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

DONALD A. KING and THE DUSTIN INMAN SOCIETY, INC.,	)	
Plaintiffs,	)	**CIVIL ACTION NO.**
v.	)	**2:22-cv-00207-WKW-JTA**
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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Plaintiffs Donald A. King and The Dustin Inman Society, Inc. (hereinafter referred to as King and DIS, respectively) by and through their attorney, James R. McKoon, Jr., submit the following Brief in Opposition to the Defendant's Motion to Dismiss the Complaint. For the reasons set forth below, King and DIS request that this Court deny the Motion to Dismiss in its entirety.

INTRODUCTION

It is easier to understand this case if the Court has the context of the debate on illegal immigration in this country. In that debate, essentially there are two sides, pro-enforcement and anti-enforcement. With their lobbying against enforcement legislation backed by King and DIS in the Georgia General Assembly, it is easy to accurately describe the Defendant (hereinafter referred to as SPLC) as "anti-enforcement" – for profit. The ever-present tool of the SPLC is to blur the clear difference between illegal immigration and immigration and especially the vast difference between illegal aliens and legal immigrants. To note the difference between the two, King makes it clear that "immigrants" do not require an amnesty from Congress– that need is only for illegal aliens. The focus of the activities of King and DIS have always been centered on the process of illegal immigration and to deter aliens from entering and remaining in the United States and Georgia illegally. This fact is key to the underlying defamation claims of King and DIS.

King and DIS allege in their Complaint:

First, that SPLC affirmatively stated DIS was not considered an "anti-immigrant hate group" in a published article at a time when all of the material facts recited by SPLC in its Motion to Dismiss were known to SPLC.

Second, that the SPLC for years chose not to classify DIS as an "anti-immigrant hate group" and gave an on the record statement to the media explaining that decision. Heidi Beirich speaking on behalf of the SPLC in July of 2011 explained to the Associated Press why DIS was **not** on the list of hate groups stating about King that, "His tactics have generally not been to get up in the face of actual immigrants and threaten them…[b]ecause 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]

Third, that the SPLC first classified DIS as an "anti-immigrant hate group" in 2018, as it registered on March 1, 2018 to lobby against passage of pro-enforcement legislation regarding illegal immigration before the Georgia General Assembly for which King and DIS had advocated passage.

Fourth, that the SPLC classified DIS as an "anti-immigrant hate group" with knowledge that King and DIS have never advocated for any measure that would be adverse to the interest of legal immigrants, that King has an adopted sister who is herself a legal immigrant, and that the board of DIS is composed in part of legal immigrants and their family members and has been since its inception in 2005. DIS has also enjoyed financial and other support from legal immigrants over the years of its activities.

Fifth, that the SPLC took the step of classifying 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 as a calculated smear designed to impair the credibility of and marginalize King and DIS and their ability to effectively advocate and educate on the issue before the Georgia General Assembly and in public and media appearances.

[1] https://www.statesboroherald.com/local/ga-man-key-to-crafting-illegal-immigration-bill/

Sixth, that the SPLC attributed statements to King in published material that were totally false and/or so wildly taken out of context as to render them libelous.

Seventh, that the SPLC published these false and defamatory statements with malice, including the repeated statement that King and DIS "vilify all immigrants". Under any reading of the applicable standard requiring particularity, King and DIS have met and exceeded their obligations.

It is important to note that King and DIS complied with the prior Order of the Court regarding the refiling of this action. The Court did not grant King and DIS leave to amend the complaint pending at that time but instead dismissed the complaint without prejudice and the court record reflects that the prior civil action was terminated on the same date the Order of Judge Marks was entered dismissing the complaint without prejudice. *See* ECF No. 20, 2:20-cv-120-ECM-SMD. There was no possibility of amending their complaint since the action had been terminated by the Court and the complaint had been dismissed. So, King and DIS acted promptly by refiling this action in conformity with the instructions of the Court and therefore there is no basis to bar any of the claims due to a statute of limitations defense which will be discussed in greater detail below. As to SPLC's argument that collateral estoppel or issue preclusion applies to any claim appearing in the refiled action that was contained in the original complaint, the Court dismissed the original complaint without prejudice, which is not an adjudication on the merits. Collateral estoppel or issue preclusion only applies under the substantive law of Georgia and Alabama when a Court has previously ruled on the merits and so none of the arguments or claims pursued by King and/or DIS in this action should be subject to collateral estoppel or issue preclusion since no Court in the history of this litigation has ruled on the merits of these claims.

Outside of these new procedural arguments, SPLC rests on three principal arguments in support of their Motion to Dismiss: (1) – that the classification of "anti-immigrant hate group" is simply the expression of subjective opinion; (2) – that in the alternative the designation is a conclusion based on disclosed facts; and (3) – that DIS and King have not alleged facts that plausibly establish actual malice on the part of SPLC.

