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

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(B)(6) AND MEMORANDUM OF LAW IN SUPPORT THEREOF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONSE TO MOTION TO DISMISS

Plaintiffs Donald A. King and The Dustin Inman Society, Inc. by and through its attorneys, McKoon & Gamble, submit the following Brief in Opposition to the Defendant's Motion to Dismiss the Amended Complaint. For the reasons set forth below, Plaintiffs request that this Court deny the Motion to Dismiss in its entirety.

INTRODUCTION

Plaintiffs allege in their Complaint:

- That the Defendant affirmatively stated Plaintiff DIS was not considered an "anti-immigrant hate group" in a published article at a time when all of the facts recited by Defendant in its Motion to Dismiss were known to Defendant.
- That the Defendant first classified Plaintiff DIS as an "anti-immigrant hate group" in 2018 as it prepared to lobby against passage of legislation effecting illegal migration before the Georgia General Assembly.
- That the Defendant classified Plaintiff DIS as an "anti-immigrant hate group" with knowledge that Plaintiffs have never lobbied or advocated for any measure that would be adverse to the interest of legal immigrants, that Plaintiff King has an adopted sister who is herself a legal immigrant, and that the board of Plaintiff DIS is composed in part of legal immigrants and their family members and has been since its inception in 2005.

- That the Defendant took the step of classifying Plaintiff DIS as an "anti-immigrant hate group" that vilifies all immigrants not as the result of any careful analysis under the standard it has itself published for such a classification but instead a calculated smear designed to impair the credibility of Plaintiffs and the ability of Plaintiffs to effectively advocate and educate on the issue before the Georgia General Assembly and in public and media appearances.

- That the Defendant attributed statements to Plaintiff King in published material that were totally false and/or so wildly taken out of context as to render them libelous.

- That the Defendant published these false and defamatory statements with malice, including the repeated statement that Plaintiffs vilify all immigrants.

Under any reading of the applicable standard requiring particularity, Plaintiffs have met and exceeded their obligations.

Nevertheless, Defendant has moved to dismiss the Complaint, claiming that Plaintiffs have not and cannot provide enough information to meet the standard for particularity in pleading, that the statements complained of are opinion, and that the claims of Plaintiff King must be dismissed because he and Plaintiff DIS are separate and distinct parties. Recognizing that it cannot meet the standard required for a Motion to Dismiss under Rule 12(b)(6), Defendant has attempted to invent a

new standard and is demanding proof that perhaps would be required at trial but not at this stage of the litigation. It is abundantly clear that Defendant's Motion is due to be denied.

ARGUMENT

I. MOTION TO DISMISS STANDARD

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. *Conley v. Gibson*, 335 U.S. 41, 48 (1957) (emphasis added); *see also* Fed. R. Civ. P. 12(b)(6); *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 570 (2007). A motion under Rule 12(b)(6) merely tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff. *Twombly*, 550 U.S. at 556-57. A complaint should never be dismissed because the court is doubtful that the plaintiff will be able to prove all of the factual allegations contained therein. *Id.* Contrary to what is seemingly advocated in Defendant's Motion to Dismiss, the fact this case involves defamation claims does not raise the pleading standard to the level required to survive a motion for summary judgment or to prevail at trial, requiring Plaintiffs to actually prove all material issues of their case; instead, Plaintiffs need only set forth the particular

facts of the defamatory acts, which at this stage must be accepted as true, to survive a motion for dismissal of the Complaint.

Moreover, Defendant repeatedly states throughout its Motion to Dismiss that the Complaint is lacking in detail. This is no ground for dismissal under Rule 12(b)(6). *See In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281, 333 (S.D.N.Y. 2003). If Defendant truly believed that the clarity of pleadings were deficient, it should have moved for a more definite statement under Rule 12(e) and requested that Plaintiffs set forth more detail. Tellingly, it did not; the Complaint is sufficiently clear and detailed and Defendant's arguments to the contrary must be disregarded. Furthermore, the Plaintiffs are not required to explicitly state every potential detail of the case to be made at trial in order to meet the pleading requirements to survive a motion to dismiss. "As we have explained, a court reviewing a motion to dismiss must draw all reasonable inferences from the factual allegations in a plaintiff's complaint in the plaintiff's favor. *Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010)." *Bailey v. Wheeler*, 843 F.3d 473 (11th Cir. 2016). For reasons that will be further expounded upon, Plaintiffs have met the plausibility requirement of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) as well as the rest of the relevant standard to have Defendant's Motion to Dismiss denied. Plaintiffs' Complaint states with particularity the party that made the defamatory statements, namely the Defendant; the parties that were the targets of the

