC Defendants.

Third, Allen contests that the Dilloway Stolen Documents exploited by the SPLC Defendants to orchestrate Allen's firing were legitimately matters of public concern. As noted, First Amendment doctrine protects the privacy of membership information of unpopular groups. It would be antithetical to this established doctrine to nonetheless deem such information matters of public concern, especially when the information was stolen and the publicizing party had acquired the information unlawfully. Moreover, even assuming that the membership information was a matter of public concern, it does not follow that *all* the information the SPLC used against Allen from the Dilloway Stolen Documents was a matter of public concern. *See,* e.*g., Toffolini v. LFP Publishing, LLC*, 572 F.3d 1201, 1212 (11th Cir. 2009).

3. The District Court erred in interpreting *Hustler* and *Food Lion* to require proof of falsity for Allen's claims for tortious interference, negligent supervision, and

restitution because his "allegations are based on statements by the defendants about Allen." Numerous types of claims that in some sense are "based on" publications do not require proof of falsity under the *Hustler / Food Lion* doctrine. These are the types of cases in which the publication involved in the claim, though truthful, is illegal or tortious because it violates a statute, e.g., the Wiretap Act, or a nondisclosure or confidentiality agreement, as in this case. Many cases illustrate this point, including *Bartnicki* itself, *Cohen v. Cowles Media*, and *Gaubatz*, 793 F. Supp.2d at 331-32.

Even assuming the *Hustler / Food* Lion doctrine applies to Allen's tort claims, under *Cohen v. Cowles Media* and many subsequent cases the need for Constitutional Malice does not apply insofar as Allen seeks occupational or pecuniary damages, which he does. His complaint consistently identifies the termination from his position at the Baltimore City law department, which the SPLC Defendants engineered, as a separate component of his damages. He does not seek only reputational damages.

Finally, analysis in this case counsels against dilating *Hustler* and *Food Lion* to embrace 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. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501

U.S. 1030, 1073 (1991). 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 defense works at cross purposes to ensuring the SPLC's compliance with these rules and requirements.

4. The District Court erred in dismissing Allen's defamation claim as unverifiable opinion. The defamatory sting on the SPLC's Hate Map falsely accused Allen of racism in the workplace. Alleged racism or discrimination in the workplace "is a mundane issue of fact, litigated every day in federal court." *Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000). The SPLC Defendants knew their statements were false, which is why, demonstrating Constitutional Malice, they deliberately omitted relevant evidence of Allen's pro bono work for black Americans and his scholarship aid to American Indians. Moreover, the accusation that Allen was a "neo-Nazi" who had "infiltrated" the Baltimore City government cannot under any plausible reading – let alone a reading favoring Allen -- be construed as mere hyperbole when the accusation employs terms of neutral reportage, such as "investigation," and is leveled by a widely-respected 501c3 public interest law firm – the SPLC -- that trumpets itself as "the nation's leading source for reliable analysis of the radical right." *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 152 (2d Cir. 2000).

5. The District Court erred in dismissing Allen's RICO claims. The *Twombly* standard fully applies to RICO claims and Allen's detailed complaint raises his right to relief well above the speculative level. At a bare minimum it alleges an open-ended scheme and two predicate acts in 1) the SPLC Defendants' false statements on the SPLC's 2016 Form 990 and 2) their numerous criminal deeds centered on the Dilloway Stolen Documents.

6. The trial court erred in holding that Allen failed plausibly to allege he was a third-party beneficiary of the NA / Dilloway confidentiality agreement. 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). Allen described when the confidentiality agreement was created, who the parties were, and its general nature. Doxxing – the malignant practice of obtaining and using private and confidential information about people to harm them socially, vocationally, and emotionally – has been a well-known weapon used by the SPLC for many years in the culture wars. Consequently, it would have been surprising for the NA *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 it. *See Catalyst Capital Group, Inc. v. Silver Point Capital L.P.*, 2005 WL 1274206 at * 5 (Sup Ct. Conn. May 4, 2005). At a minimum, Allen should have been 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), *aff'd*, 735 Fed. Appx. 241 (9th Cir. 2018).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the District Court's dismissal of a plaintiff's complaint *de novo*, accepting as true all of the factual allegations in the complaint and drawing all inferences in favor of the plaintiff. *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015). While the complaint must contain sufficient facts to state a claim plausible on its face, it nevertheless need only give the defendant fair notice of what the claims are and the grounds on which they rest. *Id*. Further, pleading standards require that the complaint be construed liberally in favor of the plaintiff. *Id*. To survive a motion to dismiss, a plaintiff need not demonstrate that his right to relief is probable or that alternative explanations are less likely. *Houck v. Substitute Trustee Services, Inc.,* 791 F.3d 473, 484 (4th Cir. 2015).

II. ALLEN'S DECLARATORY JUDGMENT CLAIM DOES NOT INVOLVE STATUTORILY FORECLOSED FEDERAL TAXES

The trial court incorrectly held that Allen's Count I Declaratory Judgment claim is precluded by 28 U.S.C. § 2201(a)'s carve out "with respect to federal taxes." 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 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.

Accordingly, the trial court's holding that Allen's declaratory judgment claim is barred by the "except with respect to federal taxes" phrase in Section 2201(a) is groundless. *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972) supports 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 contended (apparently) that 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. Rather, 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. In many contexts these two equitable remedies are functional equivalents. *See, e.g., Goldstein v. F.D.I.C.*, 2012 WL 1819284 at *12 (D. Md. May 16, 2012). If necessary, Allen should have been given an opportunity to amend his complaint to modify his declaratory judgment count to make it a count seeking an injunction. In any event, there are several cases in which plaintiffs have successfully obtained rulings from courts regarding a third party's misuse of its 501c3 status. S*ee, e.g., Zimmerman v. Cambridge Credit Counseling,* 409 F.3d 473, 477 (1st Cir. 2005) ("(I]t is already common for courts and administrative agencies to examine whether an entity actually operates as 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'"); *Fulani v. League of Women Voters,* 882 F.2d 621, 627-28 (2d Cir. 1989).