King and DIS will argue in more detail below that the classification of "anti-immigrant hate group" is portrayed by SPLC as a statement of fact, that the plain dictionary definitions of the words contained in the phrase make it possible to test the truth of the designation, and that the SPLC's own definition also allows an objective determination of what groups may be so designated. As such, the first argument advanced by SPLC to dismiss the complaint is not well founded.

King and DIS will demonstrate all of the material facts that SPLC relies on in making the "anti-immigrant hate group" designation were known for years prior to the designation first being made in 2018. The only material fact any of the parties are aware of that changed the relationship between King/DIS and SPLC at that time is SPLC registered to lobby in the Georgia General Assembly to oppose legislation for which King/DIS had been advocating. There is no fact cited by SPLC that leads to the conclusion of classifying DIS as an "anti-immigrant hate group" because none of the facts cited support the characterization of DIS as "anti-immigrant" or a "hate group" either by the commonly understood meaning of those terms or within SPLC's own definition.

Finally, King and DIS have sufficiently alleged facts that would, if proven, plausibly establish that SPLC published the defamatory statements with actual malice. While counsel for SPLC states that the actual malice standard, "requires publication with subjective knowledge of

falsity or a 'high degree of awareness' of 'probable falsity'" *See* SPLC Motion to Dismiss page 2, the U.S. Supreme Court has ruled that the actual malice standard may also be met by publishing, "with reckless disregard of whether it was false or not" *New York Times v. Sullivan*, 376 U.S. 254 (1964). As will be argued in greater detail below, King and DIS have met that standard by alleging the lack of any investigation performed by SPLC, the numerous factual errors made by SPLC, the proximity in time between the registration to lobby in opposition to DIS and King and the new designation, and that SPLC knew all of the material facts it cited years prior to the designation.

What this case is actually about is the SPLC seeking to disable DIS and King by falsely labeling DIS an "anti-immigrant hate group" so that DIS would be less effective in its efforts for legislation in front of the Georgia General Assembly in support of enforcement of immigration laws. The facts demonstrate that prior to commencement of lobbying on an issue before the Georgia General Assembly the SPLC **explicitly stated DIS was not an "anti-immigrant hate group" after having knowledge of all supporting actions and statements listed in its Motion to Dismiss, with the possible exception of King retweeting a Twitter account in 2018**.[2] The SPLC's "Intelligence Project Director", Heidi Beirich was quoted in 2011 by the Associated Press as stating that:

> "His [King's] 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."[3]

[2] King has also retweeted the SPLC's twitter account and the SPLC does not seem to consider that an endorsement of their positions.

[3] https://www.statesboroherald.com/local/ga-man-key-to-crafting-illegal-immigration-bill/

The classification occurred in connection with SPLC's lobbying activities and was done maliciously in order to impair the ability of King and DIS to effectively counter SPLC's advocacy activities and even though SPLC had knowledge of facts that contradicted such a classification, which alone supports a claim of actual malice.[4] The SPLC spends eight pages of its Motion to Dismiss and Memorandum of Law outlining "publicly stated grounds for characterizing DIS as an anti-immigrant hate group". *See* SPLC's Motion to Dismiss, page 6. But SPLC admits in its own Memorandum of Law that, "SPLC relies on the report not for the truth of the information it contains, but because its existence provides the necessary context for evaluating the challenged designation of DIS as a hate group and for assessing whether King and DIS could plausibly plead that SPLC designated DIS as a hate group with the requisite actual malice." *Id*. SPLC is taking the position that a document SPLC's Counsel will not say is truthful proves there is no basis for a claim that the designation of SPLC DIS as an "anti-immigrant hate group" was done with actual malice. There is no legal authority to support the position that citing its own report immunizes SPLC from the claims of King and DIS. The allegations made surrounding the report by the SPLC are exactly that, allegations and should not be given any weight, since the SPLC's own attorneys are unwilling to vouch for the truthfulness of the statements contained within the report. In essence, SPLC is admitting that the statements it has made about King and DIS are untrue. If SPLC is unwilling to vouch for the truthfulness of the report relied upon to defame King and DIS, it is beyond belief that SPLC continues to maintain these claims in a report presented to the public as the result of a detailed scientific inquiry. The citation of these allegations within the report merely underlines the fact that SPLC had knowledge of almost every allegation at the time it publicly announced why it did not

[4] *Eramo v. Rolling Stone, LLC*, 209 F.Supp.3d 862, 873 (W.D. Va. 2016)

consider DIS within their own concocted definition to classify it as an "anti-immigrant hate group".

