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.	)	

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

Shannon L. Holliday [ASB-5440-Y77S]
COPELAND FRANCO SCREWS & GILL, P.A.
Post Office Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Facsimile: 334-834-3172
Email: holliday@copelandfranco.com

Chad R. Bowman (*pro hac vice*)
Maxwell S. Mishkin (*pro hac vice*)
BALLARD SPAHR LLP
1909 K Street NW, 12th Floor
Washington, DC 20006
Telephone: 202-661-2200
Facsimile: 202-661-2299
Email: bowmanchad@ballardspahr.com
Email: mishkinm@ballardspahr.com

Attorneys for Defendant The Southern Poverty Law Center, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

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

INTRODUCTION

The Plaintiffs' Response (ECF No. 18, "Resp.") underscores that this lawsuit is about enforcing a preferred characterization of Plaintiffs' political positions, not asserting claims about false statements of defamatory fact. Plaintiffs the Dustin Inman Society, Inc. ("DIS") and its leader Donald A. King ("King") (together, "Plaintiffs"), allege in the opening paragraph of the Response that, in the national debate over immigration, "there are two sides, pro-enforcement and anti-enforcement." Resp. at 1.[1] They bring this lawsuit over SPLC's designation of DIS as an "anti-immigrant hate group." Acknowledging that labeling an organization a "hate group" is a non-actionable opinion under the First Amendment, Resp. at 16, Plaintiffs in their Response focus on the adjective "anti-immigrant," urging that the term is provably false because they do not oppose *legal* immigration and thus see themselves as "pro-enforcement" in the public immigration debate, as they frame it. Indeed, the Response candidly admits that "King and DIS would not be in Court today if SPLC had characterized them as 'anti-illegal alien' or 'anti-illegal immigration.'" Resp. at 15.

Plaintiffs' entire premise is flawed. Characterizations of policy or political views in the context of robust public debates in this country are simply not actionable as

[1] Citations to page numbers in briefing refer to the documents' internal page numbers at the bottom of the page, rather than the ECF page numbers.

defamation. To analogize to another controversial issue, people and organizations who prefer to be called "pro-choice" have no viable defamation claim every time they are characterized as "pro-abortion" by those on the opposite side of that debate, nor do those who prefer to be called "pro-life" have a valid legal cause of action against those who instead call them "anti-choice." Both sides might disagree with the others' characterization of their strongly held positions, but that is the nature of vigorous debate on matters of public concern, not provable defamation. As one court explained, in holding that charges of "hostility to labor" constituted protected speech:

> To say that one is unfair to labor is not a statement of a fact, but of an opinion. Likewise to say of one: you are reactionary, you are undemocratic, you are a nationalist, you are an isolationist, you are a New Dealer, you are a Union Leaguer, you are opposed to labor, you are a coddler of labor, is similarly to express an opinion.

Guilford Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 598 (D.C. 2000) (quoting *Montgomery Ward & Co. v. McGraw-Hill Publ'g Co.*, 146 F.2d 171, 176 (7th Cir. 1944)). Thus, while Plaintiffs may wish to litigate the "truth" of whether they are properly described as "anti-immigrant," this is plainly the wrong venue for that debate. Judge Thompson explained in dismissing a similar defamation claim against SPLC brought by an organization aggrieved at being characterized as an "Anti-LGBT" hate group that "[t]his engagement should be in the court of public opinion, not a federal court." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1280 (M.D. Ala. 2019), *aff'd* 6 F.4th 1247 (11th Cir. 2021). As the Chief Judge of this Court held, Plaintiffs here "ask[] the Court to ignore the protections of the First Amendment." *King v. SPLC*

("*King I*"), No. 20-cv-120-ECM-SMD, 2022 U.S. Dist. LEXIS 56569, at *11 (M.D. Ala. Mar. 29, 2022). The Response provides no basis for a different result than in either of those cases.

As a result, this re-filed lawsuit should be dismissed because the challenged statement is either unable to be empirically proven false or because it is what courts have described as a "pure opinion"—a conclusion based on disclosed facts. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018); *see* SPLC's Mot. to Dismiss ("Motion" or "Mot.") at 1-2, 18-30 (ECF No. 10). The Response does not dispute any of the stated premises for SPLC's characterization, instead quibbling that SPLC should have come to its conclusion sooner, Resp. at 23, or that SPLC should have known about and given weight to other information that *Plaintiffs* deem important, *id.* at 20. The Response even refers to the challenged statement as a "judgment of fact," which is a telling contradiction in terms. *Id.* at 16. Ultimately, none of Plaintiffs' arguments change the analysis of whether "anti-immigrant" can be empirically proven (it cannot) or whether it represents a conclusion based on stated facts (it does), which are questions of law for the Court. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20–21 (1990); *Turner*, 879 F.3d at 1262-63. As such, the reasoning of *Coral Ridge Ministries Media* is persuasive and fully applicable here.