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

An important issue in this case is the application, if any, to Allen's factual allegations of the First Amendment privilege set forth by the Supreme Court in *Bartnicki v. Vopper*. The District Court held that the privilege applied, for three reasons. As discussed below, none of these reasons, or any others, support application of the *Bartnicki* privilege.

A. The Facts and Holding in *Bartnicki*

In *Bartnicki*, an unidentified person illegally 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 acrimonious negotiations between the union and the local school board. The conversation included an apparent threat by Kane to "blow off the front porches" of members of the school board. 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 he found the tape in his mailbox from an unidentified source. Yokum was added as a defendant.

The defendants raised a First Amendment defense, which the trial court rejected. The Third Circuit reversed and the Supreme Court accepted review, expressing the issue 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. The Court emphasized it was making three important factual assumptions:

> First, respondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. . . . Third, the subject matter of the conversation was a matter of public concern.

Id. at 525. Against this backdrop, the Court, in a majority opinion by Justice Stevens with a concurrence by Justice Breyer, 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 emphasis in both the majority opinion and the concurrence that the persons who made the disclosures "played no part in the illegal interception" and "obtained [the information] lawfully"

logically implies that the First Amendment privilege at issue does *not* apply to persons who played a role in the illegal interception or obtained the information unlawfully. The correctness of this implication is confirmed by Footnote 19 of the opinion:

> Our holding, of course, does not apply to punishing parties for obtaining the relevant information unlawfully. "It would be frivolous to assert—and no one does in these cases—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." *Branzburg v. Hayes*, 408 U.S. 665, 691 . . . (1972).

B. Subsequent Cases Interpreting *Bartnicki*

Allen's research has uncovered no case in the Fourth Circuit that has interpreted *Bartnicki*.[2] *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.

[2] In *Washington Post v. McManus*, 944 F.3d 506, 522 (4th Cir. 2019), this Court cited *Bartnicki* in support of its conclusion that a Maryland statute fails First Amendment exacting scrutiny, but did not address the *Bartnicki* First Amendment privilege.

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's rejection of the *Bartnicki* privilege. 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); . . .

441 F.3d at 1016-17 (footnotes omitted); *accord Quigley v. Rosenthal*, 327 F.3d 1044, 1067 (10th Cir. 2003) (listing as a factor weighing against application of the *Bartnicki* privilege that the defendant knew the identity of the persons responsible for improperly recording the plaintiffs' conversations). The District of Columbia Circuit Court granted a hearing *en banc* (484 F.3d 573) 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.

C. Application to Facts Alleged in Allen's Complaint

1. The SPLC Defendants Engaged in Unlawful Conduct that, under *Bartnicki* and other Cases, Preclude the *Bartnicki* Privilege. 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 invoking it participated in the unlawful acquisition of the 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 (J.A. 37-45), abundantly support a plausible conclusion that these minimal criteria were fully satisfied in this case.

But Allen's allegations support far more than these minimal criteria. They further plausibly support conclusions that:

- Not only did the SPLC Defendants know the Dilloway documents were stolen and by whom but knew Dilloway was subject to a confidentiality agreement as to those documents. (J.A. 37-45).
- The SPLC and Beirich obtained the stolen documents and induced Dilloway to break his confidentiality agreement by paying him; their unlawful actions constituted the crimes of receipt of stolen property and bribery of a fiduciary. (J.A. 37-45, especially 39).
- As the SPLC is a law firm and Beirich and Potok were its employees, the SPLC Defendants' actions violated numerous Alabama Rules of

Professional Conduct, including 4.1, 4.4, 5.3, and 8.4. (J.A. 16-18, 40-44, 69-70).[3]

- The SPLC Defendants' conduct violated 501(c)(3) requirements for the public interest law firm the SPLC purports to be. (J.A. 16-18, 50-51, 69-70).[4]
- Beirich unethically and incorrectly advised Dilloway that he was free to disregard his confidentiality agreement. (J.A. 40-45).

These factual allegations abundantly support a conclusion that the SPLC Defendants, to use language from *Bartnicki*, "obtain[ed] the relevant information unlawfully" and accordingly cannot invoke the *Bartnicki* privilege. See *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).

---

[3] The trial court stated that "It is not clear if Beirich or Potok were trained as lawyers, but neither is currently a member of the bar." (J.A. 180 n.12). The import of this statement is unclear, but if it implies that even though the SPLC is a law firm and Beirich and Potok are its employees, their actions are not subject to attorney rules of professional conduct, this is plainly incorrect. *See* Alabama Rules of Professional Conduct 5.3; Alabama Ethics Opinion #2008-01 ("Rule 5.3 . . . makes an attorney responsible for the conduct of any non-lawyer employee to the same extent as if the attorney engaged in the conduct himself or herself . . . the lawyer employing the nonlawyer employee . . . must also be careful to avoid assisting the nonlawyer in the performance of activities that constitute the unauthorized practice of law.")

[4] *See also* Revenue Procedure 92-59 (1992), 1992 WL 509835, at Section 3.03 (prohibiting illegal activity and violations of applicable canons of ethics).

The District Court ran aground here. The court stated that "[w]ithout deciding whether the defendants violated the [criminal] laws identified by Allen, the court holds that the defendants' publications are protected by *Bartnicki*." (J.A. 179-80 n. 11). But *Bartnicki's* application cannot be determined without addressing the SPLC Defendant's criminal acts regarding the Dilloway Stolen Documents. Allen pleaded the SPLC Defendants' violation of multiple criminal laws plausibly and with particularity, identifying what laws were violated, when, how, and by whom. (J.A. 37-40). The court's statement rests on the incorrect premise that a third party's unlawful or illegal conduct in acquiring stolen documents is irrelevant to the *Bartnicki* analysis. As discussed above, such a view cannot be reconciled with *Bartnicki* itself or numerous cases interpreting it, including *Gaubatz* and all of the *Boehner v. McDermott* cases.