Nevertheless, SPLC has moved to dismiss the Complaint, claiming that King and DIS have not and cannot provide enough information to meet the standard for particularity in pleading, that the statements complained of are statements of opinion, that claims are barred by the statute of limitations and/or collateral estoppel, and that the claims of King must be dismissed because he and DIS are separate and distinct parties. Recognizing that it cannot meet the standard required for a Motion to Dismiss under Rule 12(b)(6), SPLC 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 SPLC'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 SPLC'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 DIS and King to actually prove all

material issues of their case; instead, DIS and King 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, SPLC repeatedly states throughout its Motion to Dismiss that the Complaint is lacking in detail. To begin, 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 SPLC 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 King and DIS set forth more detail. Tellingly, it did not; the Complaint is sufficiently clear and detailed and SPLC's arguments to the contrary must be disregarded. Furthermore, King and DIS 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, King and DIS have met the plausibility requirement of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 as well as the rest of the relevant standard to have SPLC's Motion to Dismiss denied. The allegations of the Complaint filed by King and DIS establish the essential elements for each count in the Complaint. DIS and King's Complaint identifies the SPLC as the party that made the defamatory statements; it further identifies King and DIS as the targets of the defamatory statements; the basis for the falsity of the defamatory statements; and that SPLC acted with actual malice. Because King and DIS have met the pleading requirements articulated, SPLC's Motion to Dismiss must be denied.

II. SPLC'S PUBLICLY STATED GROUNDS FOR CHARACTERIZING DIS AS AN ANTI-IMMIGRANT HATE GROUP WERE KNOWN TO SPLC YEARS PRIOR TO THE DEFAMATORY ACTIONS COMPLAINED OF BY KING AND DIS

SPLC included in its report a number of statements to attempt to justify the "anti-immigrant hate group" designation. The eight quoted statements were known to the SPLC from 14 years to 8 years prior to making the designation and importantly, all of them were known prior to the July 2011 public statement made by the SPLC explaining why DIS was not on their list of hate groups, stating that, "His tactics have generally not been to get up in the face of actual immigrants and threaten them…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." *See* Plaintiff's Complaint at Paragraph 17. The final "statement" attributed to King pertains to activity on his twitter account, but not statements he authored on twitter but rather retweets of other twitter accounts. Almost all of that twitter activity was also known to SPLC prior to the designation as well, with the possible exception of a claim that King retweeted an account which separately posted content SPLC finds offensive but has nothing to do with an "anti-immigrant" position. It should be noted King has also retweeted the SPLC's twitter account, which the SPLC clearly does not consider an endorsement by King of their views.

The remaining "evidence" cited by SPLC are all attempts to associate King or DIS with other groups the SPLC has slapped with "hate group" or "white nationalist" or "anti-immigrant" labels. All of these associations were known to SPLC years prior to the designation of DIS as an "anti-immigrant hate group" and most were known prior to the SPLC's own statement explaining why DIS was not classified as a "hate group" in 2011. As an example of the sloppy and in some cases nonexistent investigative work by SPLC, the citation that King published opinion pieces on the VDARE website does not mention that King had no editorial control over

other published pieces on the website, that the cited piece by King is describing the experience of being on the border and watching illegal immigration occur in real time, and that King ceased writing articles for VDARE in August of 2006, some 12 years before the designation of DIS as an "anti-immigrant hate group" and five years before SPLC issued the statement referenced in the Complaint explaining why DIS was not classified as an "anti-immigrant hate group". See Plaintiff's Complaint at Paragraph 17. It should also be noted that SPLC falsely claims King was writing pieces for VDARE as late as 2010 when that can be disproven by a simple review of the publicly available archive of articles.[5]

The Court should take note that SPLC has provided all of these claims in support of a legal argument that if the Court agrees with King and DIS that the defamatory statements published by SPLC may be proved false, that in the alternative the Court should dismiss the claims of King and DIS because the defamatory statements are conclusions based on disclosed facts. All of the disclosed facts SPLC allegedly relied upon in coming to the defamatory conclusions are from the SPLC's own report. The SPLC's own legal counsel refuses to claim that the report is truthful. As a result there are no independent facts SPLC has cited to draw the defamatory conclusions reached with regard to King and DIS.