Alternately, even if the "anti-immigrant" characterization of DIS—an organization named for a young man killed in a car crash with an illegal immigrant[2]— could be deemed

[2] *Who was Dustin Inman?*, The Dustin Inman Society, https://www.thedustininmansociety.org/info/who_was_dustin_inman.html (last visited Aug. 26, 2022) ("Dustin Inman was one of the un-counted thousands of Americans who have needlessly

"false," this action is properly dismissed for a separate and independent reason. Judge Marks correctly held that a substantially similar version of this Complaint failed to allege facts plausibly demonstrating, by clear and convincing evidence, that SPLC subjectively *knew* that its characterization of DIS was false—*i.e.*, plausibly alleged actual malice fault. *King I*, 2022 U.S. Dist. LEXIS 56569, at *8 n.6. The handful of new allegations in the Complaint in this re-filed case, which were previewed in briefing in *King I* and now relied upon in the Response, similarly fail as a matter of law to establish "actual malice" fault. That standard is a constitutional bulwark that protects the vitality of speech about public figures and matters of public concern, and Plaintiffs concede that they must establish actual malice here to state a claim. Resp. at 24.

ARGUMENT

I. THERE IS NO EQUITABLE BASIS HERE TO TOLL THE STATUTE OF LIMITATIONS.

In its Motion, SPLC noted that defamation claims for most of the statements challenged by Plaintiffs in the Complaint are now time barred because the publications at issue occurred more than two years before the filing of the Complaint in *this case*. Mot. at 14-16. Plaintiffs offer no authority to the contrary, nor can they. *See, e.g.*, *Blanchard v. Walker*, No. 2:20-CV-696-WKW, 2022 U.S. Dist LEXIS 142432, at *4-7 (M.D. Ala. Aug. 10, 2022) (a dismissal without prejudice acts as a dismissal with prejudice when the claims in the second case are barred by the statute of limitations). Indeed, *Blanchard* involved

---

lost their lives because government in America refuses to secure American borders or enforce American immigration and employment laws.").

precisely the same situation, where a plaintiff's initial, "substantially identical lawsuit" was dismissed without prejudice. *Id.* at *4. Although the plaintiff argued that the two actions "amount[ed] to one continuous action" for purposes of the statute of limitations, Judge Watkins disagreed. *Id.* at *5 ("The argument is creative, but it does not accurately state the law."); *see also Justice v. United States*, 6 F.3d 1474, 1478-79 (11th Cir. 1993) (finding second action, commenced after first action was dismissed without prejudice, barred by statute of limitations).

Plaintiffs argue that this Court should apply the equitable tolling doctrine, citing Alabama law for the premise that 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.'" Resp. at 11 (quoting *Ex parte Ward*, 46 So. 3d 888, 897 (Ala. 2007)). The problem is they cannot meet this standard. The Response argues that the time that passed between the motion to dismiss and this Court's order in *King I*, including the pandemic, constitutes an extraordinary circumstance. Resp. at 11-12. However, the court rejected that precise argument in *Blanchard*:

> [Plaintiff] also has not cited any authority to support equitable tolling of the statute of limitations during the COVID-19 pandemic. To the contrary, the Alabama Supreme Court established at the start of the COVID-19 pandemic that it did not have the authority to extend the statute of limitations for state law claims. *See, e.g.*, Alabama Supreme Court, In re: COVID-19 Pandemic Emergency Response, Administrative Order Suspending All In-Person Court Proceedings for the Next Thirty Days (Mar. 13, 2020), at 2 ("This Court cannot extend any statutory period of repose or statute of limitations period."); Alabama Supreme Court, In re: COVID-19 Pandemic Emergency Response, Administrative Order No. 3 (Mar. 17, 2020) ("[T]his Court's order shall not be interpreted as extending any statutory period of repose, any statute of limitations, or jurisdictional limitations provided for by statute or rule.").

Blanchard, 2022 U.S. Dist. LEXIS 142432, at *8-9.

