IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

DONALD A. KING and THE DUSTIN INMAN SOCIETY, INC.,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 2:20-cv-120-ECM-SMD**
THE SOUTHERN POVERTY LAW CENTER, INC.,	)	
Defendant.	)	

DEFENDANT SOUTHERN POVERTY LAW CENTER, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6)

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Defendant the Southern Poverty Law Center, Inc. ("SPLC") respectfully submits the following Reply in support of its motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

SUMMARY OF ARGUMENT

SPLC explained in its initial Motion that the First Amended Complaint (Doc. 3, "Am. Compl." or "Complaint") filed by Plaintiffs the Dustin Inman Society ("DIS") and Donald A. King ("King") fails to state a claim upon which relief can be granted because the statements Plaintiffs allege to be defamatory are in fact the type of expressions on matters of public concern that are protected by the First Amendment. (*See* Def. SPLC's Mot. to Dismiss Compl. Pursuant to Rule 12(b)(6) and Mem. of Law in Supp. Thereof, Doc. 10 ["Mot." or "Motion"] at 1–4, 17–44.[1]) Specifically, SPLC showed that its statement that Plaintiff DIS is an "anti-immigrant hate group" is protected as an opinion not susceptible to being objectively proven true or false, and that this question is properly decided by the Court as a matter of law at the pleading stage. (*See* Mot. at 16–30.) Further, SPLC showed, in the alternative, that even if the anti-immigrant hate group designation *could be* true or false, the Complaint did not allege plausible facts that could support an inference that SPLC *knew* the designation to be false or probably false when it was made, and that therefore Plaintiffs, as public figures, had not satisfied their burden to plead constitutional actual malice. (*See* Mot. at 34–44.)

[1] Pin cites to SPLC's Motion and Plaintiffs' Response refer to the documents' internal page numbers at the bottom of the page, rather than the ECF page numbers.

Plaintiffs' Response (Doc. 14, "Resp.") fails to effectively rebut these showings. With regard to the issue of protected opinion, the Response primarily insists on the faulty argument that, because SPLC represents its anti-immigrant hate group designation as based on "careful study and analysis" (Resp. at 12), the designation must therefore be treated as "fact" rather than opinion. This premise, however, ignores the self-evident fact that experts and commentators can offer informed views based on study and analysis, even though the truth or falsity of such views may not be objectively verifiable. (For example, a college professor might spend years developing and supporting an argument about the root cause of the Vietnam War, and, even though many people might strongly agree or disagree with her conclusions, no one would suggest that the conclusions themselves are susceptible to objective proof.) In other words, the critical question for purposes of defamation law is not the level of rigor or seriousness with which a proposition is stated and justified, but whether that proposition is one that is "susceptible to being proved true or false." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990). In their Response, Plaintiffs do not offer any persuasive explanation of how the term "anti-immigrant," or "hate group," could be subjected to such empirical proof. Therefore, as initially argued by SPLC, this Court must dismiss the Complaint under *Milkovich* and related case law.

The Response also fails to rebut SPLC's arguments with regard to actual malice. Plaintiffs admit that they are public figures who must plausibly plead actual malice, but their primary arguments for how the Complaint does so are (1) that the Complaint alleges that SPLC acted with an intent to injure DIS's reputation, and (2) that the Complaint supposedly allows an inference that SPLC knew the anti-immigrant hate group designation

was false because SPLC was aware of the underlying facts about DIS's activities in 2017, yet did not publish the designation until 2018.

The former argument simply misconstrues the actual malice standard. The operable question is whether SPLC made statements despite knowing they were false or having serious doubts as to their veracity; for First Amendment purposes, it is irrelevant whether SPLC acted with malice in the "ordinary sense of the term." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989). As to the second argument, Plaintiffs cite no precedent for the novel idea that SPLC, having learned of DIS's activities, was somehow obligated to label DIS an anti-immigrant hate group immediately, or else risk waiving its right to do so altogether. The idea is specious on its face. The operable question is whether, at the time it actually made the challenged statements, SPLC knew they were false or seriously doubted their veracity. To infer such a state of mind simply because SPLC had *not* made similar statements in the past would be, at best, rank speculation. Accordingly, the Complaint must be dismissed for the alternative and independently sufficient reason that it fails to plausibly allege actual malice.