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

SPLC concedes that even if the Court were to accept its statute of limitations argument that the principal claims made regarding SPLC's classification of DIS as an "anti-immigrant hate group" would survive for this Court to consider. However, the SPLC ignores the procedural history of this case to arrive at the conclusion that certain claims made by King and DIS are time barred. DIS and King's complaint was dismissed without prejudice by Judge Marks in her

[5] https://vdare.com/writers/da-king

March 29, 2022 Order. On the same day the Court entered that dismissal as a final judgment, terminating the previous civil action. *See* ECF No. 20, 2:20-cv-120-ECM-SMD. King and DIS acted quickly, filing this Complaint within thirty (30) days of her Order, recasting their factual allegations and pleading additional more specific allegations. It is also important to note that all claims pled in the original complaint which are recast in this Complaint were well within the applicable statute of limitations when it was filed on February 20, 2020. The original Motion to Dismiss was filed by the SPLC on May 18, 2020. The issues surrounding that Motion were fully briefed to the Court by June 16, 2020. No order issued regarding the pending motion until one year and nine months later. While there may be multiple reasons for the time required to rule on the SPLC's original Motion to Dismiss, including a worldwide pandemic caused by the novel coronavirus, none of that delay was caused by either King or DIS. It is also undeniable that once the King and DIS were on notice of the dismissal without prejudice they quickly acted to refile their Complaint with greater particularity. Alabama law recognizes the doctrine of equitable tolling, whereby a Court may suspend the running of a limitations period "in extraordinary circumstances that are beyond the Plaintiff's control and that are unavoidable even with the exercise of due diligence." *Ex parte Ward*, 46 So. 3d 888, 897 (Ala. 2007). Consideration must be given as to whether the "principles of equity would make the rigid application of a limitation period unfair" and whether the plaintiff had "exercised reasonable diligence in investigating and bringing the claims". Id 46 So. 3d at 897. Here King and DIS timely filed a Complaint and responded in a timely manner to the SPLC's Motion. The Court's own Order dismissing the case without prejudice stated King and DIS had the right to file a Complaint with additional allegations pled. SPLC would seek to penalize King and DIS who have at all times diligently pursued their claims due to the delay in ruling on SPLC's Motion. The intervening pandemic

caused by the novel coronavirus undoubtedly qualifies as an extraordinary circumstance beyond the control of both King and DIS. Therefore the Court should apply Alabama law on equitable tolling and suspend the statute of limitations. Furthermore, 28 U.S.C. 1367(d) provides that limitations periods for state claims dismissed by a federal court shall be tolled while the claim is pending and for thirty (30) days thereafter in the absence of other state law providing a lengthier period. If this Court believes that even though the previous Complaint was dismissed and therefore no pleading was pending to amend that this matter belongs in the prior civil action, King and DIS would simply ask the Court to transfer this matter to the original civil action in the interest of justice and judicial economy. For all of these reasons, none of the claims contained in the Complaint pending before this Court should be dismissed due to the applicable statute of limitations.

IV. THE COMPLAINT STATES ACTIONABLE DEFAMATION CLAIMS

A. SPLC's Claim That Plaintiff DIS is an "Anti-Immigrant Hate Group" that vilifies all immigrants is presented by SPLC as a Statement of Fact.

The court must consider the context in which a statement is made as part of its determination as to whether or not the statement is defamatory. In this case, the SPLC 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 King and DIS. The obvious intent of the SPLC was to discredit and disable King and DIS to the public and to public policy makers so that they would not be heard on the issue of immigration. Both of these documents would give the reader the impression that SPLC is not merely espousing opinions but rather

making these classifications after some rigorous analysis on the basis of the standard SPLC publishes on its own website.[6] Now the SPLC would have this Court believe that describing 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 as "opposed to immigrants or immigration; characterized by or expressing opposition to or hostility toward immigrants."[7] What is the "fair and natural meaning" of the term "vilify"? Vilify is defined as "to utter slanderous and abusive statements against."[8] With respect to the statements referenced by the SPLC since the inception of DIS made by King, DIS, or attributed to them by a third party, none express any opposition to legal immigration or legal immigrants. In the United States Immigration and Nationality Act, an immigrant defined as an individual seeking to become a Lawful Permanent Resident in the United States. All of the political activism of King and DIS have been aimed at honoring legal immigration by enforcement of laws regarding illegal immigration and making public benefits less available to individuals who have entered the United States illegally. In fact King and DIS have taken positive steps to honor legal immigrants to the United States, including holding an event on February 8, 2020, "Honoring Immigrants: An Expert Pro-Enforcement Conversation