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 are subject to legal ethical rules that preclude immediate disclosure of confidential and privileged documents that fall into their hands, and 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. 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* who identified the plaintiff in violation of a confidentiality agreement, the newspapers in *Seattle Times Co. v. Rhinehart* who were subject to a court's protective order, and other parties in analogous circumstances.[5]

The two cases the trial court relied on in upholding the *Bartnicki* privilege -- *i.e., Jean v. Massachusetts Police, et al.*, 492 F.3d 24 (1st Cir. 2007) and *Democratic National Committee v. The Russian Federation*, 392 F. Supp. 3d 410 (S.D. N. Y. 2019) – do not alter this conclusion. *Jean* involved not a single one of Allen's factual allegations enumerated above: no confidentiality agreement, no bribery, no violation of legal ethical rules or 501c3 requirements, no improper legal advice to the person who had stolen the documents. *Jean* involved the accidental recording by a motion-activated camera of the warrantless search by eight armed state police of a man's home. The facts in *Jean* fit Justice Breyer's description of the facts in *Bartnicki*: "the speakers' legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high." *Bartnicki*, 532 U.S at 540. In the present case, it is the opposite.

Moreover, the First Circuit's apparent suggestion in *Jean* that the lawfulness of a defendant's acquisition of illegally obtained information is irrelevant if the

[5] *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).

defendant played no role in the illegal interception itself is directly contrary to *Bartnicki*. If this suggestion were the rule there would have been no need for the majority opinion or concurrence in *Bartnicki*, as the defendants in that case played no role in the illegal interception at issue.

As to the *Russian Federation* case, that court stated explicitly that the plaintiff's allegations showed no more than that Wikipedia had "solicited" the stolen information. 392 F.3d at 434-35. The SPLC Defendants did much more in this case than merely "solicit" the Dilloway Stolen Documents.

The trial court also cited *Russian Federation* for the proposition that holding a third party liable for its unlawful acquisition of illegally obtained documents on a co-conspirator theory would "eviscerate" *Bartnicki.* (J.A. 179-80 n.11). Allen did not allege a co-conspiracy theory but rather alleged with particularity the SPLC Defendants' willful violations of a confidentiality agreement and specific Alabama criminal statutes. More generally, if the *Russian Federation* case were interpreted to hold that no conduct by a third party, however egregiously unlawful, in acquiring illegally obtained information is actionable, it is this broad license to commit tortious and criminal acts that would eviscerate *Bartnicki*.

What has been said above reveals the flaws in the first and third rationales stated by the trial court (J.A. 179) for upholding the *Bartnicki* privilege. Equally flawed is the court's second rationale*:* "Allen does not plausibly allege that the

defendants participated in Dilloway's taking of the documents as the complaint does not allege that Dilloway first made contact with SPLC until May 6, 2015, three days after he purportedly stole the documents." (J.A. 179) The apparent import of this confusing sentence is that Allen, the trial court appears to state, foreclosed the possibility that the SPLC Defendants and Dilloway had contact before May 3, 2015 (when Dilloway left the NA property with the Dilloway Stolen Documents), by, according to the court, alleging that the SPLC Defendants and Dilloway first made contact on May 6, 2015. But this is a clear misconstruction of Allen's allegations. Allen never conceded that the SPLC Defendants and Dilloway had no interactions on or before May 3, 2015; his allegations state no more than that Beirich *acknowledged* receiving the stolen documents on May 6, 2015. (J.A. 38-39) His allegations are entirely consistent with the likelihood that Dilloway and the SPLC Defendants communicated and cooperated on or before May 3, 2015 with regard to Dilloway's theft. They repeatedly and with particularity describe the SPLC Defendants' practice of using fraud and distortion to advance their ideological and fundraising purposes. They show the SPLC Defendants' motives to communicate and cooperate with Dilloway; Dilloway's vulnerability, given his impoverished condition; and that within only a few days Dilloway's stolen documents found their way from West Virginia to, apparently, the SPLC's headquarters in Alabama.

The pleading obstacle confronting Allen is that he is not privy to the secret communications between Dilloway and the SPLC Defendants. Only through discovery can he learn of these communications. This would be basic, elementary discovery at the core of his claims, consistent with time-honored practice. *See, e.g., Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 324-25 (2d Cir. 2011). The trial court, however, immediately dismissed his complaint with prejudice, with no leave to amend and no possibility of discovery.

It is perhaps possible to construe Allen's allegations such that Dilloway and the SPLC Defendants had no contact prior to May 3, 2015. But this is not the only plausible construction (and in fact is the less plausible one). The trial court, accordingly, erred under basic *Twombly* pleading standards in choosing an interpretation unfavorable to Allen when other plausible interpretations favorable to Allen also are present. This Court has held repeatedly that pro-defendant favoritism at the motion to dismiss stage is impermissible. *See, e.g., Houck v. Substitute Trustee Services, Inc.*, 791 F.3d 473, 484 (4th Cir. 2015) (trial court "incorrectly undertook to determine whether a lawful alternative explanation appeared more likely. To survive a motion to dismiss, a plaintiff need not demonstrate that her right to relief is probably or that alternative explanations are less likely; rather she must merely advance her claim 'across the line from conceivable to plausible'"); (*Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015) (complaint should be read liberally so

as to do substantial justice and in favor of plaintiff; dismissals are especially disfavored where complaint sets forth a novel legal theory that can best be assessed after factual development).