defamatory statements, the Plaintiffs; the basis for the falsity of the defamatory statements; and that Defendant acted with actual malice since prior to commencement of lobbying on an issue before the Georgia General Assembly it defamed Plaintiffs to obtain a lobbying advantage, the Defendant explicitly stated Plaintiff DIS was not an "anti-immigrant hate group" **after having knowledge of each and every supporting statement quoted in its Motion to Dismiss**. The Defendant's Intelligence Project Director, Heidi Beirich was quoted in 2011 by the Associated Press as stating that:

> His tactics have generally not been to get up in the face of actual immigrants and threaten them," said the law center's Heidi Beirich. "Because he is fighting, working on his legislation through the political process, that is not something we can quibble with, whether we like the law or not."[1]

The classification occurred in connection with Defendant's advocacy activities and was done maliciously in order to impair Plaintiffs' ability to effectively counter Defendant's advocacy activities, even though Defendant had knowledge of facts that contradicted such a classification.[2] These allegations establish the essential elements for each count in the Complaint. Because Plaintiffs have met the pleading requirements articulated, Defendant's Motion to Dismiss must be denied.

II. The Complaint States Actionable Defamation Claims

A. Defendant's Claim That Plaintiff DIS is an "Anti-Immigrant Hate

[1] https://www.statesboroherald.com/local/ga-man-key-to-crafting-illegal-immigration-bill/
[2] *Eramo v. Rolling Stone, LLC*, 209 F.Supp.3d 862, 873 (W.D. Va. 2016)

Group" that vilifies all immigrants is presented by Defendant as a Statement of Fact.

The court must consider the context in which statements are made as part of its determination as to whether or not the statement is defamatory. In this case, the Defendant did not publish an opinion piece or editorial in a newspaper but rather published the statement in a document it calls the "Intelligence Report" and in another document referred to as a "Hate Map" with full knowledge of its power and effect on the reputation of Plaintiffs. Both of these documents would give the reader the impression that Defendant is not merely espousing opinions but rather making these classifications after some rigorous analysis on the basis of the standard Defendant publishes on its own website. Now the Defendant would have this Court believe that describing Plaintiff DIS as an "anti-immigrant hate group" that "vilifies all immigrants" is some sort of political notion or idea that takes the term beyond the realm of defamation law.

However, courts are charged to first consider the meaning of the terms used. "A court must look to the 'fair and natural meaning which will be given it by reasonable persons of ordinary intelligence' and examine the publication as a whole and in context." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3rd Cir. 1998). What is the "fair and natural" meaning of the term "anti-immigrant"? It is defined by the Merriam-Webster.com Dictionary as "opposed to immigrants

or immigration; characterized by or expressing opposition to or hostility toward immigrants."[3] What is the "fair and natural meaning" of the term "vilify"? The word vilify is defined by the Merriam-Webster.com Dictionary as "to utter slanderous and abusive statements against."[4] With respect to the statements referenced by the Defendant since the inception of Plaintiff DIS made by Plaintiff King, Plaintiff DIS, or attributed to them by a third party, none express any opposition to legal immigration or legal immigrants.

The United States Immigration and Nationality Act, defines "immigrant" as an individual seeking to become a Lawful Permanent Resident in the United States. All of the political activism of Plaintiffs have been aimed at honoring legal immigration by enforcement of laws regarding illegal migration and making public benefits less available to individuals who have entered the United States illegally. Defendant cannot credibly claim that this Court is not capable of testing the statement that Plaintiffs are "anti-immigrant" or "hate group" or that they "vilify" all immigrants.[5] There are articles authored by Plaintiffs, media appearances, statements on the record to legislative committees, and other information all of

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[3] "Anti-immigrant." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.meriam-webster.com/dictionary/anti-immigrant. Accessed 9 jun.2020.
[4] "Vilify" *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.meriam-webster.com/dictionary/vilify. Accessed 9 jun.2020.