[6] https://www.splcenter.org/fighting-hate/extremist-files/ideology/anti-immigrant
[7] *Anti-Immigrant*, Merriam-Webster Dictionary (Accessed August 15, 2022). https://www.merriam-webster.com/dictionary/anti-immigrant
[8] *Vilify*. Merriam-Webster Dictionary (Accessed August 15, 2022). https://www.merriam-webster.com/dictionary/vilify

on Immigration".[9] DIS has articulated its mission since 2005, "[o]ur unequivocal mission is to end illegal immigration, illegal employment, the illegal administration and granting of Public Benefits and services through the equal application of existing laws. Additionally, we are proud to successfully advocate for and offer expert, experienced advice on crafting state and local legislation aimed at impeding illegal immigration."[10] King has repeatedly cast the efforts made to restrict illegal immigration in the context of honoring those individuals who follow the lawful process to immigrate to the United States. "The 287(g) tool is a proven public safety asset and we cannot honor immigrants who obey our immigration laws unless those laws are enforced."[11] The voluminous public record generated by King and DIS over the last 17 years shows a consistent opposition to illegal immigration, taking a pro-enforcement stance in the debate regarding illegal immigration, and honoring legal immigrants. King has publicly declared in the Atlanta Journal-Constitution that, "[f]or the record – yet again – I am not "anti-immigration" any more than the folks at Mothers Against Drunk Driving are "anti-driving". Neither is my adopted sister, who is an immigrant."[12] This quote alongside many other similar statements throughout the public record have been intentionally ignored by SPLC in their quest to defame King and DIS.

SPLC's claim that this Court is incapable of testing the statement that King and/or DIS are "anti-immigrant" or a "hate group" or that they "vilify all immigrants" is not supported by any fair reading of the terms used by SPLC.[13] There are articles authored by King and DIS, media appearances, statements on the record to legislative committees, and other information all

[9] A detailed description of the event referenced may be found here: https://newdustininmansociety.org/reserved_1/
[10] https://newdustininmansociety.org/mission-statment/
[11] https://www.ajc.com/news/opinion/opinion-expand-local-immigration-enforcement-efforts-funding/mlVVpCcZ0Xfty5N2BLkTrJ/
[12] https://www.ajc.com/news/opinion/readers-write-june/F3JqOrd4zaYriAJfGGl6RJ/
[13] Evidently the use of the term "anti-Muslim extremist" may be factually tested, as evidenced by the $3.4 Million SPLC paid to Maajid Nawaz and Quilliam regarding a potential lawsuit for the use of that defamatory language.

of which support the contention of King and DIS that at no time has either King or DIS 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, King and DIS are widely known for the position that illegal immigration and lack of immigration enforcement dishonors legal immigrants and legal immigration. SPLC has attempted to conflate opposition to illegal immigration with being anti-immigrant. This is factually incorrect and easy to confirm. King and DIS would not be in Court today if SPLC had categorized them as "anti-illegal alien" or "anti-illegal immigration" but that would not advance the factually false narrative the SPLC 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 SPLC 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 King and DIS as "anti-immigrant" is an "idea" protected by the First Amendment.[14] That same case states that, "[b]ut there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." SPLC has continuously represented the classification of DIS as an "anti-immigrant hate group" as a matter of fact following rigorous investigation and scientific inquiry. It is telling that SPLC ignores the "anti-immigrant" and "vilifying all immigrants" labels it slapped on King and DIS in

[14] It is worth noting that in the *Gertz* case, the U.S. Supreme Court held that the claims of Gertz could move forward under the substantive defamation law of Illinois. The Court in that case did not find that the charges published about Gertz, including that he was a "Leninist" and a "Communist-fronter" were matters of opinion. In fact both of those published charges were considered by the trial jury and resulted in an award of damages to Gertz. The primary distinction drawn in the *Gertz* case was that since the plaintiff was a private individual that the "actual malice" standard previously adopted did not apply and that Illinois law had greater latitude in determining the threshold for liability under its defamation law.

its discussion of a previous court decision. SPLC leans heavily upon the decision in *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1277 (M.D. Ala. 2019). While you would not know it from reading the SPLC'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) was distinguishable from the case before this Court in a number of significant respects. That case 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 SPLC 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 King and DIS as "anti-immigrant" and "vilifying all immigrants" in a document called the Intelligence Report or the Hate Map is not a statement of opinion but rather the rendering of a judgment of fact based upon SPLC's "analysis" of the activities of King and DIS. 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 King and DIS have sufficiently

pled the facts in their Complaint to demonstrate it is false. King and DIS have met this burden by clearly articulating the mission of DIS as articulated by 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 King and DIS 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 immigration. By contrast, King and DIS 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 SPLC's smear that King and DIS 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 SPLC has offered a definition of what a "hate group" is and so should be held to their own invented definition. There is no evidence to support the claim that King and DIS have pursued any sort of agenda against any group defined by immutable characteristics which is another way of testing the truth of SPLC's defamatory claim. Clearly illegal aliens are a diverse group that can be foreign nationals of any country other than the United States, men, women, children of all racial and ethnic backgrounds and therefore cannot possible fall within the immutable characteristics category necessary to fall within the "hate group" definition advanced by SPLC. The illegal status of such individuals can be changed simply by leaving the United States.