2. The Balancing Test Prescribed by the Supreme Court in *Bartnicki* Weighs Decisively Against According the *Bartnicki* Privilege to the SPLC Defendants in this Case. The *Bartnicki* opinions – both Justice Stevens' majority opinion and Justice Breyer's concurrence – do not state a bright line rule. Instead, they adopt a balancing test that assigns weight to the competing fundamental interests involved under the circumstances presented. On the pro-privilege side of the scales, the opinions give weight to (a) the public's right to truthful information, (b) that was lawfully acquired by the defendants, (c) on an issue of public concern. *Id*. at 517-18, 535-36. On the contra-privilege side of the scales, the opinions give weight to individual privacy and fostering private speech, noting that "the fear of public disclosure of private conversations might well have a chilling effect on private speech." *Id.* at 518, 533, 538-40. Balancing these interests, the majority opinion concludes 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.

In this case, the balancing test weighs decisively against the *Bartnicki* privilege for two important reasons. The first is that, in this case, the SPLC Defendants *unlawfully* acquired the information at issue. This factor, accordingly,

must move from the pro-privilege side of the scales to the contra-privilege side; otherwise, the privilege will have the effect of encouraging unlawful behavior. The second reason concerns the nature of the privacy interests at stake. A primary component of the SPLC Defendants' disclosures of Stolen Dilloway documents consists of documents linking Allen to membership in the NA. While to its scant few votaries the NA is an advocacy group for persons of white European ancestry, many more view it as an extremist group rightfully subject to doxxing, public shaming, and other techniques directed to destroying its members' vocations and personal relationships.

The Supreme Court and lower federal courts, however, have been solicitous to protect the privacy of membership information for unpopular organizations, because they have recognized the profound effect public disclosure of such information has on the fundamental right to freedom of association. The Supreme Court's decision in *NAACP v. Patterson*, 357 U.S. 449 (1957), in which the Court refused to permit the compelled disclosure of the membership lists of the NAACP, is a seminal case. There the Court stated (at page 462):

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

The Supreme Court's stalwart defense of the rights to privacy and freedom of association of supporters of dissident beliefs has continued in subsequent cases, both in that Court and in the lower federal courts, *e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) ("[F]reedom of expressive association protects more than just a group's membership decisions. For example, we have held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87 (1982), or impose penalties or withhold benefits based on membership in a disfavored group, *Healy v. James*, 408 U.S. 169, 180–184 (1972)") (alternative Supreme Court cites omitted); *Brown v. Socialist Workers' 74 Campaign* Committee, 459 U.S. at 95-101; *Black Panther Party v. Smith*, 661 F.2d 1243, 1265, 1268 (D.C. Cir. 1981), *vacated on mootness grounds*, 458 U.S. 1118 (1982) ("Privacy is particularly important where the group's cause is unpopular; once the participants lose their anonymity, intimidation and suppression may follow."); *International Action Center v. U.S.*, 207 F.R.D. 1, 3 (D.D.C. 2002) (First Amendment speech and association rights of political action groups precluded government from obtaining through discovery names and addresses of persons who attended protests during presidential inauguration parade); *Sexual Minorities of Uganda v. Lively*, 2015 WL 4750931 at * 3 (D. Mass. Aug. 10, 2015) (applying principles from *NAACP v. Patterson* to discovery dispute); *In re GlaxoSmithKline plc*, 732 N.W. 2d 257, 267-70 (Minn. 2007) (summarizing case law).

In summary, the privacy interests at issue here merit greater weight than those weighed in the balance in *Bartnicki*. This, plus the removal of the lawfulness factor from the pro-privilege side of scales, tilts the balance decidedly against a *Bartnicki* privilege for the SPLC Defendants.

3. The Dilloway Stolen Documents Used by the SPLC Defendants to Orchestrate Allen's Firing Did Not Address Matters of Public Concern. The trial court stated that the parties appeared to agree that the Dilloway Stolen Documents used by the SPLC Defendants were matters of public concern. (J.A. 175 n.6). Allen, however, contests that the documents were legitimately matters of public concern. As noted, First Amendment doctrine robustly protects the privacy of membership information of unpopular groups. It would be antithetical to this well-established doctrine to deem such information matters of public concern, especially when the information was stolen and an organization acquired the information unlawfully. Moreover, even assuming for sake of argument that the membership information was a matter of public concern, it does not follow that all the information the SPLC used against Allen from the Stolen Dilloway documents was a matter of public concern. *See, e.g., Toffolini v. LFP Publishing*, LLC, 572 F.3d 1201, 1212 (11th Cir. 2009) (to properly balance freedom of the press against the right of privacy, every private fact in an otherwise newsworthy publication must have substantial relevance to a matter of legitimate public interest).

As an independent contractor attorney, Allen occupied the lowest rung in the Baltimore City Law Department hierarchy. If the SPLC is not to be given a limitless license to invade every detail of the private lives of its targets, it must be restrained at some point. In this regard, it should not, in light of our culture's respect for nonconformist beliefs, be deemed a matter of legitimate public interest what DVDs Allen may or may not have purchased nor, in light of attorney client privilege and the rule of law, that in 1987 he was cc'd on a confidential and privileged letter in which William Pierce complained, rightly, that the local sheriff was flying his helicopter over Pierce's land. The trial court on a remand should be instructed to more carefully address these issues.

IV. ALLEN'S COMPLAINT PLEADED VIABLE CLAIMS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ADVANTAGE, NEGLIGENT SUPERVISION, AND RESTITUTION IN ACCORDANCE WITH THE *HUSTLER / FOOD LION* DOCTRINE

The trial court committed fundamental errors with regard to the four claims in Allen's complaint that the court grouped together as his "tort claims," i.e., Count IV (tortious interference), Count VI (negligent training and supervision), Count VII (restitution), and Count VIII (defamation).[6] This error consisted in holding that all four claims have proof of falsity as a required element, when in fact this is true only

[6] Allen actually alleges five tort claims (assuming his restitution / unjust enrichment claim is characterized as a tort claim), as his Count v. claim for tortious interference is also a tort claim.

of the Count VIII defamation claim. (This and other elements of this Count VIII defamation claim are addressed separately below in Section IV).