In addition, the Response makes several misstatements of law and of the record, which are pointed out below for the Court's benefit. SPLC renews its request that the Complaint be dismissed in its entirety and with prejudice pursuant to Rule 12(b)(6).

ARGUMENT

I. CONCESSIONS BY THE PLAINTIFFS, PARTICULARLY AS TO THEIR STATUS AS PUBLIC FIGURES, HAVE NARROWED THE ISSUES BEFORE THE COURT.

As an initial matter, in their Response, Plaintiffs make a number of concessions which narrow the issues before the Court.

First, and most importantly, Plaintiffs concede, as they must, that "they are public figures for the purpose of defamation law, who must plead and prove actual malice." (Resp. at 20.) This is a crucial concession because, despite repeatedly incanting the words "actual malice," neither the Complaint nor the Response offers any plausible factual basis that could support such an inference. This point is developed further in Part IV below.

Second, Plaintiffs recognize that, as argued by SPLC (*see* Mot. at 8 n.4), the materials on SPLC's website which they reference in their Complaint are available for the Court's consideration in deciding this motion to dismiss. (*See, e.g.*, Resp. at 6, 22.) They also implicitly recognize that this Court can take judicial notice of additional materials outside the Complaint. (*See, e.g.*, Resp. at 13–14 (citing Congressional testimony of SPLC employee); *id.* at 5 (citing statements of SPLC employee as quoted in media article); *cf.* Mot. at 8–9 n.5 (stating that Court can take judicial notice of news reporting and other materials).)

Finally, Plaintiffs do not dispute that Georgia law applies to the common law defamation claims brought in their suit.[2] (*See* Resp. at ii, 18.)

[2] *Cf. Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 695 (11th Cir. 2016) (noting that, by declining to contest applicable law, parties had consented to application of New York libel law); *Williams*

II. PLAINTIFFS MAKE MISSTATEMENTS OF LAW AND MISCHARACTERIZE THE CONTENTS OF THE COMPLAINT.

A. Plaintiffs Misstate the Standard of Review.

The Response misstates the law starting with the first sentence of its legal argument which states that: "A motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief." (Resp. at 3 (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).) This "no set of facts" language was, of course, abrogated by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), over a decade ago, because it had been too often misunderstood as meaning that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." 550 U.S. at 561 (brackets in *Twombly*).

Plaintiffs' misstatement is actually quite telling because their Complaint suffers from the same defects as the complaint in *Twombly*. The *Twombly* plaintiffs sought to sustain their complaint "even though [it did] not set forth a single fact in a context that suggests an agreement" in restraint of trade (a required element of their claim). 550 U.S. at 561–62. The Supreme Court, however, declined to do so, explaining that the mere "prospect of unearthing direct evidence of [an agreement]" was not "sufficient to preclude dismissal," absent some facts in the complaint itself that rendered the claim "plausible on

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v. A.L. Williams & Assocs., Inc., 555 So. 2d 121, 124 (Ala. 1989) (applying Georgia law where "[t]he parties and the trial court agreed that Georgia substantive law governs the libel claim").

its face." *Id.* at 561, 570. Further, the Court observed that improper reliance on the *Conley* "no set of facts" formulation had too often allowed such speculative complaints to survive, and therefore held that the formulation "ha[d] earned its retirement." *Id.* at 563. Here, the Plaintiffs are in the same situation as the *Twombly* plaintiffs—they are required to plead and prove actual malice, yet, as explained below (*infra* Part IV) they have "not set forth a single fact in a context that suggests" actual malice. *Id.* at 562. In that sense, it is not surprising that they might seek the broader, pre-*Twombly* indulgence provided by some courts under the "no set of facts" formulation, as it is the only standard that might save their Complaint.