King and DIS agree with the SPLC 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 SPLC's own admission this statement was issued after some deliberation and was

physically published in addition to being published to the SPLC's web site. The circumstances were that all of the material facts SPLC claims it based its classification upon were known to the SPLC when it chose not to label King and DIS "anti-immigrant" or an "anti-immigrant hate group" or state that King and DIS "vilify all immigrants" in the 2017 edition of its Intelligence Report and all editions issued previously through the founding of DIS in 2005. The nexus in time between the labeling of King and DIS as "anti-immigrant" or as an "anti-immigrant hate group" or that they "vilify all immigrants" in early 2018 and SPLC's lobbying activities before the Georgia General Assembly commencing on March 1, 2018 are undeniable. It is the contention of King and DIS that this nexus was no coincidence and in fact the SPLC maliciously plotted to defame King and DIS as part of its lobbying strategy and if this Court does not find King and DIS have adequately pled actual malice, the remedy here is to allow the King and DIS leave to amend their complaint, as opposed to a dismissal with prejudice.[15]

Next the SPLC 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 SPLC 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.). 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 SPLC is not describing an act of the King and DIS but rather

[15] 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.

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 SPLC goes on to make the stunning claim that the context in which these statements were made makes it clear that the statements are a mere political opinion. SPLC 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 SPLC is representing to the public goes into these publications. SPLC 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 SPLC 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. 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. 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.[16]

[16] "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.

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.[17]

The SPLC would have this Court believe that the "census" it has conducted for thirty years which it states is relied upon by law enforcement and other figures involved in the public policy formation process 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 SPLC's "classification" of DIS as an "anti-immigrant hate group" was an opinion as well as its characterization of King as "anti-immigrant" that would not authorize dismissal of this case. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) stands 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 a jury or this Court can, after weighing the evidence presented by the parties make a determination as to whether or not SPLC's statement that King and DIS are "anti-immigrant" are true or false. The evidence King and DIS 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 strongly supports Plaintiffs' position that they are not "anti-immigrant". Whether or not that evidence is sufficient to prove that SPLC's statements are false is a determination to be made by the finder of fact following a trial, not before King and DIS have even had an opportunity to pursue discovery.

[17] Id.

SPLC 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 SPLC could do to represent the statement made as fact, not opinion, was done. While 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. In this case the King and DIS contend the real reason for making the defamatory statement was the lobbying activities of the SPLC, not any of the material facts recited by SPLC, which again were known to the SPLC in 2017 when it did not "classify" DIS as an "anti-immigrant hate group" nor did it characterize as "anti-immigrant". 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 third claim which was based on a statement that Buckley routinely lied and libeled others the Court upheld. 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. SPLC knows that this defamatory speech makes it far less likely that either King or DIS 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. So if this Court is to take the *Buckley* analysis seriously, it should absolutely consider the statements made by SPLC to be actionable defamation.

SPLC 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 SPLC can be factually proven or disproven and therefore this basis to dismiss Plaintiffs' Complaint should be denied.

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

SPLC 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. SPLC's defamatory statements here were not comparing King or DIS to other political activists or organizations in their effectiveness, but instead making the blanket classification that DIS is "anti-immigrant" and a "hate group" that "vilifies all immigrants" and that King is "anti-immigrant" and that he leads a "hate group" that "vilifies all immigrants".

Next SPLC 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 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 with the exception of the limited Twitter activity of King in 2018 *each and every fact SPLC claims it relied on were known to it* when it published the 2017 Intelligence Report and all editions issued previously through the founding of DIS in 2005 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 SPLC's attention between the publication of the 2017 Intelligence Report and the 2018 Intelligence Report and Hate Map. SPLC cannot credibly argue that the facts it is citing from as far back as to a time prior to the incorporation of 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 DIS as an "anti-immigrant hate group" that "vilifies all immigrants" and to attach the "anti-immigrant" or "vilify all immigrants' label to King. So the entire line of cases SPLC 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. SPLC repeatedly uses the "anti-immigrant" that "vilifies all immigrants" label to slander King.

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

B. Plaintiffs concede they are public figures who must plead and prove actual malice, but the Complaint Does Plausibly Allege Facts Supporting a Reasonable Inference of Actual Malice.

King and DIS readily concede they are public figures for the purpose of defamation law.

It is important to note that the cases SPLC relies on in this section of its brief are all defamation cases against news organizations. SPLC 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.