A. Allen Was Not Required to Allege and Prove Falsity as to His Tortious Interference, Negligent Supervision, and Restitution Claims

Proof of falsity is not a required element of claims for tortious interference, negligent supervision, or restitution. The trial court nonetheless held that Allen was required to prove falsity as to these claims because his "allegations are based on statements by the defendants about Allen." (J.A. 175). The court reasoned that *Hustler* and *Food Lion* required this result. But neither *Hustler* nor *Food Lion* nor any other authority requires proof of falsity in every tort claim that is "based on" statements or publications.

There are in fact numerous types of claims, including tort claims, that in some sense are "based on" publications but nonetheless do not require proof of falsity under the *Hustler / Food Lion* doctrine. These are the types of cases in which the publication involved in the claim, though truthful, is illegal or tortious because it violates a statute, e.g., the Wiretap Act, or a nondisclosure or confidentiality agreement, as in this case, or constitutes an invasion of privacy. The gravamen of such claims is not that the publication at issue states falsehoods but that it should never have been published at all. Many cases illustrate this point. In *Bartnicki*, which involved a claim under the federal Wiretap Act, there is no suggestion that

proof of falsity was a required element of plaintiffs' claim; nor is there in *Cohen*, which, like this case, involved the breach of a confidentiality agreement; nor in other relevant cases, *e.g., Democracy Partners v. Project Veritas Action Fund*, 285 F.Supp. 3d 109, 125-26 (D.D.C. 2018); *Gaubatz*, 793 F. Supp. 2d at 331-32.

Requiring proof of falsity for non-defamation claims that do not put at issue the truth of the publication involved is illogical and unfair, for it would negate the possibility of recovering on such claims. The rationale of the *Hustler / Food Lion* doctrine does not require this. In the circumstances of this case, for example, requiring proof of falsity would mean that the SPLC could obtain confidential information by theft, violation of the Wire Tap Act, or breach of a confidentiality agreement but would nonetheless be immune from any claim so long as it accurately published the information that it illegally obtained. This is a legally, logically, and ethically indefensible position.

B. Allen Has Alleged Occupational or Pecuniary as Well as Reputational Damages

For the reasons above, the *Hustler / Food Lion* doctrine should not apply at all to Allen's tortious interference, negligent supervision, and restitution claims. Even assuming the doctrine did apply, however, it nonetheless does not apply insofar as Allen seeks occupational or pecuniary damages, which he does. His complaint consistently identifies the termination from his position at the Baltimore City law department, which the SPLC Defendants engineered, as a separate component of his

damages. He separately describes this termination in Paragraphs 95-98 of his complaint, and in pleading his claims repeatedly 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" or similar language. (J.A. 56 ¶¶ 97-98; 79-80 ¶ 155; 80-81 ¶ 159; 81 ¶164; 82 ¶171; 84 ¶ 178; 85 ¶ 181; 88 ¶ 198). He does not seek only reputational damages.

A robust line of cases originating with *Cohen v. Cowles Media* holds that a plaintiff's non-defamation claim for occupational / pecuniary damages, as opposed to reputational damages, is not subject to the *Hustler / Food Lion* doctrine. In *Cohen*, reporters breached their promise that Cohen would not be identified as a source and identified him in their articles. After he was publicly identified in the resulting news articles, he was fired by his employer. The Supreme Court held that "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," 501 U.S. at 671, and accordingly held that his claim for damages (loss of his job and loss of future employment opportunities) was not barred by the First Amendment. That was so even though Cohen's immediate injury was most directly caused by a third party (his employer) in response to the publication of his name as a source.

Cohen was cited with approval and followed 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). Numerous other cases have upheld and applied this distinction between reputational and occupational or pecuniary damages. *See, e.g., Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 129 (1st Cir. 2000); *Planned Parenthood Federation,* 214 F. Supp. 3d at 840-41 ("the First Amendment does not impose heightened standards on plaintiff's tort claims as long as the plaintiffs *do not seek* reputational damages (lost profits, lost vendors) stemming from the publication conduct of defendants . . . discovery will shed light on the nature of the damages for which plaintiffs seek recovery") (emphasis in original); *Steele v. Isikoff*, 130 F.Supp. 2d 23, 29 (D.D.C. 2000) ("Viewed in tandem, *Hustler* and *Cohen* divide claims against the news media by categorizing the damages sought. If a party seeks damages for harm to reputation or state of mind, the suit can only proceed if that party meets the constitutional requirements of a defamation claim. If a party seeks damages for non-reputational harms, which include lost jobs and diminished employment prospects, then the First Amendment does not bar suit as long as the claims are brought under generally applicable laws."); *Democracy Partners*, 285 F. Supp. 3d at 125-26. Accordingly, even assuming the SPLC Defendants could properly invoke the *Food Lion* First

Amendment defense, they could do so only as to Allen's claim for damage to his reputation and not for the distinct and separate actual pecuniary loss he suffered because he lost his job.

The trial court sought to escape *Cohen* and its progeny by asserting that *Cohen* is distinguishable because it involved an agreement directly between the plaintiff and defendant. (J.A. 175-76). But *Cohen*'s holding is not limited to agreements of a particularly type or even to agreements generally; it applies to all generally applicable claims, which Allen's tort claim are. Moreover, as noted, subsequent cases, *e.g.*, *Steele v. Isikoff*, interpret *Cohen* as focusing on the nature of the plaintiff's damages. The trial court also asserted that Allen's claim for loss of his job is like a claim for "lost sales." (J.A. 176 n.). Allen is not seeking "lost sales." He seeks pecuniary damages for the loss of his job – his occupation – which the SPLC Defendants not only caused but boasted about causing in their Hate Map.