The proper standard, however, is the one stated in SPLC's Motion. (Mot. at 15–17.) SPLC is not asking this Court to apply a summary judgment or trial standard to the Complaint, as the Plaintiffs claim (Resp. at 3–4). It is simply asking that it not be subjected to burdensome litigation based on a Complaint which fails to state a claim under the applicable standard proscribed by *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

B. Plaintiffs Mischaracterize the Contents of the Complaint.

Plaintiffs also misstate the factual allegations of the Complaint in material ways, and again it starts from the beginning. In the "introduction" section of the Response, on page one, Plaintiffs list a number of items that they claim were "allege[d] in their Complaint." (Resp. at 1–2.) But, again, the very first item in that list is wrong.

Plaintiffs claim that they "allege[d] in their Complaint" that SPLC "affirmatively stated Plaintiff DIS was not considered an 'anti-immigrant hate group' in a published article." (Resp. at 1.) The first red flag here is that no citation to the Complaint is

provided—for this, or for any of the other items listed in the introduction. Worse, though, than the lack of citation, is the lack of actual support for the statement. Undersigned counsel has scoured the Complaint, and it contains no allegations about any affirmative statement made by SPLC that DIS was not considered an anti-immigrant hate group. (*See* Am. Compl. at 1–10.) The closest it comes—which is not close at all—is an allegation that, up to 2017, "SPLC had not labeled Plaintiff DIS an 'anti-immigrant hate group.'" (Am. Compl. at 3 ¶ 14.)

Later, the Response makes reference to an article that appears to be the basis for its supposed allegation that SPLC "affirmatively stated Plaintiff DIS was not considered an 'anti-immigrant hate group' in a published article." (*See* Resp. at 5.) This does not do anything to rescue the Response's claim that such an allegation was made in the Complaint, as the article is not mentioned or referenced in the Complaint, but is raised for the first time in the Response. And, even then, neither the portion of the article quoted in the Response nor the article itself[3] contains any "affirmative[]" statement by SPLC that DIS is not an anti-immigrant hate group. The author of the article merely notes that SPLC "hasn't put King's organization on its list of hate groups," while SPLC employee Heidi Beirich is quoted only as saying that King has not "generally… [gotten] up in the face of actual immigrants and threaten[ed] them" and that SPLC will not "quibble with" King's political lobbying for legislation, "whether we like the law or not." Brumback, *Ga. man key to*

[3] Kate Brumback, *Ga. man key to crafting illegal immigration bill*, STATESBORO HERALD (Ga.), July 4, 2011, https://www.statesboroherald.com/local/ga-man-key-to-crafting-illegal-immigration-bill/.

crafting illegal immigration bill, cited *supra* n.3. Clearly, none of this constitutes an "affirmative[]" statement that DIS is *not* an anti-immigrant hate group.[4]

In the end, it would not matter even if SPLC *had* affirmatively stated in 2011 that DIS was not an anti-immigrant hate group (and therefore any amendment of the Complaint to add this allegation would be futile). The relevant question is whether, when SPLC made the challenged statement seven years later, in 2018, it knew or had serious doubts that the statement was false. But SPLC wishes to make clear what is and is not properly before the Court with regard to its Motion.

Nor is this the only statement supposedly "allege[d] in the[] Complaint" that does not, in fact, appear anywhere in the Complaint. Plaintiffs also claim to have alleged that SPLC had "knowledge that Plaintiffs have never lobbied or advocated for any measure that would be adverse to the interest of legal immigrants," (Resp. at 1) but this allegation is nowhere in the Complaint. And they claim that the Complaint alleges that SPLC knew "that Plaintiff King has an adopted sister who is herself a legal immigrant" (Resp. at 1), but, again, no such allegation is found in the Complaint.[5] (*See generally* Am. Compl.)

III. THE COMPLAINT MUST BE DISMISSED BECAUSE, AS A MATTER OF LAW, THE CHALLENGED STATEMENTS ARE PROTECTED OPINION.

The overwhelming thrust of Plaintiffs' Response consists of an attempt to argue that the term "anti-immigrant" is an actionable statement of defamatory fact, rather than a

[4] Nor is the article in question one "published" by SPLC, as implied by the Response's claim; it is an article published by a third party which happens to describe SPLC's position and quote an SPLC employee.