Indeed, the equitable tolling doctrine law applies only where a plaintiff, even with diligence, could not have remedied the situation: "A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way as to the filing of his action.'" *LEAD Educ. Found. v. Ala. Educ. Ass'n*, 290 So. 3d 778, 786 (Ala. 2019) (quoting *Weaver v. Firestone*, 155 So. 3d 952, 957-58 (Ala. 2013)). "Tolling is not favored; finality and predictability are." *Bray v. Bank of Am., N.A.*, 763 F. App'x 808, 811 (11th Cir. 2019). The disfavored equitable tolling doctrine is inapplicable here, where the Plaintiffs were fully aware of the grounds for dismissal beginning on May 18, 2020, when the SPLC filed its motion to dismiss in *King I*. Resp. at 11. Plaintiffs opted *not* to seek leave to amend that pleading at their own risk. And, following dismissal in *King I*, Plaintiffs could have moved to re-open the case, or filed a timely appeal. *See, e.g.*, *Justice*, 6 F.3d at 1477 ("[Plaintiff] could have appealed from the dismissal of his action."); *Blanchard*, 2022 U.S. Dist LEXIS 142432, at *9 ("Mr. Blanchard's recourse was to appeal the final judgment in *Blanchard I*.").

Here, rather than seeking to re-open *King I* or appeal the ruling, Plaintiffs filed a *new* case—with a "Complaint" not labeled as a second amended complaint, and without reference to the prior related case—which was assigned to a different judge. Now, faced with the consequences of that strategic choice, Plaintiffs ask, in the guise of equitable tolling, that the claims (though not judicial analysis) be "transferred" from the prior case. Plaintiffs cite no authority for this request, with good reason. "The fact that dismissal of

an earlier suit was without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations." *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

As such, the only statement that is not time-barred here is the characterization of DIS as an "anti-immigrant hate group." Mot. at 15-16. In addition, and as set forth in the Motion, King is not a proper plaintiff because that remaining statement at issue is not "of and concerning" him. *Id.* at 17-18. Plaintiffs concede as much in acknowledging that "King is not making the claim that SPLC's defamation of DIS is also a defamation of him." Resp. at 24.

II. THE "ANTI-IMMIGRATION" CHARACTERIZATION IS A NOT A DEFAMATORY STATEMENT OF FACT.

A. Plaintiffs Have Narrowed this Case to the Characterization of DIS as "Anti-Immigrant," But That Is Not the Precise Factual Term Plaintiffs Insist It Is.

Perhaps recognizing the weight of legal authority against taking a position that "hate group" represents a statement of provable fact susceptible to a defamation claim, rather than a constitutionally protected opinion, Plaintiffs now focus their claim on the phrase "anti-immigrant." *See generally* Response; *see also id.* at 9 (distinguishing "anti-immigrant" from "hate group"). "Anti-immigrant," Plaintiffs urge, has a "commonly understood meaning," *id*. at 16, and therefore the Response urges that the plethora of cases finding similar characterizations to be nonactionable opinions, *see generally* Motion at 19-30, are all distinguishable, *see* Response at 15-18.

Is the term "anti-immigrant" so widely understood, though? DIS's own online mission statement sets forth Plaintiffs' view that "immigrants" means *only* legal immigrants: "It is our opinion that use of the term 'immigrants' should be limited to describing individuals who join the American family lawfully."[3] That is the premise of their claims here. *See, e.g.*, Resp. at 15 ("King and DIS would not be in Court today if SPLC had characterized them as 'anti-illegal alien' or 'anti-illegal immigration.'"). Despite supposedly representing the "commonly understood meaning" for "immigrant," it is telling that DIS felt compelled not only to include that definition in its mission statement, but also to label it an "opinion." *Supra* note 3. The Merriam-Webster online definition of "immigrant," on the other hand, is more inclusive than Plaintiffs' version. The online dictionary defines "immigrant" as "one that immigrates: such as … a person who comes to a country to take up permanent residence."[4] The definition makes no distinction on the basis of documentation or formality of entry, and there is no qualifier for "legal" and "illegal." And, while not every undocumented person comes to this country "to take up permanent residence," many do. Similarly, Merriam-Webster defines the adjective "anti-immigrant" as "opposed to immigrants or immigration: characterized by or expressing

[3] *See Mission statement and information about The Dustin Inman Society*, The Dustin Inman Society, https://www.thedustininmansociety.org/info/dustin_inman_society_mission.html (last visited Aug. 26, 2022).