C. 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 they seek.

Lawyers are subject to greater restrictions on their First Amendment rights than nonlawyers. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1073 (1991). 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 *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984) 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. *Id* at 35-36.

As the *Bartnicki* case and many others illustrate, First Amendment analysis involves a balancing process. The SPLC Defendants' arguments based on *Hustler* and *Food Lion* pit Allen's right to privacy and confidentiality – a right Justice Brandeis described 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" – against the SPLC Defendants' right to ferret out information on what they regard as issues of public concern, although Allen would characterize them as all too frequently issues of fundraising appeal.

In the circumstances of this case, a factor weighing heavily in the balance arises from the fact that, 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. The logic of the SPLC Defendants' *Hustler / Food Lion* argument is that they should be given First Amendment immunity from the consequences of violating these rules and requirements insofar as the harms they inflict can be characterized as reputational damage, even though causing reputational damage is one of the SPLC Defendants' chief techniques for achieving their goals of fundraising and destroying their political enemies. Permitting the SPLC Defendants to invoke the *Hustler* and *Food Lion* First Amendment defense thus works at cross purposes to ensuring their compliance with ethical and IRS rules.

V. THE DISTRICT COURT ERRED IN DISMISSING ALLEN'S DEFAMATION CLAIM

The District Court held that Allen could not recover on his Count VIII claim for defamation under the First Amendment for two reasons: 1) he had not alleged that the factual statements in the SPLC publications were false; and 2) the statements he objected to were non-actionable opinion or hyperbole. (J.A. 176-78). These are both errors.

The defamation here did not rest on whether or not Allen was or is a "neo-Nazi" or a "racist" (charges which he denies, but which are irrelevant to this litigation). Rather, the defamation was squarely centered on Allen's vocation; hence the Complaint at ¶¶

187—88: "The SPLC smear… essentially accuses Allen of professional ethical violations and incompetence.. Accusing Allen of being an unethical and / or incompetent attorney is defamatory per se…" (J.A. 86-87). Again and again, Allen's Complaint made clear he was objecting to the false implication that he had behaved unethically in his capacity as an attorney for the City of Baltimore, as when the SPLC falsely implied there was something untoward about Allen's conduct in litigation concerning a black man named Burgess, especially because Allen had filed a routine motion.

Thus, the falsity was not whether or not Allen had (decades ago) contributed to the NA or committed thought crimes by attending a Holocaust Revisionist Conference. Rather, the defamatory sting here was that Allen was a "neo-Nazi" who had "infiltrated" the City of Baltimore's Law Department and, through surreptitious maneuvering, "obtained an important position of power." These accusations are factual – and they are false.

A generalized, floating accusation of racism, race hatred, or Nazism may sometimes be waived off as obvious hyperbole, but *not* when the charge is tied to a man's work. There, it becomes closely intertwined with concrete and measurable facts which are susceptible of obvious proof. The Seventh Circuit cogently expressed the matter when it observed:

> "*...whether a given supervisor is a racist, or practices racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal court*. 'Felton is a racist' is defamatory, and a person who makes an unsupported defamatory statement may be penalized without offending the

> first amendment." *Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir. 2000) (emphasis supplied).

Likewise, here, Allen was attacked, not as the SPLC Defendants and the District Court would have it, as a "neo-Nazi," but rather as a racist who had "infiltrated" the City of Baltimore law department and who, it was clearly implied, was abusing his "position of power" because of a perverse ideology. Those charges, too, present "mundane issues of fact," of the kind litigated every day in federal court.

The District Court's strained reasoning, crammed into a footnote, that Allen had not "directly disputed" the characterization of him is false. (J.A. 177 n. 10) Standing on the allegations of the Complaint that showed that the SPLC Defendants knew about Allen's lengthy pro-bono on work on behalf of African-Americans and his funding of a scholarship for American Indians, Allen argued:

> 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). (J.A. 165)

Faced with the above, the District Court misframed the issue. The court employed the following line of reasoning in its footnote disposing of Allen's argument:

> Allen has not plausibly alleged that the defendants should have included his *pro bono* work. Unlike witnesses or tapes that could prove or disprove bribery accusation [such as those in *Harte-Hanks*], Allen's *pro bono* work does not

> prove or disprove the documents showing Allen's payment of dues and donations to the National Alliance, which was the basis for the defendants' characterization of him as a neo-Nazi. (J.A. 177 n.10)

But this miscasts the actual issue before the court. The proper question before the District Court was: given both a) knowledge of Allen's decades-old connections to the National Alliance; and b) knowledge of his abundant *pro-bono* work on behalf of African-Americans and his efforts to aid American Indians, was it fair to smear Allen as a neo-Nazi lawyer, infiltrating the city of Baltimore with his perverse ideology? Clearly, the answer is "No," for the reasons recited above.

The District Court erred by stating that the facts under "b" above do not matter at all because they do not show that Allen's connections to the NA were false. Allen's past connections to the NA may be a part of the evidence leading up to the proper conclusion, but they are only a small part of the whole evidence, much as one of the incriminating "sources" (i.e., Alice Thompson) about candidate Daniel Connaughton's alleged bribes in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989) was but one piece of a much larger puzzle. *Id.* at 679-84. Dismissing the contrary evidence about Allen's character, especially where it directly impacted his actions within his profession, is like dismissing the contrary evidence provided by the tapes and witnesses other than Alice Thompson because they would not disprove what Ms. Thompson had told the newspaper in *Harte-Hanks Communications*. *Id*. at 684.

Turning to the second reason cited by the District Court, that the offending publications must be dismissed as opinion or hyperbole, that, too, must fail. Both the stature and character of the SPLC Defendants and the nature of the words employed rule out "opinion or hyperbole."