[5] Again, even if these facts were added to the Complaint, they would not change the result.

statement of protected opinion. Neither precedent nor logic, however, supports such an argument.

A. Whether the Challenged Statements Are Protected Opinions Is a Matter of Law to Be Decided by the Court.

As an initial matter, it should be reiterated that it is clearly a threshold question of law whether a statement is one of opinion, either for purposes of the First Amendment or under Georgia law. *Turner v. Wells*, 879 F.3d 1254, 1262–63 (11th Cir. 2018) ("Whether the statement is one of fact or opinion and whether a statement of fact is susceptible to defamatory interpretation are questions of law for the court."); *Bergen v. Martindale-Hubbell, Inc.*, 337 S.E.2d 770, 772 (Ga. Ct. App. 1985) ("Since what appellant contends was libel was a statement of opinion which … cannot be libel, appellant's pleadings show that no claim for libel exists in this case. Accordingly, the trial court did not err in granting appellee's motion for judgment on the pleadings on appellant's libel claim."). To the extent that the Response argues to the contrary (*see* Resp. at 14–15), it is mistaken.

B. Nothing in the Response Rebuts SPLC's Prior Showing That the Challenged Statements Are Protected Opinion.

Plaintiffs' entire argument proceeds from the mistaken premise that an informed analysis cannot be an opinion. But an expert can offer an informed or even authoritative view, even though that view is not susceptible to objective proof of falsity. For example, a judge of this Court has held that one doctor's opinion about the conduct of another doctor (i.e., that the second doctor's failure to exercise good medical judgment had caused patient deaths) was not actionable. *See Marshall v. Planz*, 13 F. Supp. 2d 1246, 1257–58 (M.D. Ala. 1998) (holding statement non-actionable and discussing similar precedents).

Plaintiffs make much of the fact that SPLC documents its deliberative process and the criteria it uses to decide whether to designate a group as an anti-immigrant hate group, and that SPLC makes such designations "with full knowledge of its power and effect on the reputation of Plaintiffs." (Resp. at 6.) Plaintiffs argue that the presence of such "careful study and analysis" (Resp. at 12) renders these designations actionable "Statement[s] of Fact." (Resp. at 6; *see also* Resp. at 9.) They contrast this to what they claim is SPLC's position of treating the challenged statements as "mere political opinion." (Resp. at 12.)

This framing, however, presents a false dichotomy. What determines whether a statement is an actionable, potentially defamatory statement of fact is not the rigor or care or thoroughness or conviction with which that statement is expressed—what determines whether a statement is potentially defamatory is whether or not that statement is "susceptible to being proved true or false." *Milkovich*, 497 U.S. at 20–21. To SPLC, there is nothing "mere" about the opinions it expresses. They are serious matters, and SPLC treats them as such. But that is an entirely different question from whether the statements are actionable. (*See* Mot. at 22 ("[T]here is a large and dispositive difference between a statement that the proponent believes is *correct* and a statement that can be proven or disproven as [objectively] *true* in the context of a legal proceeding.") (emphases in original).)

One might read an exhaustively reasoned essay and conclude that it is "true"—in the colloquial sense of "correct"—that, for example, Charles Lindbergh was a fascist, or that George Bush [or Barack Obama] was a bad president. Indeed, there have been entire book-length arguments made to prove the point that, for example, James Buchanan was

our worst President. But no matter how rigorous the analysis on which they are based, and no matter how precisely the author defines the criteria they are applying, conclusions of this type are not of a kind that are susceptible of objective proof.

The question of whether DIS is "anti-immigrant" and/or a "hate group" is no different. Just as there is no objective measure of political philosophy or no objective way to rank Presidents, there is no objective scale upon which to rate "anti-immigrantness." Plaintiffs fall back on dictionary definitions, but these prove nothing—words like racist, fascist, right-wing, left-wing, are all defined in the dictionary, yet courts have consistently, and correctly, held that these labels are protected opinion not capable of being proven true or false. (*See* Mot. at 24–26 & n.8 (citing cases).) For that matter, all manner of subjective words like beautiful, noble, infamous, dastardly, or evil are defined in dictionaries.