[5] Evidently the use of the term "anti-Muslim extremist" may be factually tested, as evidenced by the $3.4 Million Defendant agreed to pay to Maajid Nawaz and Quilliam regarding a potential lawsuit for the use of that defamatory language.

which support Plaintiffs' contention that at no time has either Plaintiff espoused "anti-immigrant" views but in fact has continuously and publicly countered that false description and defended legal immigrants when they are intentionally included with illegal aliens. By contrast, Plaintiffs are widely known for the position that illegal migration and lack of immigration enforcement dishonors legal immigrants and immigration. Defendant has attempted to conflate opposition to illegal migration with being anti-immigrant. This is factually incorrect and easy to confirm. Plaintiffs would not be in Court today if Defendant had categorized them as "anti-illegal alien" or "anti-illegal migration" but that would not advance the factually false narrative the Defendant uses to solicit contributions and wage its political battle to hinder immigration enforcement.

1. The challenged statements are not opinions protected by the First Amendment from being sanctioned as defamation.

The Defendant also cited the case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) to stand for the proposition that its labeling of the Plaintiffs as "anti-immigrant" is an "idea" protected by the First Amendment. It is telling that Defendant ignores the "anti-immigrant" and "vilifying all immigrants" labels it slapped on Plaintiffs in its discussion of a previous decision of the Middle District of Alabama. While you would not know it from reading the Defendant's Motion to Dismiss, the decision of a District Court is only binding on the parties to that

case and is in no way dispositive of the factually distinct issues present here. *Threadgill v. Armstrong World Indus.*, 928 F.2d 1366, 1371 (3d Cir. 1991). To clarify, the case *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1277 (M.D. Ala. 2019) did not involve the use of the term "anti-immigrant hate group" and "vilifying all immigrants"; it involved a claim regarding the use of a charitable sharing program offered by Amazon; it involved a religious organization that Defendant characterized as making anti-LGBT statements which the Plaintiff conceded making; and the Plaintiff was claiming a definition of hate group that was not supported by the record. To sum up, the Coral Ridge case is not binding upon this Court, is clearly distinguishable from the facts presented in that case, and should not be considered by this Court in deciding the pending Motion to Dismiss.

Referring to Plaintiffs as "anti-immigrant" and "vilifying all immigrants" in a document called the Intelligence Report and the Hate Map is not a statement of opinion nor is it presented as opinion, but as if the characterizations are facts based upon Defendant's "analysis" of the activities of the Plaintiffs. This is illustrated by the testimony delivered to Congress referenced later in this Brief. Unlike the discussion about "hate group" in the Coral Ridge case, the term "anti-immigrant" has a commonly understood meaning as reflected by the dictionary definition referenced earlier. With that commonly understood meaning available to the

Court, it is possible to perform the test of whether or not the statement is true or false. It is not necessary at this stage to conclusively prove that the statement is false but rather that the Plaintiffs have sufficiently pled the facts in their Complaint to demonstrate it is false. Plaintiffs have met this burden by clearly stating the mission of Plaintiff DIS as articulated by Plaintiff King, to seek enforcement of existing laws and passage of additional laws to discourage illegal immigration to the United States. There is a simple methodology available to determine whether or not Plaintiffs are "anti-immigrant" — reviewing the public record to identify any statement that opposes immigrants or immigration instead of a statement that opposes illegal aliens or illegal migration. By contrast, Plaintiffs can cite countless statements and writings that support legal immigrants and legal immigration. Regardless of how this Court determines "hate group" should be or can be defined, the Defendant's smear that Plaintiffs are "anti-immigrant" or "anti-immigrant hate group" or that they "vilify all immigrants" stands alone as actionable defamation since these are terms with commonly understood meanings that are demonstrably false. It should be noted that the Defendant has offered a definition of what a "hate group" is and so should be held to that definition. There is no evidence to support that Plaintiffs have pursued any sort of agenda against any group defined by immutable characteristics which is another way of testing the truth of Defendant's defamatory claim.