[4] Immigrant, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/immigrant.

opposition to or hostility toward immigrants,"[5] again without specific reference to legal status.

Plaintiffs do not dispute that they denigrate illegal aliens, nor could they. *See, e.g.*, Mot. at 6-9 (noting statements by Plaintiff King and others associated with DIS describing "illegal" immigrants as a "third world horde" and "lawless" invaders who bring "chaos" and are "here to blow up your buildings and kill your children"). Other statements by Plaintiffs cited by SPLC reference "brown" and "Hispanic" people as "an angry, barely restrained mob" without distinguishing by immigration status. *Id.* But a dispute over the extent to which Plaintiffs denigrate illegal immigrants versus the extent to which they also disparage immigrants generally is a red herring. SPLC is not legally bound to Plaintiffs' preferred definition.

In seeking to distinguish the weight of cases recognizing that characterizations are non-actionable opinions, Plaintiffs reply on *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976). Resp. at 21-22. SPLC cited *Buckley* for its determination that characterizations of William F. Buckley as a "fellow traveler" of "fascism" or the "radical right" were non-actionable, because these were "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." *Buckley*, 539 F.2d at 893–94. *See* Mot. at 25. Indeed, as Judge Thompson explained, to the *Buckley* court, the fact "[t]hat the plaintiff and defendant defined 'fascism' differently was but one example of the 'imprecision of the

[5] Anti-immigrant, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/anti-immigrant.

meaning and usage of the[] term[] in the realm of political debate.'" *Coral Ridge Ministries Media*, 406 F. Supp. 3d at 1276 (quoting *Buckley*, 539 F.2d at 890, 893).

Plaintiffs ignore *Buckley*'s treatment of the "debatable" terms "fascism" and "radical right" as non-actionable. Instead, they focus on a separate claim that the *Buckley* court allowed to go forward, involving an accusation that Buckley "routinely lied and libeled others," claiming that SPLC's statement that DIS is an anti-immigrant hate group necessarily means that it "vilifies all immigrants" and is analogous to Littell accusing Buckley of lying and libeling others. Resp. at 21-22. However, the statement that DIS vilifies all immigrants is just a gloss on the challenged statement of "anti-immigrant," and much more analogous to the "debatable" terms from "the realm of political debate"—*i.e.*, "fascist" and "radical right"— that *Buckley* found non-actionable, 539 F.2d at 893-94, especially giving the varying definitions for those terms.

At bottom, the "anti-immigrant" characterization is non-actionable for the same reasons that "racist," "anti-Semitic," and similar terms have been repeatedly held non-actionable in courts around the country. *See generally* Mot. at 19-26. To submit the question of whether DIS is "anti-immigrant" to a jury would condition SPLC's First Amendment rights on the jury's subjective assessment of SPLC's and DIS's opposing viewpoints, violating the "principle of viewpoint neutrality that underlies the First Amendment itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (noting "danger that decisions by triers of fact may inhibit the expression of protected ideas").

B. Nothing in the Response Rebuts SPLC's Showing That the Challenged Statement Is Protected Opinion.

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

What determines whether a statement is an actionable, potentially defamatory statement of fact is not the rigor or care or thoroughness in its development or the conviction upon which it is expressed, but whether the statement itself is "susceptible to being proved true or false" as an empirical matter. *Milkovich*, 497 U.S. at 20–21. To SPLC, hate group designations are serious matters, and SPLC treats them as such. But that is an entirely different question from whether such designations are actionable under the First Amendment, which recognizes "no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *see generally* Mot. at 18-23.

Nor does it matter whether SPLC keeps track of and publicizes how many organizations it has designated as hate groups. This does not somehow mean that any of the individual hate group designations themselves are factual. The Better Business Bureau catalogs its grades of a community's businesses, Zagat's compiles its reviews of a city's

restaurants, and Martindale-Hubbell publishes ratings of attorneys, but the compilation of opinions does not convert each B+ business rating, three-star review, or B legal ability grade into a statement of objectively verifiable, and potentially actionable, fact.