Moreover, Plaintiffs' use of the dictionary is selective and self-serving. They cite the Merriam-Webster online dictionary for the definition of "anti-immigrant," but define the word "immigrant" based, they say (again they offer no citation), on the provisions of the Immigration and Nationality Act. (Resp. at 7.) Using these cherry-picked definitions, they argue that "immigrant" means only what they call a "legal immigrant," and that they are not "anti-immigrant" because they supposedly do not denigrate "legal immigrants." (*See* Resp. at 7–8, 10.) The Merriam-Webster online definition of "immigrant," however, is more inclusive: "one that immigrates: such as … a person who comes to a country to take up permanent residence."[6] It makes no distinction on the basis of documentation or

[6] Immigrant, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/immigrant (all online dictionary definitions cited herein last visited June 16, 2020).

formality of entry.[7] And, while not every undocumented person comes to this country "to take up permanent residence," many do. Thus, based on an apples-to-apples comparison, Plaintiffs do, in fact, fit their own chosen dictionary definition of anti-immigrant, as they have not disputed in their Complaint or in their Response that they denigrate what they refer to as "illegal" (i.e., undocumented) immigrants. Nor could they dispute this. (*See, e.g.*, Mot. at 8–11 (noting statements by Plaintiff King and others associated with DIS describing "illegal" immigrants as a "third world horde" and "lawless" invaders who bring "chaos" and are "here to blow up your buildings and kill your children").)[8]

Ultimately, though, the dictionary argument is a red herring. SPLC is not bound by any particular definition of anti-immigrant. It is entitled to its opinion about the meaning and import of the statements by Plaintiff King and DIS Board of Advisors member Fred Elbel that it cites on its DIS Page, as well as DIS's connections to various even-more-

[7] At any rate, many of the statements cited by SPLC reference "brown" and "Hispanic" people without distinguishing by immigration status. (*See* Ex. 4 to Ex. A to Mot. (SPLC DIS Page).) In addition, it is disingenuous for Plaintiffs to suggest that their consistently inflammatory and dehumanizing rhetoric will not have the effect on at least some recipients of denigrating all immigrants, whether or not Plaintiffs qualify certain comments as directed only at what they refer to as "illegal" immigrants.

[8] Plaintiffs also resort to dictionary-related legerdemain in attempting to distinguish Eleventh Circuit precedent holding that an accusation of "homophobic taunting" constituted a non-actionable opinion. *See Turner v. Wells*, 879 F.3d 1254, 1264 (11th Cir. 2018) ("The first statement that Coach Turner challenges—that on at least one occasion he participated in 'homophobic taunting' of Player A—is an opinion and not actionable in a defamation suit. This statement is the Defendants' subjective assessment of Turner's conduct and is not readily capable of being proven true or false."). They argue that there is no analogy between *Turner* and their Complaint, because the full phrase "homophobic taunting" is not defined in the dictionary, whereas "anti-immigrant" is. (Resp. at 12.) Clearly, though, it is the adjective "homophobic" that is the operative term and the one that is analogous to "anti-immigrant." And "homophobic," of course, *is* defined in the dictionary. *See* Homophobia, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/homophobia ("homophobic" listed as variation).

extremist figures espousing hatred of immigrants and racial and ethnic minorities. (*See* Mot. at 11–14 (detailing such connections).) And it clearly discloses those statements and connections as the basis for its opinion that DIS is an "anti-immigrant hate group." (*See* Ex. 4 to Ex. A to Mot. (SPLC DIS Page).) Plaintiffs have not disputed the accuracy of any of this underlying information.[9] Thus, it is clear under both Federal and Georgia law that SPLC's opinion based on disclosed facts is protected. (*See generally* Mot. at 17–31.)