King and DIS contend they have adequately pled actual malice within the four corners of the Complaint filed with this Court. King and DIS clearly outline information readily available to SPLC that would show the assertion that King and DIS are "anti-immigrant" to be demonstrably false. These facts include that King has an adoptive sister who is a legal immigrant and the Board of Advisors of DIS is not only racially diverse but includes legal immigrants as well. King and DIS also clearly alleged the nexus between the timing of SPLC's defamatory statements and its lobbying activities in its Complaint. King and DIS also alleged that SPLC had previously chosen not to "classify" DIS as an "anti-immigrant hate group" when substantially the same set of facts were known to it at an earlier time. From all of these facts it can be reasonably inferred that SPLC 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 SPLC would suddenly decide to "classify" King and DIS with the "anti-immigrant hate group" label on the basis of facts it had in its possession for years. The documents incorporated by the Complaint do not make it clear what SPLC did or did not believe. The evidence that SPLC actually entertained serious doubts as to the veracity of their published statement is that in 2017, knowing all of the relevant facts that it still knew in 2018, it chose not to make the defamatory statement. That shows this was a deliberate telling of an untruth by the SPLC. It strains credulity to believe that SPLC 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 SPLC claims. Instead it warrants that King and DIS be allowed the tools of discovery to further demonstrate the malicious acts of the SPLC. SPLC'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."[18] There is no evidence — none — that King and DIS have attacked any class of people with immutable characteristics which is the SPLC's definition of a hate group. As discussed earlier, illegal aliens are diverse, comprising persons from a variety of ethnic, racial, and national backgrounds. It is important to note the status of an illegal alien is inherently mutable since the status may be changed simply by physically leaving the United States. There is no evidence that King or DIS has engaged in opposition to immigration which is the legal process of a person becoming a permanent resident in contrast to opposing illegal immigration whereby the laws of this country are broken in order to illegally cross our borders. These are facts which can either be proven or disproven and are entirely outside the scope of opinion.

SPLC goes on in its argument on actual malice to suggest that it did not know the composition of the Board of DIS. The fact that SPLC had reviewed media appearances by King and cites statements years earlier from former Board members strongly suggests SPLC knew or should have known of the composition of the Board of DIS. Now that it is on notice of the composition of the Board of DIS, SPLC's own Counsel dismisses it by claiming that these individuals and King's sister, a legal immigrant, must be self-hating. This is done without SPLC having taken the time to do basic fact finding on these individuals. Is it really irrelevant and immaterial to a determination as to whether an organization is an "anti-immigrant hate group" to at least inquire about the views of the members of the Board of that organization?

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

SPLC also argues King or DIS are merely denying the defamatory statements are true. While King and DIS are indeed denying those statements vigorously, they have also put forward facts that establish these statements were not only untrue and false, but published with actual malice. The 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. The SPLC 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 SPLC failed to properly investigate where 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 SPLC 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. Moreover there are numerous statements that have been made by the SPLC demonstrating the use of the "tools" of the Intelligence Report and Hate Map as ways to destroy its enemies as reported by Tyler O'Neil of PJ Media in his interview with former SPLC spokesman Mark Potok:

> "Sometimes the press will describe us as monitoring hate groups, I want to say plainly that our aim in life is to destroy these groups, completely destroy them," Potok declared. The next year, he added, "You are able to destroy these groups sometimes by the things you publish. It's not so much that they will bring down the police or the federal agents on

their head, it's that you can sometimes so mortally embarrass these groups that they will be destroyed."[19]

This makes the reasons for the actual malice painfully clear and certainly sufficient to survive the SPLC's Motion to Dismiss.

V. THE DOCTRINE OF COLLATERAL ESTOPPEL IS NOT APPLICABLE TO THIS CASE

In the SPLC's own Memorandum of Law, they cite the case of *Sure, Inc. v. Premier Petroleum, Inc.*, 807 S.E.2d 19, 25 (Ga. Ct. App. 2017) for the proposition that an issue adjudicated on the merits may not be re-litigated. The case originally filed before this Court was dismissed without prejudice. King and DIS took the Court's direction and refiled an action with additional specified allegations supporting their claims. Georgia law makes it clear that a dismissal without prejudice is not an adjudication upon the merits and therefore the doctrine of collateral estoppel is inapplicable here. *See* O.C.G.A. 9-11-41(1). Alabama law makes the same distinction with regard to a dismissal without prejudice. *See* Alabama Rule of Civil Procedure 41. The Court therefore should consider in totality the allegations of the Plaintiffs' Complaint before it in conformity with the Order issued by Judge Marks since none of the issues raised in the history of this litigation has been adjudicated upon their merits.