It is remarkable that *Flamm v. Am. Ass'n. of Univ. Women*, 201 F.3d 144 (2nd Cir. 2000) is never cited, let alone discussed, by the District Court. That Second Circuit opinion was one of the bedrocks of Allen's argument in opposition to dismissal of the defamation count. In *Flamm*, the Second Circuit explained that the nature of the source of offending statements substantially affects the credibility and import of the statements. In that case, a non-profit academic organization's directory of attorney referrals described the plaintiff as an "ambulance chaser" interested only in "slam dunk" cases. The attorney sued for defamation and, much like Appellees here, the nonprofit invoked the "loose, figurative" language defense. The Second Circuit rightly 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." *Id.* at 152. In other words, 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 Defendants' 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 in fact "infiltrating" a municipal law department and abusing his power. Even more, 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." (J.A. 67 ¶ 120) (emphasis supplied).

Indeed, at the outset of their argument below in support of their motion to dismiss (J.A. 4, DE 9 at pp. 12-13), Appellees' attorneys stressed their clients' alleged gravitas and respectability:

> Founded in 1971 in Montgomery, Alabama, SPLC is a leading non-profit organization dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of society…. In furtherance of that purpose, the SPLC is engaged in 'monitoring 'hate groups.' *See also, e.g.*, *Toston v. Thurmer*, 689 F.3d 828, 831 (7th Cir. 2012) (citing affidavit testimony that "[i]n the United States, [the] two main organizations that monitor intolerance and hate groups are the Anti–Defamation League (ADL) and the Southern Poverty Law Center (SPLC)").

But this gravitas and respectability cuts against Appellees on their "opinion and hyperbole" defense. As in *Flamm*, precisely because of the mantle of respectability claimed by Appellees, the District Court should have concluded that a reasonable reader would have taken their Hate Map as conveying facts, not delivering the overheated rhetoric of a union organizer caught up in the emotional strife of a labor strike.

Further, to underscore another argument that neither the District Court nor the Appellees addressed, it is reasonable to assume that because of the laws and regulations binding the SPLC readers of the "Hate Map Flyer" would interpret the SPLC's offerings about Allen as factual. As specifically set forth in the Complaint, the ethical and IRS regulations to which the SPLC is subject require truthfulness. (J.A. 16-18, 40-44, 50-51, 69-7) And quite aside from its stature, the SPLC Defendants cannot retreat behind the shield of "opinion" where they deliberately omitted known facts to such an extent as to evince Constitutional Malice. *See Harte-Hanks Communications,* 491 U.S. at 692-93. The SPLC Defendants' false portrayal of Allen was so distorted, incomplete, and one-sided as lose all protection under *Milkovich v. Lourain Journal Co*., 497 U.S. 1 (1990) and its progeny.

Finally, the key words chosen by the SPLC Defendants to set the context for their attack on Allen in the Hate Map flyer – "investigation" and "exposé" – are those of neutral reportage, not rhetoric and editorializing. 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 City of Baltimore certainly did: Allen was promptly fired after the first of the SPLC's reports.

VI. THE DISTRICT COURT ERRED IN DISMISSING ALLEN'S RICO CLAIMS

In dismissing Allen's RICO claims, the District Court hurriedly invoked *Food Lion*, stating that it could see "no reason why Allen should be able to avoid First Amendment standards by seeking publication damages under RICO." (J.A. 182) The court cited no binding precedent or even persuasive authority for this statement.

The court did cite a case from the Eastern District of Virginia, *Smithfield Foods, Inc. v. United Food & Comm. Workers, Int'l Union*, 585 F. Supp. 2d. 815, 821-822 (E.D. Va. 2008), which has never been followed by any Circuit Court. *Smithfield Foods,* however, was not decided under Rule 12(b)(6) but rather in the context of pretrial briefing on the appropriate standard for damages. *Id.* at 817. And it did not dismiss RICO claims but merely held that the plaintiffs would need to demonstrate Constitutional Malice at trial, even as to RICO counts. *Id.* at 825. Thus, because the District Court here was mistaken as to the absence of Constitutional Malice, it follows that, relying on *Smithfield Foods*, it was mistaken in dismissing Allen's RICO claims.

Indeed, a closer reading of *Smithfield Foods* presents additional arguments against the District Court's decision in this motion to dismiss procedural context. The *Smithfield Foods* opinion stated: "From a purely analytical standpoint, the distinction between economic and reputational damages remains unsettled and is often difficult to ascertain… Notwithstanding this analytical uncertainty, it is

evident that a party's own characterization of its damage claims is highly persuasive in determining whether the damages sought are 'reputational.'" *Id*. at 822. If so, then under the very authority cited by the District Court it was improper, on a Rule 12(b)(6) motion where Allen had explicitly characterized his damages as separately including *both* reputational and pecuniary or economic damages, to construe his allegation so strongly against him that his own characterization of damages would be disregarded and in consequence his RICO claims be dismissed, even insofar as they were based on pecuniary or economic damages.

Finally, even apart from the Hate Map mail fraud predicate act, the court was clearly mistaken to jettison the remaining predicate acts of mail and wire fraud. The court asserted that Allen needed to provide additional "factual support" as to the mail and wire fraud allegations that rested on: 1) intentionally inflated hate group tallies; 2) false and misleading definitions of "hate groups"; 3) intentionally false statements regarding Maajid Nawaz; 4) intentionally false statements about noted author Charles Murray; and 5) intentionally false statements on the SPLC's IRS Form 990 for Fiscal Year ending October 31, 2016. (J.A. 182-83)

Notably, this was not a ground ever urged by the SPLC Defendants in their motion to dismiss but one the District Court itself reached for after apparently finding the SPLC Defendants' other arguments insufficient to dispose of the RICO claims. The court's objection is cryptic, contained in the following single sentence:

"Besides excerpts from several news articles on the SPLC, however, see id. [Complaint] ¶ 30, Allen does not provide any factual support for his claim that donors are being defrauded by these false and misleading publications." (J.A. 183) But it is not clear what the court meant. News articles may not be competent evidence, but as the court itself noted at the beginning of its decision, in this particular procedural posture "a plaintiff need not 'forecast' evidence sufficient to prove the elements of the claim." (J.A. 170, quoting *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012)). If the court is suggesting Allen needed stronger evidentiary proof than the news articles at this initial stage of the litigation, it is clear error.