Nor does it matter whether SPLC keeps track of and publicizes how many organizations it has designated as hate groups. (*See* Resp. at 13–14 (discussing Congressional testimony by SPLC employee Lecia Brooks in which Brooks cites "sharp increases in the number of U.S.-based hate groups").) Plaintiffs argue that SPLC puts forth "the rise in organizations deemed 'hate groups' by the SPLC as if it were fact." (Resp. at 13.) This is true, as far as it goes, but it does not help the Plaintiffs' ultimate case. It is indeed a factual statement *that the SPLC has designated an increasing number of organizations as hate groups*. And *that* fact could be proven true or false. One can simply count the designations for each given year and determine objectively whether the number

[9] The closest they come is to repeatedly assert, without any specifics, that "most" of King's cited statements are taken "out of context" or are the statements of others improperly "impute[d]" to King or DIS. (Am. Compl. at 4 ¶ 22; *see also* Resp. at 2, 20). Yet even after SPLC specifically pointed out the conclusory and insufficient nature of this allegation (Mot. at 30 n.11, 43), Plaintiffs still have not identified any particular statement or how any such statement was "misrepresented" (Resp. at 20) or taken out of context. Particularly given that Plaintiffs are in a position to know the context of their own statements without any discovery, the conclusory allegation in Paragraph 22 of the Complaint does not provide facts that could plausibly support an inference that any of King's statements cited by SPLC are inaccurate, never mind that those statements are "fabricated" or made up, as required to support an inference of actual malice. *See Michel*, 816 F.3d at 703.

has increased. But this does not somehow mean that any of the individual hate group designations themselves are factual. The Better Business Bureau may catalog its grades of a community's businesses, or Zagat's may compile its reviews of a city's restaurants, but the compilation does not convert each B+ rating or three-star review into a statement of objectively verifiable fact. (And this is true notwithstanding the fact that one may be able to objectively verify whether there has been a year-over-year increase in B+ ratings or three-star reviews.)

The Response also fails to rebut the controlling legal analysis set forth in SPLC's Motion. (*See* Mot. at 17–31.) SPLC primarily relies on that analysis, but it is notable in particular how the Response tries and fails to distinguish *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976). SPLC cited *Buckley* for its determination that characterizations of William F. Buckley as a "fellow traveler" of "fascism" or the "radical right" were non-actionable, because these were "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." *Id.* at 893–94. (*See* Mot. at 25.) Indeed, as Judge Thompson has explained, to the *Buckley* court, the fact "[t]hat the plaintiff and defendant defined 'fascism' differently was but one example of the 'imprecision of the meaning and usage of the[] term[] in the realm of political debate.'" *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1276 (M.D. Ala. 2019) (quoting *Buckley*, 539 F.2d at 890, 893) (second and third alterations in *Coral Ridge*).

But Plaintiffs completely ignore *Buckley*'s treatment of the "debatable" terms "fascism" and "radical right" as non-actionable. Instead, they focus on a separate claim that the *Buckley* court allowed to go forward, involving an accusation that Buckley

"routinely lied and libeled others," claiming that SPLC's statement that DIS is an anti-immigrant hate group that "vilifies all immigrants" is analogous to Littell accusing Buckley of lying and libeling others.[10] (Resp. at 16.) In fact, however, the statement that DIS vilifies all immigrants is just a gloss on the broader characterization of "anti-immigrant," and that term is much more analogous to the "debatable" terms from "the realm of political debate"—i.e., "fascist" and "radical right"— that *Buckley* found non-actionable. *See* 539 F.2d at 893–94.

The very examples that Plaintiffs put forth as potential "proof" that they are not "anti-immigrant" only serve to demonstrate the subjective nature of the term. They argue that

> the finder of the facts can, after weighing the evidence presented by the parties, make a determination as to whether or not Defendant's statements that Plaintiffs are "anti-immigrant" are true or false. For instance, Plaintiffs can demonstrate, from King's relationship with his adopted sister who is an immigrant to the continuing presence of immigrants on Plaintiff DIS's Board of Advisors that they are not "anti-immigrant."