VI. NEW ALLEGATIONS CONTAINED WITHIN PLAINTIFF'S COMPLAINT MEET THE ACTUAL MALICE STANDARD

King and DIS have alleged that to the extent there has ever been any connection between U.S. Inc. and King and DIS that would in no way impact the designation of DIS as an "anti-

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[19] O'Neil, Tyler. "Southern Poverty Law Center: 'Our Aim in Life Is to Destroy These Groups, Completely.'" PJ Media. September 1, 2017. Accessed August 24, 2019. https://pjmedia.com/trending/2017/09/01/southern-poverty-law-center-our-aim-in-life-is-to-destroy-these-groups-completely/

immigrant hate group". It is also important to note that the only "facts" relied upon to cast U.S. Inc. in a negative light to then attempt to find King and DIS guilty by association is the SPLC's own statement. King and DIS expect, but have no way to demonstrate unless given access to the tools of discovery, that SPLC knew about the modest financial support DIS had received from U.S. Inc. years earlier. Inventing a justification for the designation would be further evidence of actual malice.

The allegations regarding correspondence from U.S. Senator Jeff Sessions demonstrates actual malice in that SPLC cites it as evidence supporting the "anti-immigrant hate group" designation when it is merely a thank you letter. SPLC's Counsel claims it proves that the King and DIS are "prominent in the heated debate over immigration policy". While "prominent players in the heated debate over immigration policy that oppose the SPLC" might be a more accurate definition for SPLC to use in the future to place the "anti-immigrant hate group" label on an organization, that is not the definition they have held out to the world to use. The debate to which the SPLC refers is whether or not to enforce the immigration laws of the United States. This admission from the SPLC that receiving a thank you note from then-U.S. Senator Jeff Sessions is the closest we likely will come in this matter to SPLC stating that their hostility to DIS and King reflected in the published defamatory statements is due solely to DIS and King effectively advocating for enforcement of immigration laws. Clearly, making a false claim that a thank you letter from a U.S. Senator for being effective in the debate over enforcement of immigration laws is evidence supporting the "anti-immigrant hate group" classification is evidence of actual malice in publishing that defamatory statement.

SPLC attempts to dismiss the relevance of the Board of DIS and the fact that Plaintiff King's sister is herself a legal immigrant. SPLC had a duty to investigate the Board members of DIS before labeling the organization an "anti-immigrant hate group". Again the SPLC is not a crank yelling on the side of the road, it is a multi-million dollar organization that holds itself out to be, "the premier U.S. non-profit organization monitoring the activities of domestic hate groups and extremists…" Upon learning the Board of DIS was racially diverse and included immigrants and that King himself has a sister who legally immigrated to the U.S., SPLC should have done some fact finding to determine if this organization was truly an "anti-immigrant hate group". Instead SPLC's Counsel blithely dismisses these facts by implying that all of these individuals hold anti-immigrant views. This attitude is reflective of the sloppy investigation conducted by SPLC, including engaging in willful blindness to the voluminous public record that demonstrates the classification SPLC has made regarding DIS is patently false. SPLC wants the Court to make factual assumption after factual assumption in its favor regarding a ruling upon a Motion to Dismiss not only to obtain a quick dismissal but to avoid discovery. While it is true the mere fact that the Board of DIS is racially diverse and includes immigrants and that King's sister is an immigrant does not prove affirmatively that the King and DIS are not anti-immigrant, it does demonstrate the total lack of actual research or work performed to slap the "anti-immigrant hate group" label on DIS. As previously cited, "[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). It is not probable that DIS would be classified as an "anti-immigrant hate group" if it is governed by a Board that is racially diverse and includes immigrants. The information about the Board and about King's immigrant sister is apparently

reliable contradictory information that should have been investigated by SPLC but, as evidenced by their own Memorandum of Law, was not examined at all.

The allegations concerning the flawed and often incorrect nature of the investigation and conclusions reached by SPLC on matters of fact regarding King and DIS is compelling indirect evidence of actual malice. The sloppy and sometimes non-existent monitoring or investigation is further proof that SPLC was not interested in satisfying its own definition before slapping DIS with the "anti-immigrant hate group" label. As soon as it became politically convenient to try to kneecap the most effective pro-enforcement immigration organization on the eve of lobbying for immigration laws in Georgia, SPLC acted, with malice, to defame King and DIS for its own gain.

While the SPLC would advance the position that only if King and DIS possessed direct evidence of actual malice could they survive this Motion to Dismiss that is not the state of the law on this subject. Sufficient indirect evidence of actual malice can defeat a defendant's unsupported statement that he did act in good faith. *St. Amant v. Thompson,* 390 U.S. 727, 732, *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976).

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

CONCLUSION

For all the reasons provided herein, Plaintiffs respectfully request the Court deny the Motion to Dismiss in its entirety.

Dated: August 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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