In any event, the court was simply wrong under *Twombly* and its progeny. Allen respectfully refers this Court to the cogent decision in *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310 (2d Cir. 2011) ("*Anza V*"). In *Anza V*, the Second Circuit reversed the district court's dismissal of plaintiff's RICO claims, noting (at page 323-24) that the *Twombly* standard of pleading was fully applicable to RICO claims:

> [A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,' *but only '[f]actual allegations [that are] enough to raise a right to relief above the speculative level,' i.e., enough to make the claim 'plausible*,' ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). *The Twombly Court stated that '[a]sking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]*.' (emphasis supplied; citations omitted)

It cannot fairly be said that Allen's 81 page complaint, which incorporates several news articles by reference and, at ¶¶ 30, 34, 36, 101-103, 104-108, 109-112, 113-115, 116-117, and 146-151, details numerous counts of mail and wire fraud regarding: 1) intentionally inflated hate group tallies; 2) false and misleading definitions of "hate groups"; 3) intentionally false statements regarding Maajid Nawaz; 4) intentionally false statements about noted author Charles Murray, lacks enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal[ity]."

Further, if this Court were inclined to distinguish *Anza v.* and hold that Allen has somehow failed to properly plead his RICO claims under the *Twombly* standard, then the dismissal here should be without prejudice and with leave to amend upon further discovery into the allegations of this Complaint. After all, "the availability of 'amendment of pleadings' was one of the reasons for Congress's expectation that the private right of action for RICO violations would be an effective tool." *Anza v.* at 325 *(citing to S. Rep. No. 91-617, at 82).* Dismissal with leave to amend after discovery would be consistent with both *Anza V* and this Court's own precedents in *Chisolm v. TranSouth Fin. Corp*., 95 F.3d 331, 338 (4th Circ. 1996) and *Menasco, Inc. v. Wasserman*, 886 F2d 681, 685-686 (4th Cir. 1989).

Then, too, an objection to the "news articles" does nothing to suggest why the allegations of mail and wire fraud were insufficient as to the intentionally false

statements on the SPLC's IRS Form 990 for Fiscal Year ending October 31, 2016 (which was signed on January 26, 2017, and which the Complaint alleges was dispatched to the IRS on or about that day). (J.A. 55-56 ¶¶ ¶¶117-18; 78 ¶151) That predicate act, then, must stand. And thereby, even assuming *arguendo* that the District Court was correct to compress all the misdeeds relating to the Dilloway Stolen Documents into one act, Allen's Complaint clearly has at least two predicate acts and a pattern of open-ended continuity, such that the RICO counts must stand. *CVLR Performance Horses, Inc. v. Wynne*, 524 F. App'x 924 (4th Cir. 2013) (reversing dismissal where the alleged conduct projected into the future with threat of repetition); *see also, H.J. Inc. v. Northwestern Bell Telephone Co*., 492 U.S. 229, 242 (1989).

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

The trial court improperly dismissed Allen's tortious interference with contract (Count V) and aiding and abetting breach of contract (Count IX) claims together, asserting they failed *Twombly* standards.

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). The essence of Allen's allegations in support of this claim is as follows. Randolph Dilloway was party to an employment agreement with the NA that

contained a confidentiality provision covering the documents Dilloway was reviewing. *Complaint* at ¶¶ 56, 57, 167. Allen was a third-party beneficiary of that confidentiality agreement. *Id*. at ¶¶ 168, 169. In breach of this confidentiality agreement, Dilloway, in apparent cooperation with the SPLC, 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.

These allegations satisfy all elements for a tortious interference with contract claim. The trial court, however, held that Allen's claim failed properly to plead that he was a third-party beneficiary. (J.A. 183-84) But Allen has certainly described when the document was created, who the parties were, and its general nature. There is nothing 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 been a weapon of choice by the SPLC for many years in the culture wars. As Allen explains in his complaint, the SPLC is renowned for its skill at it. Moreover, the SPLC over the past few decades has written numerous tabloid-style attack articles specifically about the NA. Consequently, it would have been surprising for the NA *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 NA. *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: "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, Allen should have been allowed discovery into the factual question of whether he was an intended third-party beneficiary. *See Planned Parenthood Federation*, 214 F. Supp. 3d at 832 (denying motion to dismiss and holding that plaintiff had alleged plausible claim as third-party beneficiary of a confidentiality agreement).

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. 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).

CONCLUSION

For the reasons stated, Allen requests that the District Court's November 13, 2019 opinion and order be reversed and the case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

As this case presents complex and important issues under *Bartnicki*, *Hustler, Food Lion, Cohen*, *Anza V*, and other cases, Allen submits that oral argument would benefit the Court and he accordingly requests it.

Respectfully Submitted,

_____ /s _____
Glen K. Allen
GLEN K. ALLEN LAW
502 Edgevale Road
Baltimore, MD 21210

_____ /s _____
Frederick C. Kelly, III
LAW OFFICE OF
FREDERICK C. KELLY
One Harriman Square
Monroe, NY 10950

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

this document 12,694 words.

2. This document complies with the typeface requirements because:

This document has been prepared in a proportional spaced typeface using Microsoft Word in 14 point Times New Roman.

This the 14th day of February, 2020.

_____ /s _____
Glen K. Allen
GLEN K. ALLEN LAW
502 Edgevale Road
Baltimore, MD 21210