[10] Again, Plaintiffs base their argument on cherry-picked dictionary definitions, citing one of two definitions offered for the word "vilify" by Merriam-Webster.com: "to utter slanderous and abusive statements against." (*See* Resp. at 7, 17; *cf.* Vilify, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/vilify (defining word alternatively as "to lower in estimation or importance").) Other dictionaries define the word "vilify" differently, however. Cambridge defines it as "to say or write unpleasant things about someone or something, in order to cause other people to have a bad opinion of them." Vilify, CAMBRIDGE ENGLISH DICTIONARY (online), https://dictionary.cambridge.org/us/dictionary/english/vilify. Dictionary.com defines it *either* as "to speak ill of" or to "defame" or "slander." Vilify, DICTIONARY.COM, https://www.dictionary.com/browse/vilify. Clearly, a statement that a plaintiff has "vilified" someone does not carry the kind of direct accusation of untruth that rendered the statements in *Buckley* actionable. *Cf. Milkovich*, 497 U.S. at 21 (accusation that plaintiff committed the crime of perjury held actionable).

(Resp. at 15.) Such "proofs" amount to nothing more than would a plaintiff suing over an accusation of racism or anti-Semitism presenting evidence that he has African American or Jewish family members or friends. Clearly, neither would be sufficient to render the truth or falsity of the allegedly defamatory statement "objectively verifiable." *Milkovich*, 497 U.S. at 22. Accordingly, the term "anti-immigrant" is non-actionable for the same reasons that "racist" and "anti-Semitic" have been repeatedly held non-actionable. (*See generally* Mot. at 24–26.) To submit the question of whether DIS is "anti-immigrant" to a jury would condition SPLC's First Amendment rights on the jury's subjective assessment of SPLC's and DIS's opposing viewpoints, violating the "principle of viewpoint neutrality that underlies the First Amendment itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (noting "danger that decisions by triers of fact may inhibit the expression of protected ideas").

For the above reasons, and for the reasons submitted in SPLC's initial Motion, this Court should hold that the challenged statements are protected opinion not capable of defamatory meaning, and dismiss the Complaint in its entirety. Further, because the character of the challenged statements would not be changed by any potential amendments to the Complaint, dismissal should be with prejudice.

IV. THE RESPONSE FAILS TO POINT TO ANY PLAUSIBLE BASIS FROM WHICH TO INFER THAT SPLC MADE THE CHALLENGED STATEMENTS WITH ACTUAL MALICE.

In its initial motion, SPLC argued that Plaintiffs, as public figures, are required to plead and prove actual malice. (*See* Mot. at 35–38.) In their Response, Plaintiffs candidly

admit that they bear this burden.[11] (Resp. at 20.) Yet, as also pointed out in SPLC's initial motion, while the Amended Complaint incants the word "malice" as part of every separate count, it is otherwise devoid of any factual allegations that go to the actual underlying standard—i.e., allegations that could support an inference that SPLC knew the statements it made were false, or had serious doubts as to their truthfulness. (*See* Mot. at 40.)

In their Response, Plaintiffs misconstrue actual malice doctrine to the degree that they argue malice in the ordinary sense of animus or ill will—i.e., that SPLC acted out of a desire to damage, discredit, or undermine them—rather than the constitutional sense of actual malice—i.e., that SPLC acted despite subjective knowledge of falsity or likely falsity. (*See* Resp. at 21, 23–24; *see also* Mot. at 34 (citing Supreme Court and Eleventh Circuit cases on actual malice).) This fundamental error renders much of Plaintiffs' argument inapposite. *See, e.g.*, *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) ("It … is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."). And what arguments Plaintiffs do make with regard to SPLC's supposed knowledge of falsity are based on speculation, supposed facts that are not in the Complaint, or both.