Plaintiffs agree with the Defendant that a court "must consider the circumstances in which the statement was expressed." *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002). This was not a statement blurted out during a television debate or in some other spontaneous way. By Defendant's own admission this statement was issued after some deliberation and was physically published in addition to being published to the Defendant's web site. The circumstances were that all of the facts Defendant claims it based its statement upon were known to the Defendant when it chose not to label the Plaintiffs "anti-immigrant" or an "anti-immigrant hate group" or state that Plaintiffs "vilify all immigrants" in the 2017 edition of its Intelligence Report. The nexus in time between the labeling of Plaintiffs as "anti-immigrant" or "anti-immigrant hate group" or that they "vilify all immigrants" and Defendant's lobbying activities before the Georgia General Assembly are undeniable. It is the contention of the Plaintiffs that this nexus was no coincidence and in fact the Defendant maliciously plotted to defame the Plaintiffs as part of its lobbying strategy. If this Court were to find, the Plaintiffs have not adequately pled actual malice, the remedy would be to allow the Plaintiffs leave to amend their complaint, as opposed to a dismissal with prejudice.[6]

[6] It is important to note that in the case of *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 694 (11th Cir. 2016) that the Court held the Plaintiff be allowed to amend his complaint to plead actual malice.

Next the Defendant tries to analogize the carefully calculated repeated publication of the "anti-immigrant" label with the case of a football coach who objected to his behavior being characterized as "homophobic taunting". The conduct complained of in that case was subject to a number of different interpretations and unlike the term "anti-immigrant" there is no readily available dictionary definition of "homophobic taunting". *Turner v. Wells*, 879 F.3d 1254 (11th Cir. 2018). The other case Defendant offers as an analogy to this case is one where the alleged defamatory speech was describing a homicide in unflattering terms. *Hamze v. Cummings,* 652 Fed. App'x 876 (11th Cir. 2016). The Court in that case actually did not definitively rule the statements were opinion but also allowed for the possibility that the statements made were in fact true. In any case, here the Defendant is not describing an act of the Plaintiffs but rather characterizing their entire person as "anti-immigrant" or "anti-immigrant hate group" or "vilifying all immigrants" and there is no comparison to either the *Turner* or *Hamze* case.

The Defendant goes on to make the stunning claim that that the context in which these statements were made makes it clear that the statements are a mere political opinion. Defendant publishes on its website a definition of "hate group" and it describes there and even in its Motion the careful study and analysis that allegedly goes into making these statements, which it refers to as "classifications",

another term to underline the scientific process Defendant is representing to the public goes into these publications. Defendant does not publish these self-proclaimed "political opinions" in the op-ed pages of a newspaper but rather in a document it titles the "Intelligence Report" or by showing the locations on a "Hate Map". If anything the context makes it clear that the Defendant is representing these statements as matters of fact, arrived at after concluding an exhaustive and scientific process. In Congressional testimony delivered on June 4, 2019, the SPLC's Lecia Brooks cited the rise in organizations deemed "hate groups" by the SPLC as if it were fact, a statistically significant measure of increasing white supremacy in America. Brooks cited the "hate group" list in her Congressional testimony stating that, "[e]ach year since 1990, we have conducted a census of hate groups operating across America, a list that is used extensively by journalists, law enforcement agencies and scholars, among others," she said.[7] Later she cited the "hate group" list as evidence of "sharp increases in the number of U.S.-based hate groups around the turn of the century, following a decade in which the unauthorized immigrant population doubled, rising from 3.5 million to 7 million.

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[7] "Testimony of Lecia Brooks, Southern Poverty Law Center, Before the Subcommittee on Civil Rights and Civil Liberties Committee on Oversight and Reform, United States House of Representatives." June 4, 2019. https://www.splcenter.org/sites/default/files/lecia_brooks_testimony-house_oversight-060419.pdf.