C. Plaintiffs Also Do Not Dispute That the Challenged Statement Was a Conclusion Based on Disclosed Facts.

Plaintiffs spend nearly a page of their Response criticizing footnote 2 of the Motion, which explains that Motion relies on SPLC's published reports about DIS and King not for their truth but as "the necessary context for evaluating the challenged designation of DIS as a hate group." Mot. at 6 n.2; Resp. at 6 ("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 a result of detailed scientific inquiry."). Plaintiffs misunderstand the scope of judicial review on a motion to dismiss. The Complaint referred to the published statements and therefore incorporated them into the pleadings. Mot. at 5 n.1. Plaintiffs do not dispute that the SPLC postings are properly considered by the Court. In its Motion addressed to the pleadings, SPLC expressly does not make an argument based on underlying truth—only that the pleadings and materials incorporated into the pleadings show that SPLC stated the bases for its conclusion that DIS is an "anti-immigration hate group." Mot. at 6-11. Plaintiffs have no answer to legal authority making clear that, where a conclusion is offered based on disclosed facts, it is a "pure opinion." *Turner*, 879 F.3d at 1262. Plaintiffs may disagree with the conclusion, or believe SPLC should have considered other information, but that is legally irrelevant. *See generally* Mot. at 29-30.

III. PLAINTIFFS ARE BARRED FROM RE-LITIGATING PRIOR ACTUAL MALICE THEORIES AND THEIR NEW ALLEGATIONS FAIL TO STATE A PLAUSIBLE CLAIM.

Plaintiffs offer two errors of law in prefacing their substantive discussion of "actual malice" fault. *First*, while conceding that they are public figures and that the actual malice standard applies, Plaintiffs nevertheless suggest that SPLC should not be entitled to "be treated as the New York Times," arguing that "the cases SPLC relies on in this section of its brief are all defamation cases against news organizations." Resp. at 24. That is factually incorrect. In both *Coral Ridge Ministries Media* and *King I*, of course, the defendant ***was SPLC***. *See* Mot. at 34, 38. More fundamentally, though, the suggestion that only traditional newspapers are entitled to First Amendment protections is also clearly wrong as a matter of law, given that free speech rights may not properly be limited to certain speakers. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (First Amendment bars "restrictions distinguishing among different speakers, allowing speech by some but not others"). Thus, the Eleventh Circuit has applied the speech protections of the actual malice standard to non-media defendants. *See, e.g.*, *Turner*, 879 F.3d at 1272 (affirming dismissal of a defamation claim against a law firm and one of its partners, who wrote a report detailing its investigation into bullying at an NFL team and delivered it to the NFL, for lack of plausible actual malice allegations); *see also Coral Ridge Ministries Media*, 406 F. Supp. 3d at 1276 n.15 ("[B]ecause the constitutional limits on defamation actions apply equally to media and nonmedia defendants, this court need not decide on which side of the 'blurred' media-nonmedia line SPLC falls.").

Second, it is also a misstatement to urge that "'[a] motion to dismiss under Rule 12(b)(6) should be granted only if it appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.'" Resp. at 7 (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). The Supreme Court, of course, expressly abrogated that standard in *Bell Atlantic Corp. v. Twombly*. *See* 550 U.S. 544, 561-63 (2007) ("[T]his famous observation has earned its retirement."); *see also, e.g.*, *Hudson v. Bd. of Trs. of the Univ. of Ala.*, No. 2:07-cv-1542-TMP, 2009 U.S. Dist. LEXIS 140761, at *2-3 (N.D. Ala. Jan. 26, 2009) (rejecting the "no set of facts" formulation and noting that *Twombly* "clearly raised the threshold for the sufficiency of factual allegations required in a complaint"). Rather, to state a claim and survive this motion to dismiss, Plaintiffs must point to factual allegations of the Complaint that, if proven, would plausibly establish clear and convincing evidence that SPLC published its "anti-immigrant" characterization with actual malice, a subjective awareness of its falsity. Plaintiffs' pleadings have already been found wanting in this regard, and their efforts to remedy their deficiencies continue to fall far short of a plausible claim.

A. Collateral Estoppel Bars a Re-Litigation of Plaintiffs' Arguments That Have Already Been Rejected.

The SPLC argued in its Motion that collateral estoppel barred Plaintiffs' re-litigation of the actual malice allegations they made in *King I*, which where be held to be insufficient as a matter of law. *See* Mot. at 34. Plaintiffs contend that under Georgia law, collateral estoppel does not apply. Resp. at 28. Both parties erred in citing state law on this issue. When a federal court is deciding the preclusive effect of a federal decision, federal

preclusion law applies. "The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008); *see also CSX Transp., Inc. v. Bhd. of Maint. of Way Emps*., 327 F.3d 1309, 1316-18 (11th Cir. 2003) (federal preclusion law applies in federal court whether jurisdiction is based on diversity or federal question).