Plaintiffs primarily rely on a narrative, based on scant allegations in the Complaint, to the effect that SPLC designated DIS an anti-immigrant hate group in 2018 as part of a

[11] Although conceding that the actual malice standard applies, Plaintiffs obliquely raise the issue of whether precedents involving traditional media defendants (e.g., newspapers) are applicable to SPLC. (Resp. at 20.) They are. *See Coral Ridge*, 406 F. Supp. 3d at 1276 n.15 ("[B]ecause the constitutional limits on defamation actions apply equally to media and nonmedia defendants, this court need not decide on which side of the 'blurred' media-nonmedia line SPLC falls.") (citing Eleventh Circuit and other precedents).

scheme to undermine DIS's influence (and enhance SPLC's influence) in the Georgia General Assembly. (*See* Resp. at 1, 5, 11, 20.) As a matter of fact, this is not true; SPLC's designation was not connected to its lobbying activity in Georgia, and both SPLC and DIS had lobbied in Georgia for several years before 2018. More importantly, though, even if this alleged scheme were true, it would not be relevant because it does not go to the operative question, which is whether SPLC made the designation knowing it was false or with reckless disregard for its probable falsity. For this reason, Plaintiffs' arguments based on SPLC's motive to undermine DIS have no bearing on the question of actual malice.

Plaintiffs' related strain of argument in support of actual malice is to claim that, prior to the emergence of the supposed lobbying conflict, SPLC "knew all of the facts it claims led it to issue the statements a year earlier but did not make the statements at that time." (Resp. at 23; *see also id.* at 19, 21–22.) They cite no authority for the remarkable proposition that a defendant, having learned something about a plaintiff at one time or another, is under some obligation to "speak now or forever hold its peace." Nor would such a rule be justified. There are any number of reasons that SPLC might not have designated DIS as an anti-immigrant hate group in 2017 (or 2015, or 2016), even assuming it knew, at that time, all the damning facts about DIS that are currently presented on the SPLC website and summarized in its initial motion (*see* Mot. at 6–14). Maybe it didn't have the staff capacity at that time. Maybe DIS didn't seem important enough to bother with. It doesn't matter what the actual reason was, because SPLC does not owe Plaintiffs an explanation of why it *didn't* allegedly defame them in 2017. The only question is whether it *did* defame them in 2018 and 2019, a question which turns on whether SPLC knew, when

it made the 2018 and 2019 statements, that they were false or probably false. And there is no basis in precedent or logic for this Court to infer such a state of mind from the fact that SPLC didn't make similar statements in 2017[12]; any such inference would simply be rank speculation. *Cf. Twombly*, 550 U.S. at 555 (factual allegations in complaint must "raise a right to relief above the speculative level").[13]

In summary, nothing in the Complaint or the Response supports a reasonable inference that SPLC acted with knowledge that its statements were false or probably false. Therefore, the Complaint must be dismissed for failure to plausibly plead actual malice. Moreover, because the Response suggests no potential amendments to the Complaint that would alter this result—and also because the context of the challenged statements demonstrates SPLC's good faith belief that the anti-immigrant hate group designation is correct (*see* Mot. at 43–44)—the dismissal should be with prejudice.

[12] SPLC, in fact, had published numerous articles critical of Plaintiff King prior to 2018.

[13] Plaintiffs also allege that SPLC knew several other facts that should have alerted it that its anti-immigrant hate group designation was false. (*See* Resp. at 21, 23.) One of these facts, that Plaintiff King has a sister who is an immigrant, is not in the Complaint. (*See supra* Part II.B.) More fundamentally, though, whether or not SPLC knew this, or knew that DIS had members of its Board of Advisors who are immigrants, does nothing to show knowledge of falsity or probable falsity. SPLC listed DIS as an anti-immigrant hate group because of its activities, not because of the familial relations of its leader or the immigration status of its board members. For this reason, amending the Complaint to add the facts raised in the Response but missing from the Complaint would be futile.

CONCLUSION

For the foregoing reasons, as well as the primary reasons stated in its initial Motion, Defendant SPLC respectfully moves this Court for an order dismissing Plaintiffs' First Amended Complaint in its entirety, with prejudice, and granting such other relief as it deems just and proper.

Dated: June 16, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I caused a copy of the foregoing to be served upon all counsel of record by filing the same using the Court's CM/ECF system.

s/ *Benjamin W. Maxymuk*
Of Counsel