In 1999, we counted 457 hate groups. That number more than doubled—to 1,018—by 2011, two years into the Obama administration. But, after that peak, the number began to decline steadily, to a low 784 by 2014."[8] Still later, Brooks testified that, "[o]ur latest count shows that hate groups operating across America rose to a record high in 2018. It was the fourth consecutive year of growth—a cumulative 30 percent increase that coincides roughly with Trump's campaign and presidency—following three straight years of declines. We also found that white nationalist groups in 2018 rose by almost 50 percent—from 100 to 148—over the previous year."[9] The Defendant would have this Court believe that the "hate group census" it has conducted for 30 years which it states its relied upon by law enforcement and figures involved in the formation of public policy is "rhetoric" and mere "political opinion" despite its representation to the contrary under oath before Congress.

Even if this Court were to find that the Defendant's "classification" of Plaintiff DIS as an "anti-immigrant hate group" was an opinion as well as its characterization of Plaintiff King as "anti-immigrant" that would not authorize dismissal of this case. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) stands

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[8] Id.

[9] Id.

for the proposition that even the expression of an opinion may be actionable where the opinion makes an assertion that "is sufficiently factual to be susceptible of being proved true or false" 479 U.S. at 21. In this case 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". Whether or not that evidence is sufficient to prove that Defendant's statements are false is a determination to be made by the finder of fact following a trial, not before the Plaintiffs have even had an opportunity to pursue discovery.

Defendant also tries to argue that the "anti-immigrant" label is an allegation of prejudice, hatred, or political extremism that cannot be proven and cites cases where calling someone a "fascist", "racist", or "xenophobic" were held to be non actionable opinion. In the case of *Egiazaryan v. Zalmayev*, 880 F. Supp. 2d 494 (S.D.N.Y. 2012), it was held that:

> [t]he Court considers the alleged statements in their context. Beginning with the broader context, the article appears in the "opinion" section of the newspaper…editorial formats in sharp contrast to news reporting…create the "common expectation" that the communication would "represent the viewpoint of [its] author[] and…contain considerable hyperbole, speculation, diversified forms of expression and opinion." *Richardson,* 87 N.Y.2d at 53

Obviously that is distinguishable to this case where everything the Defendant could do to represent the statement made as fact, not opinion, was done. In the case of *Ratajack v. Brewster Fire Dep't, Inc.*, 178 F. Supp. 3d 118, (S.D.N.Y. 2016) the Court ruled that since the facts upon which the opinion was based were disclosed that stating the plaintiff was a racist was not actionable. However, in this case the Plaintiffs contend the real reason for making the defamatory statements was the lobbying activities of the Defendant, not any of the facts recited by Defendant. All of these facts were known to the Defendant in 2017 when it chose not to "classify" Plaintiff DIS as an "anti-immigrant hate group" nor did it characterize Plaintiff King as "anti-immigrant" or that either Plaintiff "vilified all immigrants". In the final of this trio of cases, *Buckley v. Littell,* 539 F.2d 882, 893-95 (2d Cir. 1976) the Court did dismiss two of three defamation claims made by Buckley. But the Court upheld the third claim which was based on a statement that Buckley routinely lied and libeled others. In doing so, the Court held that:

> …whatever might be said of a person's political views any journalist, commentator, or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is "crucial" to such a person's career that he or she not be so treated. To call a journalist a libeler and to say that he is so in reference to a number of people is defamatory in the constitutional sense, even if said in the overall context of an attack otherwise directed at his political views. *Buckley* at 896-897

In this case, any political activist is entitled not to be lightly characterized as "anti-immigrant" or belonging to a "hate group" that "vilifies all immigrants" and an

organization devoted to political activism is entitled not to be lightly characterized as "anti-immigrant" or a "hate group" that "vilifies all immigrants". It is equally "crucial" to the career of a political activist or a political organization that it not be falsely characterized in a way that makes it difficult for that activist or group to access elected officials. Defendant knows that this defamatory speech makes it far less likely that either Plaintiff will be able to meet with or engage with in a meaningful way elected officials who are themselves afraid of being falsely smeared with these malicious labels. Defendant stating that Plaintiffs vilify all immigrants is directly analogous to Littell calling Buckley libelous. As cited earlier, the dictionary definition of vilify includes uttering slanderous statements against. So if one is to take the *Buckley* analysis seriously, the statements made by Defendant constitute actionable defamation.