Under federal common law, collateral estoppel bars re-litigation of an issue of fact or law litigated in a prior suit where: (1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the issue was critical and necessary to the outcome of the prior proceeding, and (4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000). Notably, collateral estoppel can apply even where a case is dismissed without prejudice. *Irvin v. United States*, 335 F. App'x 821, 825 (11th Cir. 2009) ("[T]he fact that the district court's dismissal of the 2003 Complaint was without prejudice is irrelevant for purposes of collateral estoppel"); *Shaw v. Upton*, No. 6:16-CV-6, 2021 U.S. Dist. LEXIS 118933, at *68-69 (S.D. Ga. May 19, 2021) (finding dismissal without prejudice irrelevant to collateral estoppel analysis and that collateral estoppel applied because all four issue-preclusion elements had been satisfied), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 118312 (S.D. Ga. June 24, 2021). The doctrine precludes litigation "of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Irvin*, 335 F. App'x at 823; *see also, e.g.*, *Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) (recognizing collateral estoppel where dismissal was without

prejudice "so long as the determination being accorded preclusive effect was essential to the dismissal").

Each of the four collateral estoppel elements are present here, as the SPLC noted in its prior briefing. Mot. at 34. The *King I* Court's well-reasoned analysis of the sufficiency of the actual-malice allegations—the same allegations as here, prior to the specific additions identified in Exhibit 4 to the Motion—was certainly "sufficiently firm to be accorded preclusive effect." The Court would not have dismissed the action had it not been. *King I*, 2022 U.S. Dist. LEXIS 56569, at *8. Plaintiffs are barred from re-litigating the sufficiency of those allegations here. Alternately, for all the reasons set forth persuasively in *King I*, those allegations fail as a matter of law. *Id.*

B. The Complaint's New Allegations Do Not Establish Actual Malice as a Matter of Law.

The discussion of supposed new allegations of "actual malice" fault in the Response, Resp. at 28-31, repeats the same themes as in *King I* and betrays a fundamental misunderstanding of actual malice, *i.e.*, urging that the designation should be deemed "false" because DIS opposed *illegal* immigration or that SPLC intended to harm DIS. But even if those allegations are credited—and to be clear, SPLC disputes both—neither alleged falsity nor supposed ill will establish a subjective *awareness* of falsity. *See, e.g.*, *Bose Corp.*, 466 U.S. at 511 ("there is a significant difference between proof of actual malice and mere proof of falsity"); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (a defendant's "motive in publishing a story . . . cannot provide a sufficient basis for finding actual malice"); *id.* at 666 ("It … is worth emphasizing that the actual

malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term."). Indeed, even if "anti-immigrant" was provable and the information now proffered by Plaintiffs weighed against such a conclusion—which, given every benefit of the doubt is the best that Plaintiffs could possibly allege—then the SPLC would *still* be entitled to its judgment without imputing actual malice. Thus, in *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971), and *Bose Corp.*, 466 U.S. at 512-513, the U.S. Supreme Court recognized that where an event lends itself to "a number of possible rational interpretations," an author's "deliberate choice of [one] such ... interpretation, though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice' under *New York Times*." *Pape*, 401 U.S. at 289-90.

For all the reasons set forth in *King I* and in the Motion, Plaintiffs fail to allege facts plausibly establishing actual malice. For this reason, too, the Complaint should be dismissed.

//

//

CONCLUSION

For the foregoing reasons, and those set forth in the Motion, Defendant SPLC asks this Court to dismiss Plaintiffs' Complaint in its entirety, with prejudice, and grant such other relief as it deems just and proper.

Dated: August 29, 2022

Respectfully submitted,

/s/ Shannon L. Holliday
Shannon L. Holliday [ASB-5440-Y77S]
COPELAND, FRANCO, SCREWS & GILL, P.A.
Post Office Box 347
Montgomery, AL 36101-0347
Telephone: 334-834-1180
Facsimile: 334-834-3172
Email: holliday@copelandfranco.com

Chad R. Bowman (*pro hac vice*)
Maxwell S. Mishkin (*pro hac vice*)
BALLARD SPAHR LLP
1909 K Street NW, 12th Floor
Washington, DC 20006
Telephone: 202-661-2200
Facsimile: 202-661-2299
Email: bowmanchad@ballardspahr.com
Email: mishkinm@ballardspahr.com

Attorneys for Defendant
The Southern Poverty Law Center, Inc.