Defendant includes a laundry list of cases regarding the use of the terms "racist" or "anti-Semitic" which have no bearing on the case here which uses neither of those terms. Stating someone is racist is not only subjective but difficult to define. A racist could be someone who subscribes to white supremacy, black nationalism, or many other belief systems. The same could be said of the term "anti-Semitic" which while understood by some to mean "anti-Jewish" could also apply to a variety of other Semitic peoples who do not subscribe to Judaism. "Anti-immigrant" on the other hand is a commonly understood term as indicated

by the dictionary definition provided herein. Since the terms "anti-immigrant" and "hate group" have specific definitions, the truth of the statements made by Defendant can be factually proven or disproven and therefore this basis to dismiss Plaintiffs' Complaint should be denied.

2. Georgia law does not avail the Defendant of any more protection than its previous First Amendment argument and should fail for the same reasons.

Defendant commences this argument by citing the case of *Bergen v. Martindale-Hubbell,* 337 S.E.2d 770 (Ga. Ct. App. 1985), which involved a lawyer suing a company for issuing a rating for him comparing his legal ability to other attorneys. Defendant's defamatory statements here were not comparing Plaintiffs to other political activists or organizations in their effectiveness, but instead making the blanket classification that Plaintiff DIS is "anti-immigrant" and a "hate group" that "vilifies all immigrants" and that Plaintiff King is "anti-immigrant" and that he leads a "hate group" that "vilifies all immigrants".

Next Defendant attempts to make the argument that because it disclosed certain facts along with the defamatory statement that it places the defamatory statement beyond the reach of a civil action. It cites the case of *Monge v. Madison Cnty. Record, Inc.,* 802 F. Supp. 2d 1327 (N.D. Ga. 2011) in which a newspaper published comments from a judge about, among other things, the failure of an attorney of record to appear at his client's deposition. The Court found that

statement was true which is an absolute defense to a defamation claim. The other claim had to do with the statement that the attorney had "torpedoed" his client's case. The Court ruled that was an opinion for which the facts were disclosed and therefore could not be actionable as defamation. The problem with making that comparison to this case is *each and every fact Defendant claims it relied on were known to it* when it published the 2017 Intelligence Report which did not use any of the "anti-immigrant" or "hate group" or "vilify all immigrants" language.

Therefore the only conclusion must be that some undisclosed fact came to Defendant's attention between the publication of the 2017 Intelligence Report and the 2018 Intelligence Report and Hate Map. Defendant cannot credibly argue that the facts it is citing from as far back as a time prior to the incorporation of Plaintiff that DIS suddenly became more relevant — and by its own prior publications it has admitted knowledge of these previous facts well before the decision to categorize Plaintiff DIS as an "anti-immigrant hate group" that "vilifies all immigrants" and to attach the "anti-immigrant" or "vilify all immigrants" label to Plaintiff King. So the entire line of cases Defendant is citing cannot be relied upon by the Court because in each of those cases the publisher of the alleged defamatory statements did not make one statement while disclosing those facts and then went on later in time to make an entirely different statement on the basis of the same facts.

3. Defendant repeatedly uses the "anti-immigrant" that "vilifies all immigrants" label to slander Plaintiff King.

Plaintiff King is not making the claim that Defendant's defamation of Plaintiff DIS is also a defamation of him. That is why the Amended Complaint sets out the claims separately. Defendant cites alleged statements and actions of Plaintiff King, often by misrepresenting them or taking them out of context, to now justify the smearing of Defendant DIS. Defendant has also separately labeled Plaintiff King as "anti-immigrant" and that he "vilifies all immigrants" and so whether or not Plaintiff DIS ultimately prevails on its claims, the claims made by Plaintiff King stand separate and distinct from the designation by Defendant of Plaintiff DIS as an "anti-immigrant hate group".

B. Plaintiffs readily concede they are public figures for the purpose of defamation law, who must plead and prove actual malice. As required, Plaintiffs' Complaint does plausibly allege facts supporting a reasonable inference of actual malice.

It is important to note that the cases Defendant relies on in this section of its brief are all defamation cases against news organizations. Defendant wishes for this Court to consider earlier arguments made in light of it being a political organization but evidently wishes to be treated as the New York Times when it comes to analyzing the actual malice standard.

First, Plaintiffs contend they have adequately pled actual malice within the four corners of the Amended Complaint filed with this Court. The Plaintiffs clearly outline information readily available to Defendant that would show the assertion that Plaintiffs are "anti-immigrant" to be demonstrably false. These facts include that Plaintiff King has an adoptive sister who is a legal immigrant and the Board of Advisors of Plaintiff DIS is not only racially diverse but includes legal immigrants as well. Plaintiffs clearly alleged the nexus between the timing of Defendant's defamatory statements and its lobbying activities in its Amended Complaint. Plaintiffs also alleged that Defendant had previously chosen not to "classify" Plaintiff DIS as an "anti-immigrant hate group" when the same set of facts were known to it at an earlier time. From all of these facts it can be reasonably inferred that Defendant maliciously issued these defamatory statements as part of a lobbying strategy to disable what they assessed to be their most formidable adversaries. These are far beyond "mere conclusory statements" but instead form the basis of a compelling narrative as to why Defendant would suddenly decide to "classify" Plaintiffs with the "anti-immigrant hate group" label on the basis of facts it had in its possession for years. The documents incorporated by the Amended Complaint do not make it clear what Defendant did or did not believe. The evidence that Defendant actually entertained serious doubts as to the veracity of their published statements is that in 2017, knowing all of the relevant

facts that it still knew in 2018, it chose not to make the defamatory statements. That shows this was a deliberate telling of an untruth by the Defendant. It strains credulity to believe that Defendant would publish anything revealing its strategy to attack a political opponent by making defamatory statements. The lack of such a revelation does not justify dismissal of this action as Defendant claims.

Defendant's own definition of a hate group states that, "The Southern Poverty Law Center defines a hate group as an organization that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."[10] There is no evidence — none — that Plaintiffs have attacked any class of people with immutable characteristics which is the definition of a hate group. There is no evidence that Plaintiff King or Plaintiff DIS has engaged in opposition to immigration which is the legal process of a person becoming a permanent resident in contrast to opposing illegal migration whereby the laws of this country are broken in order to illegally cross our borders. Further, there is no evidence that Plaintiff King or Plaintiff DIS has beliefs or practices that involve attacking or maligning all immigrants. These are facts which can either be proven or disproven and are entirely outside the scope of opinion.

[10] www.splcenter.org/20200318/frequently-asked-questions-about-hate-groups#hate%20group

Defendant goes on in its argument on actual malice to suggest that it did not know the composition of the Board of Plaintiff DIS. The idea that Plaintiff has to allege it had knowledge of these facts when Defendant had reviewed media appearances by Plaintiff King and cites statements years earlier from Board members strongly suggests Defendant knew or should have known of the composition of Plaintiff's Board. Defendant also argues Plaintiffs are merely denying the defamatory statements are true. While Plaintiffs are indeed denying those statements vigorously, they have also put forward facts that establish these statements were issued with actual malice. The Defendant 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. The Defendant purposefully avoided the truth in making these defamatory statements which also supports actual malice. *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 692 (1989). The Defendant failed to properly investigate whether there were other factors weakening the basis for the ultimately defamatory claims. "[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by inherent improbability, internal inconsistency, or apparently reliable contradictory information." *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987). The Defendant registered to conduct political activity in Georgia at precisely the same time it decided, on the basis of those same facts, to suddenly issue these defamatory statements. This was

a calculated decision to injure the reputation of their perceived political opposition at the very moment they were attempting to exert influence on the Georgia General Assembly. This makes the reasons for the actual malice painfully clear and certainly sufficient to survive the Defendant's Motion to Dismiss.

Finally, in the unlikely event the Court is persuaded that the Amended Complaint does not allege actual malice with sufficient specificity, then the Court should follow the *Michel* case and allow the Plaintiffs leave to amend the complaint to more fully detail Defendant's scheme to malign their good names in reckless pursuit of its agenda.

CONCLUSION

It is obvious Defendant would like to deny Plaintiffs their access to discovery to prove the elements of defamation as alleged in the Amended Complaint. For all the reasons provided herein, Plaintiffs respectfully request the Court deny the Motion to Dismiss in its entirety.

Dated: June 9, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 2020, I have provided a copy of the foregoing to all counsel of record by electronically filing a copy of the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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